UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ATHLETIC TRAINING INNOVATIONS, LLC	*	**CIVIL ACTION**
	*	
	*	
	*	**CASE NO.**
vs.	*	
	*	**SECT.**
	*	
eTAGZ, INC.	*	**MAGISTRATE**
	*	
	*	**JURY TRIAL DEMANDED**

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COMPLAINT FOR DECLARATORY JUDGMENT OF NON-INFRINGEMENT AND PATENT INVALIDITY, DAMAGES FOR PATENT MISUSE, ANTITRUST VIOLATIONS AND UNFAIR COMPETITION, AND DEMAND FOR TRIAL BY JURY

NOW INTO COURT, through undersigned counsel, comes Plaintiff, Athletic Training Innovations, LLC, (hereinafter "ATI" or "Plaintiff") who respectfully avers that:

Parties

1.

Plaintiff, Athletic Training Innovations, LLC., is a Louisiana Limited Liability company authorized to do and doing business in the State of Louisiana with its principal place of business in Kenner, Louisiana.

2.

Defendant, eTAGZ, Inc. (hereinafter "Defendant") is a Utah corporation with its principal place of business in Provo, Utah.

3.

Defendant is and has been doing business, and has committed acts and caused damages, in this judicial district at all times relevant hereto.

Jurisdiction and Venue

4.

This is an action for a declaratory judgment of noninfringement of patent rights, patent misuse and for patent invalidity under the Patent Laws of the United States, 35 U.S.C. §1 *et seq.,* and for damages under the Sherman Antitrust Act, 15 U.S.C. 1 *et seq*. and Louisiana's Antitrust Statutes, LA. R.S. 51:122 et seq , and for damages under both Federal and state laws of unfair trade practices and unfair competition. Furthermore, the amount in controversy exceeds $75,000 exclusive of interest and costs. Accordingly, subject matter jurisdiction herein is based upon 15 U.S.C. §4 and 28 U.S.C. §§1331, 1332, 1367, 1338, 2201 and 2202.

5.

Venue is proper in this judicial district pursuant to 28 U.S.C. §1391(b) and (c) because Defendant is doing business and "resides" in this judicial district as defined by 28 U.S.C. §1391(c), and a substantial part of the events or omissions giving rise to this claim occurred in this district.

Facts

6.

Plaintiff sells various athletic equipment, including a specially-designed training shoe marketed and sold under the registered trademark ATI® that includes a wide-profile platform depending from the front portion of the sole that is used in conjunction with a customized training program to enhance strength, speed, agility and balance.

7.

Plaintiff sells its specialty training shoe almost exclusively on the internet or by phone.

8.

When Plaintiff ships the training shoe to a purchaser, a DVD demonstrating specific exercises to be performed with the training shoe is placed into a shipping container along with the shoe.

9.

Plaintiff's predecessors, Strength Footwear, Inc. and Strength Systems, Inc. produced and distributed a specialty training shoe that is nearly identical to the training shoe produced by ATI. Furthermore, the aforementioned predecessors distributed the training shoe along with a training video at least as early as 1991.

10.

Defendant allegedly owns U.S. patent nos. 6,298,332, 7,503,502 and 7,703,686 ("the eTAGZ patents") pertaining to, *inter alia,* a hangtag having a computer-readable medium that is attached to a product by a vendor and removed therefrom by a purchaser. See Exhibits A-C.

11.

The broadest claims of the aforementioned patents limit Defendant's scope of protection to: 1) hangtags or labels that are secured to and removed from a vendor's product; 2) the hangtag or label including a computer-readable medium thereon **and** 3) the medium including computer-readable instructions executable on a purchaser's computer.

12.

Defendant admits on its website that "eTAGZ owns the patents on **attaching** digital media to merchandise" and that the "U.S. Patent and Trademark Office granted a patent for the process of creating and **attaching** digital media **as a 'hangtag'** to any merchandise." (Emphasis Added). See Exhibit D.

13.

Plaintiff simply places a demonstrational video (DVD) into a shipping container along with a specially-designed training shoe; it does not attach a hangtag or label having a computer-readable medium to the shoe or any other product, or any other component that includes computer-readable instructions that are executable on a purchaser's computer.

14.

The instructional or demonstrational video is neither a label nor "adapted to be selectively secured to and removed from a product."

15.

Plaintiff received a letter dated September 7, 2012 in which Defendant alleged that it believed that the ATI "product(s) utilize the inventions embodied in the eTAGZ Patents." See Exhibit E.

16.

Defendant further stated in the letter that "eTAGZ reserves all rights with regard to the '502, '686 and '332 patents, including: (1) the right to seek damages anytime within the last six years that your company started to make use of the eTAGZ patented technology; (2) the right to change its royalty rates at any time; (3) the right to change this licensing program at any time without notice, including variance to conform to applicable laws. You should not rely on any communication or lack of communication from eTAGZ as a relinquishment of any of eTAG's rights." See Exhibit E.

17.

Upon receipt of the letter, Plaintiff discovered that Defendant boasts on its website, www.etagz.com, that it has similarly threatened and/or sued other entities for engaging in various activities, such as attaching CD's or DVD's to a magazine or the mere inclusion of an instructional video with a product. See Exhibit F.

18.

Defendant also boasts on its website and through self-serving press releases that, in many cases, it has successfully coerced such entities to settle and agree to a licensing arrangement in order to avoid costly litigation, in spite of knowing that the mere inclusion of a demonstrational or instructional video or disc with a product has been in the public domain for decades. See Exhibit G.

19.

On its website, Defendant advertises that its patent "allows for the attachment of digital media to products at retail" and then falsely states that attachment is defined as "inclusion" or

"enclosure." Exhibit H.

20.

By stating both on its website and to Plaintiff that simply "including" or "enclosing" digital media constitutes infringement of the eTAGZ patents, Defendant is and has made infringement allegations that are objectively false, and in bad faith, with complete knowledge of or disregard for their incorrectness or falsity.

21.

Defendant's bad faith is evidenced by its repeated admissions on its website that it owns the patents on **attaching** digital media to merchandise and "for the **process of creating** and **attaching** digital media as a 'hangtag'" to any merchandise.

First Claim for Relief-Declaratory Judgement of Non-Infringement of U.S. Patent Nos. 6,298,332, 7,503,502 and 7,703,686

22.

The allegations of paragraphs 1- 21are repeated and are incorporated herein by reference.

23.

Defendant's conduct in forwarding the threatening letter cited above as well as repeatedly threatening and suing others engaged in similar activity has created a reasonable apprehension on the part of Plaintiff that it will be subjected to a lawsuit based upon patent infringement if it continues to manufacture, sell and/or promote its ATI® brand training shoe.

24.

As a result of Defendant's false and reckless allegations of patent infringement, and its threat to pursue legal action, an actual controversy exists between the parties hereto regarding Plaintiff's right to continue selling the ATI® brand training shoe.

25.

The making, using or selling of Plaintiff's training shoe does not infringe any of the eTAGZ patents either literally or under the doctrine of equivalents.

26.

The accused video that accompanies the shoe is neither a label, a hangtag nor any other item that is attached to a product.

27.

Therefore, Plaintiff is entitled to a judgement declaring that its shoe and the accompanying demonstrational video does not infringe any of the eTAGZ patents pursuant to 28 U.S.C. §§ 2201 and 2202.

Second Claim for Relief-Declaratory Judgment of Invalidity of U.S. Patent Nos. 6,298,332, 7,503,502 and 7,703,686

28.

The allegations of paragraphs 1- 21are repeated and are incorporated herein by reference.

29.

Upon information and belief, many of the claims in the eTAGS patents should be

invalidated as covering or allegedly covering subject matter that was undeniably prior art before Defendant applied for patent protection.

30.

The above-referenced patents are invalid for failure to meet one or more of the requirements of patentability under 35 U.S.C. § 101, *et seq.*, including but not limited to 35 U.S.C. §§ 102 and 103.

31.

The above-referenced patents are invalid because the alleged inventions claimed therein are anticipated by the pertinent prior art and thus fail to satisfy the conditions for patentability set forth in 35 U.S.C. §102.

32.

The claims of the above-referenced patents are invalid because the difference between the subject matter of such claims and the prior art is such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which the subject matter of the invention pertains as set forth in 35 U.S.C. §103.

33.

Accordingly, ATI is entitled to a declaratory judgment that any or all claims of the above-referenced patents are invalid.

Third Claim for Relief-Violation of The Sherman Antitrust Act, 15 U.S.C. §1 et seq.

34.

The allegations of paragraphs 1- 21are repeated and are incorporated herein by reference.

35.

Furthermore, Defendant's false assertions that its patents prohibit the mere inclusion of instructional videos or discs with a product is clearly an improper expansion of the scope of the eTAGZ patents.

36.

Defendant's false assertions that its patents prohibit the mere inclusion of instructional videos or discs with a product has caused damage to Plaintiff.

37.

Defendant's assertions that its patents prohibit the mere inclusion of instructional videos with a product, combined with its repeated threatening of others by demanding licenses, filing lawsuits and issuing laudatory press releases that attempt to substantiate its erroneous claims are an attempt to monopolize an entire public-domain market through fear, coercion and intimidation.

38.

Defendant's assertions that its patents prohibit the mere inclusion of instructional videos with a product constitute a violation of the Sherman Antitrust Act, 15 U.S.C. 1 et seq., thereby rendering Defendant liable for treble damages, legal costs, prejudgment interest and attorneys' fees.

Fourth Claim for Relief-Violation of Louisiana's Antitrust Statutes, LA. R.S. 51:122 et seq.

38.

The allegations of paragraphs 1- 21are repeated and are incorporated herein by reference.

39.

Furthermore, Defendant's false assertions that its patents prohibit the mere inclusion of instructional videos or discs with a product is clearly an improper expansion of the scope of the eTAGZ patents.

40.

Defendant's false assertions that its patents prohibit the mere inclusion of instructional videos or discs with a product has caused damage to Plaintiff and any relevant competition.

41.

Defendant's assertions that its patents prohibit the mere inclusion of instructional videos with a product, combined with its repeated threatening of others by demanding licenses, filing lawsuits and issuing laudatory press releases that attempt to substantiate its erroneous claims are an attempt to monopolize an entire public-domain market through fear, coercion and intimidation.

42.

Defendant's assertions that its patents prohibit the mere inclusion of instructional

videos with a product constitute a violation of Louisiana's Antitrust Statutes, LA. R.S. 51:122 et seq. thereby rendering Defendant liable for treble damages, legal costs, interest and attorneys' fees.

Fifth Claim for Relief-Unfair Competition

43.

The allegations of paragraphs 1- 21are repeated and are incorporated herein by reference.

44.

By threatening ATI with the baseless allegations of patent infringement, and knowing that the eTAGZ patents do not encompass the subject matter that Defendant purports, Defendant purposely harmed the marketing efforts and sales of ATI's training shoe. Such conduct constitutes unfair trade practices and unfair competition pursuant to Federal and Louisiana Antitrust Laws and is a violation of the Louisiana Unfair Trade Practices Act LSA-R.S. 51:1401 *et seq.* for which Defendant is liable for loss of economic opportunity, loss of revenue/profits, general damages and attorneys' fees.

Sixth Claim for Relief-Patent Misuse

45.

By repeatedly boasting, advertising and publicly asserting that its patents prevent others from selling a product with an accompanying CD, DVD or instructional video, Defendant has engaged in patent misuse by asserting that its patent protection extends

beyond its lawful scope.

46.

Accordingly, all patent rights of Defendant, if any, should be suspended or nullified until the misuse is purged.

47.

Plaintiff hereby demands a trial by jury according to Fed. Rule Civ. Pro. 38.

WHEREFORE, Plaintiff, Athletic Training Innovations, LLC, respectfully prays for judgment in its favor and against Defendant, eTAGZ, Inc., as follows: 1) declaring that Plaintiff has not and does not infringe any purported patent rights of Defendant; 2) declaring that some or all of the claims in Defendant's patents are invalid; 3) decreeing that Defendant has violated both Federal and state laws of unfair competition and Federal and state antitrust laws and 5) that Defendant has misused its patents by improperly expanding the scope thereof in an effort to coerce other entities into paying royalties for subject matter that is clearly in the public domain thereby entitling Plaintiff to treble damages, attorneys' fees, costs, expenses, interest and any further relief as the Court deems just or equitable under the circumstances.

RESPECTFULLY SUBMITTED,

/kenneth l. tolar/

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