NO JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BRAGEL INTERNATIONAL, INC., Plaintiff, v. CHARLOTTE RUSSE, INC., et al., Defendants.	CASE NO. CV 15-8364-R ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Before the Court is Plaintiff's Motion for Summary Judgment, which was filed on August 05, 2016. (Dkt. No. 45). Having been thoroughly briefed by both parties, this Court took the matter under submission on September 1, 2016.

As in any other civil action, summary judgment is proper in a patent infringement action when the pleadings, discovery and affidavits show that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Southwall Techs., Inc. v. Cardinal IG Co.*, 54 F.3d 1570, 1575 (Fed. Cir. 1995). Material facts are those which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict in favor of the nonmoving party. *Id.* The party moving for summary judgment bears the burden of identifying those portions of the pleadings, discovery and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex*

Corp. v. Catrett, 477 U.S. 317, 323 (1986).

Patent infringement may be proven by showing literal infringement of every limitation recited in a claim or by showing infringement under the doctrine of equivalents. *See Linear Tech. Corp. v. Impala Linear Corp.*, 379 F.3d 1311, 1318 (Fed. Cir. 2004). Both literal infringement and infringement under the doctrine of equivalents require an element-by-element comparison of the patented invention to the accused device. *Warner–Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 40 (1997). To literally infringe a patent claim, an accused product or process must have or perform every limitation of the claim exactly as recited in the claim. *V-Formation, Inc. v. Benetton Group SpA*, 401 F.3d 1307, 1312 (Fed. Cir. 2005).

The determination of patent infringement is a two-step process. *Cybor Corp. v. Fas Techs.*, 138 F.3d 1448, 1454 (Fed. Cir. 1998) (en banc). First, the Court construes the asserted claims of the patent to determine its scope. *Id*. This is a question of law for the Court. *Id*. Second, the construed claims are compared to the accused products. *Id*. Infringement occurs where every element of a claim is present in the accused product. *Transocean Offshore Deepwater Drilling v. Maersk Drilling USA, Inc.*, 699 F.3d 1340, 1356 (Fed. Cir. 2012).

Plaintiff Bragel designs, manufactures, and distributes strapless bras and attachable breast forms. Plaintiff seeks summary judgment of infringement of Claims 1, 2, and 5 of U.S. Patent No. 7,144,296 (the "'296 Patent" or "Patent-in-Suit") against Defendants PPI Apparel Group, Inc. ("PPI") and Charlotte Russe, Inc.'s ("Charlotte Russe") accused Lace Silicone Fashion Bra, Microfiber Silicone Fashion Bra, and Oh Baby Silicone Bra ("Accused Products"). Defendant PPI distributes the Accused Products to retailer Charlotte Russe who sells them. As an initial matter, Defendant Charlotte Russe's Motion to Stay is DENIED. Judicial economy is best served by applying this Order granting summary judgment to all Defendants. Moreover, Charlotte Russe's argument that a stay is warranted under the "customer-suit" exception is inapplicable here since there is no manufacturer over which this Court has jurisdiction. *See Kahn v. Gen. Motors Corp.*, 889 F.2d 1078, 1081 (Fed. Cir. 1989).

The Patent-in-Suit generally relates to backless, strapless breast form systems that are designed to be worn in lieu of a traditional bra. Claim 1 of the Patent-in-Suit claims an improved

backless, strapless breast form system with a pair of breast forms and a connector. Each breast forms are comprised of silicone gel encased between thermoplastic film materials, and have a concave interior surface facing towards a user's breast. The interior surfaces of the breast forms have a pressure sensitive adhesive layer for securing the breast forms to the user's breasts. The connector is adapted to adjoin the breast forms together, and is positioned between inner sides of each of the breast forms.

The introduction of Claim 1 recites "An improved backless, strapless breast form system to be warn in place of a traditional bra." Visual inspection and analysis of the Accused Products confirm that the Accused Products are backless, strapless breast form systems to be worn in place of a traditional bra. In fact, the packaging for the Accused Products says just that. Moreover, PPI's CEO, Abraham Hanan, also admitted that each of the Accused Products are backless, strapless bras worn in place of traditional bras. Accordingly, this first part is met.

Claim 1 further recites "a pair of breast forms." Visual inspection and analysis of the Accused Products confirm that these products include a pair of breast forms. PPI's CEO agreed that each of the Accused Products contain a pair of breast forms. Claim one goes on to recite that each breast form is comprised of "a volume of silicone gel encased between thermoplastic film material." Defendants do not challenge the fact that the Accused Products include a silicone gel encased in a thermoplastic material. Again, PPI's CEO has admitted that each of the Accused Products contain silicone gel encased in a plastic material. Accordingly, this next part is met.

Claim 1 further recites that each breast form comprises "a concave interior surface facing towards a user's breast having a pressure sensitive adhesive layer for securing the breast form to the user's breast." While both parties disagree about the exact definition attributable to "pressure sensitive adhesive layer," this Court adopts Judge Morrow's definition proscribed in her Claim Construction Order from *Bragel International, Inc. v. Telebrands Corp.*, Case No. CV 05-01141-MMM (C.D. Cal. Jan. 17, 2007). That definition reads: "a layer of any type of pressure sensitive adhesive that is suitable for removably attaching a breast form to a user's skin." *Id*. at 26:2-4.

The adhesive layer of the Accused Products adheres to the user's skin when pressure is applied. Pressing the breast form against the user's breast allows the adhesive layer to adhere to

the skin and remain adhered to the user's breast without requiring a back portion or straps. Descriptions of the steps of usage of the Accused Products from the instruction manuals confirm that the adhesive layer is pressure sensitive and PPI's CEO once again admitted that the Accused Products have an adhesive layer that sticks to the user's breast once pressure is applied. Additionally, the pressure sensitive adhesive layer of the Accused Products is configured to be used and re-used multiple times. The Accused Products' instruction manual identifies that the breast forms include "special adhesive materials," and "will last from three months to one year." Accordingly, this next part is met.

The final portion of Claim 1 states "a connector adapted to adjoin the breast forms together, wherein the connector is positioned between inner sides of each of the breast forms." The Accused Products include a connector that joins the breast forms together and is positioned between the inner sides of each of the breast forms. Further, the Accused Products' instruction manuals advertise the connector, which fastens the breast forms together. Finally, PPI's CEO also admitted that each of the Accused Products has a connector between the cups that joins the breast forms to one another. Accordingly, each element of Claim 1 is included in the Accused Products.

Claim 2 depends from Claim 1 and further recites that the connector comprises "a first portion attached to the inner side of one of the breast forms and a second portion attached to the inner side of the other breast form." As addressed above, each of the Accused Products practices all of the limitations of Claim 1. In addition, visual inspection and analysis of the Accused Products confirm that the connector of these products include two portions attached to the inner side of each of the two breast forms. Again, PPI's CEO admits that each of the Accused Products have a connector positioned between the interior edges of each of the breast cups.

Claim 2 further recites that "the first portion and the second portion [of the connector] are adapted to cooperatively engage." Visual inspection and analysis of the Accused Products confirm that these products meet this limitation. The portions of the connector of the two breast forms cooperatively engage, thereby bringing together the right breast form and the left breast form. Further, the instruction manual for the Accused Products state that the connector is fastened in the front and depicts closure of the breast forms. Accordingly, each element of Claim 2 is

contained in the Accused Products.

Claim 5 depends from Claim 2 and further recites "wherein the first portion and the second portion are permanently attached to the breast forms." As described above, each of the Accused Products practices all of the limitations of Claim 2. In addition, visual inspection and analysis of the Accused Products confirm that the portions of the connectors of these products are permanently attached to the breast forms. Accordingly, each element of Claim 5 is contained in the Accused Products.

The Accused Products meet all of the limitations of the asserted claims of the Patent-in-Suit. Plaintiff has demonstrated how each of the Accused Products infringe. Further, the testimony of PPI's own CEO confirms Plaintiff's infringement analysis and demonstrates that there are no genuine issues of material fact. Accordingly, this Court enters summary judgment that the Oh Baby Strapless, Backless Self-Adhesive Silicone Bra, the Lace Silicone Fashion Bra, and the Microfiber Silicone Fashion Bra each infringe claims 1, 2, and 5 of the Patent-in-Suit.

A finding of liability against Defendant PPI applies with equal force and effect to Defendant Charlotte Russe. Whoever without authority "makes, uses, offers to sell, or sell" a product covered by a patent claim is liable for infringement. Title 35 U.S.C. § 271. It is undisputed that Defendant PPI sells and offers for sale the Accused Products. Moreover, it is undisputed that Defendant Charlotte Russe is a customer of PPI that purchases the Accused Products. Finally, Defendant Charlotte Russe is a retailer which advertises and sells the Accused Products on its website for purchase by customers. Accordingly, Defendants PPI and Charlotte Russe are liable for infringement of the Accused Products.

Defendant PPI argues that Plaintiff's patent infringement claims fail because it is barred by the doctrine of equitable estoppel and laches. To establish equitable estoppel, the moving party must prove that (1) the patentee, through misleading conduct, led the alleged infringer to reasonably believe that the patentee did not intend to enforce its patent against the infringer; (2) the alleged infringer relied on that conduct; and (3) due to its reliance, the alleged infringer would be materially prejudiced if the patentee were permitted to proceed with its charge of infringement. *Aspex Eyewear Inc. v. Clariti Eyewear, Inc*., 605 F.3d 1305, 1310 (Fed. Cir. 2010). Here, material

facts exist regarding the underlying elements of Defendant's equitable estoppel claim. At a time close to Plaintiff's initial August 2010 cease and desist letter, Defendant PPI's CEO stated that he had no reason to believe Plaintiff would not enforce its patent against PPI. Moreover, Plaintiff's conduct since 2010 has been to continuously sue retailers selling PPI's products; therefore, a genuine question exists as to whether Defendant PPI reasonably believed that Plaintiff would never enforce its patent rights against it.

Moreover, facts regarding Defendant's own egregious conduct are highly relevant to Defendant PPI's equitable defenses. Plaintiff has produced evidence of Defendant PPI's willful infringement, PPI's attempts to cover up its willful infringement, and PPI's hiding behind customers while Plaintiff continues to enforce its patent rights against PPI's products. All of this factual evidence of PPI's misconduct precludes this Court from granting Defendants' Summary Judgment Motion. Additionally, even if Defendant PPI were to establish its equitable defense, Defendant Charlotte Russe has no basis for an equitable estoppel defense. Equitable estoppel only applies to a party who acted in direct reliance on the patentee's conduct. *Stickle v. Heublein, Inc.*, 716 F.2d 1550, 1559 (Fed. Cir. 1983). There is no evidence that Charlotte Russe ever relied on or acted as a direct consequence of any conduct by Plaintiff and therefore is not entitled to the benefit of equitable estoppel.

Finally, Defendants' invalidity arguments have no merit. The obviousness argument is the same argument raised by the patent examiner during the prosecution of the parent application to the patent-in-suit. Ultimately the patent examiner discarded such an argument and found the patent valid. In addition, the false inventorship argument is based on factually and legally incorrect arguments that two of the inventors were not inventors, when both of those inventors contributed to conceiving of the complete and operative invention as it would be used in practice and to reducing the invention to practice. Accordingly, Defendants' Motion for Summary Judgment is DENIED.

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IT IS HERBY ORDERED that Defendant Charlotte Russe's Motion to Stay Case is DENIED. (Dkt. No. 48).

IT IS FURTHER ORDERED THAT Defendants' Motion for Summary Judgment is DENIED. (Dkt. No. 50).

IT IS FURTHER ORDERED THAT Plaintiff's Motion for Summary Judgment is GRANTED. (Dkt. No. 45).

IT IS FURTHER ORDERED THAT the parties' Motion to Compel Discovery Responses is DENIED as moot in light of the Court's grant of summary judgment regarding infringement. (Dkt. No. 59). Should any party require discovery regarding Defendant's equitable defenses, the parties may file a revised motion if necessary.

Dated: September 6, 2016.

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE