

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-cv-00059-REB-MEH

FOOTHILLS CREATIONS LTD, a Colorado corporation,

Plaintiff,

v.

BILLY BOB TEETH, INC., an Illinois corporation;

Defendant.

AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff Foothills Creations LTD (“Foothills”) complains of Defendant Billy Bob Teeth, Inc. (“DEFENDANT”) and alleges as follows:

JURISDICTION

1. This is an action for patent infringement arising under the patent laws of the United States of America, Title 35, United States Code, and in particular, 35 U.S.C. § 271, et seq. Jurisdiction is based on 28 U.S.C. § 1338(a). The patent infringement alleged has been and is now being carried out throughout the United States and within the District of Colorado.

THE PATENTS-IN-SUIT

2. There are two patents-in-suit in the instant case. The first is United States Design Patent No. D579,509 which is referred to herein as the “‘509 Design Patent”. The ‘509 Design Patent was duly and legally issued by the U. S. Patent and Trademark Office (“USPTO”) on October 28, 2008, to Donald W. Nutting (“Nutting”). A true and accurate copy of the ‘509 Design Patent as issued by the USPTO on October 28, 2008 is attached hereto as Exhibit A.

3. The second patent-in-suit is United States Letters Patent No. 5,547,381 which is referred to herein as the “‘381 Patent”. The ‘381 Patent was duly and legally issued by the U. S. Patent and Trademark Office (“USPTO”) on August 20, 1996, to Donald W. Nutting (“Nutting”). A true and accurate copy of the ‘381 Patent as issued by the USPTO on August 20, 1996 is attached hereto as Exhibit B.

4. On October 23, 1998, Nutting sought reexamination of the ‘381 Patent in light of certain prior art which was not considered by the USPTO during the original prosecution of the ‘381 Patent. The USPTO proceeded with the reexamination and on May 24, 1999 confirmed the validity of each and every claim of the ‘381 Patent. A true and accurate copy of the reexamination certificate for the ‘381 Patent as issued by the USPTO on September 7, 1999 is attached hereto as Exhibit C.

5. On November 29, 2010 inventor Nutting assigned his entire right, title and interest in and to the ‘509 Design Patent and the ‘381 Patent to Foothills. While Nutting has assigned these patents, he still has an indirect interest in said patents as a shareholder of Foothills.

6. By virtue of the aforementioned assignments to Foothills, Foothills has the right to sue for infringement of the ‘509 Design Patent and the ‘381 Patent.

7. The ‘381 Patent is entitled "Fangs and Applications Thereof" and covers a novel tooth extension apparatus including a tooth cap body and an initially malleable (thermoplastic) material for anchoring or attaching the tooth cap body to a person’s real teeth. Methods for anchoring and attaching a tooth cap to a person’s real teeth with thermoplastic material are also covered by the ‘381 patent.

8. As commercially marketed, the tooth extension apparatus of the ‘381 patent

typically includes a pair of tooth cap bodies and a quantity of thermoplastic material for anchoring each tooth cap body to a person's real teeth. A typical purchaser of such products (also referred to herein as artificial fang products) (which are sold by both Foothills and DEFENDANT as described in more detail herein) would be a Halloween partygoer who desires to masquerade as a vampire or wild beast.

9. A problem with past artificial fang products which were sold before Nutting's invention is that the artificial fangs could not be easily and securely attached to a person's teeth and therefore tended to fall off the masquerader's tooth or teeth quite easily. Nutting's invention as embodied in the '381 Patent solved this problem.

10. The '509 Design Patent is entitled "Pair of Artificial Fangs" and covers a novel ornamental design for a pair of artificial fangs wherein the fangs are curved.

THE PARTIES

11. Plaintiff Foothills is a corporation organized under the laws of the State of Colorado with an established place of business at 1295 Ithaca Drive, Boulder, Colorado 80305.

12. On information and belief, Defendant Billy Bob Teeth, Inc. ("DEFENDANT") is a corporation organized under the laws of the State of Illinois which does business under the name Billy-Bob Inc. at Rt. 100, P.O. Box 389, Hardin, Illinois 62047. Upon information and belief, DEFENDANT is currently doing business in Colorado, through, among other things, its distribution and sale of fake teeth products including the alleged infringing products to retailers and consumers in Colorado directly and through its web sites billybobproducts.com and billybobteeth.com.

BACKGROUND

13. Inventor Nutting expended considerable time, effort and money during the years

of 1993 and 1994 developing his novel artificial fang product and methods for attaching an artificial fang to a person's real teeth. These efforts culminated in the development of the artificial fang product which Nutting began selling in 1994 under the mark Custom Dracula Fangs and which is sold today by plaintiff Foothills as the Custom Designer family of artificial fang products which includes the following products; Dracula Fangs, Chrome Dracula Fangs, Gold Dracula Fangs, Sexy Bites, Sexy Devil Bites, Sexy Bite Doubles, Sexy Devil Doubles, Double Uppers Fangs, Werewolf Fangs, Devil Fangs, Witch Fangs, Wall Street Bloodsuckers and Goblin Fangs.

14. As is customary, to protect one's investment in the development of such an invention, Nutting filed a patent application for his invention on March 22, 1994. The '381 Patent, as mentioned above, issued from this application on August 20, 1996. All artificial fang products in the Custom Designer family of fang products (identified above in paragraph 13) fall within the scope of the claims of the '381 Patent. Photographs of the Custom Designer family of artificial fang products covered by the '381 Patent are attached hereto as Exhibit D.

15. Nutting and now Foothills has continuously promoted the patented artificial fang products covered by the '381 Patent in one or more booths at trade shows every year since 1994. The largest of these trade shows has been the annual Transworld National Halloween Show which has been held every year in Chicago or Las Vegas, and which is now held in St. Louis. Nutting and now Foothills has had one or both booths at the National Halloween Show for every year since 1994. Another national Halloween show which has come into prominence since 2009 is the Houston Halloween & Party Expo Show.

16. The patented artificial fang products covered by the '381 Patent have also always been marked with the proper patent notice in accordance with 35 U.S.C. § 287. Such marking

constitutes constructive notice to DEFENDANT of the '381 Patent.

17. Inventor Nutting also expended time, effort and money during the years of 2005-6 developing a novel ornamental design for a pair of artificial fangs wherein the fangs are curved. These fangs are part of the Custom Designer family of artificial fang products and have been sold by Foothills since 2006 under the marks; Sexy Bites, Sexy Devil Bites, Sexy Bite Doubles and Sexy Devil Doubles.

18. Nutting filed a design patent application for this new design on February 20, 2007. The '509 Design Patent, as mentioned above, issued from this application on October 28, 2008. The artificial fang products identified above in paragraph 17 fall within the scope of the claim of the '509 Design Patent and photographs of these products are also shown in Exhibit D.

19. Foothills began promoting the fang products covered by the '509 Design Patent on March 10, 2006 at the National Halloween trade show in Chicago, IL and Foothills has promoted this product at this trade show as well as other trade shows every year since then.

20. On information and belief, DEFENDANT has had one or more booths of its own at every National Halloween Show since 1997, and also has had one or more booths at the Houston Halloween & Party Expo Show since 2009. On information and belief, DEFENDANT's principal Jonah White has seen Nutting and/or Foothills personnel demonstrating the patented artificial fang products covered by the '381 Patent at these National Halloween Shows or seen the products on display in Foothills' booth.

21. DEFENDANT's principal Jonah White was also advised by a Mr. Greg Reinke at the 2009 Halloween & Party Expo in Houston that DEFENDANT's Double Vampire Fangs product which uses thermoplastic infringes the '381 Patent. Mr. White responded by advising that he was aware of Foothill's '381 Patent and was confident that DEFENDANT's product did

not infringe the patent.

22. On January 9, 2011 Foothills filed suit against DEFENDANT for infringement of the '381 Patent and the '509 Design Patent. Foothill's did not serve the complaint on DEFENDANT immediately after filing the suit but did bring it to DEFENDANT's attention in hopes of reaching an agreement with DEFENDANT prior to service of the complaint that DEFENDANT would stop selling infringing product, among other things. Discussions did take place between Foothills and DEFENDANT but these talks broke down with the DEFENDANT continuing its sales of product which infringe the '381 Patent and the '509 Design Patent.

23. Despite DEFENDANT's actual knowledge of the '381 Patent and '509 Design Patent, DEFENDANT has sold and continues to sell products which infringe the '381 Patent and the '509 Design Patent and induce infringement of the '381 Patent. A photograph and webpages from DEFENDANT's website showing these products which include DEFENDANT's (1) Triple Vampire Fangs (2) Triple Werewolf Fangs (3) Double Vampire Fangs (hereinafter ACCUSED PRODUCTS) and (4) IMPRESSION MATERIAL (inducing infringement product) are attached hereto as Exhibit E.

24. On information and belief, DEFENDANT continues to manufacture and/or sell the ACCUSED PRODUCTS and the IMPRESSION MATERIAL.

25. DEFENDANT's manufacture and/or sale of the ACCUSED PRODUCTS and the IMPRESSION MATERIAL infringes the '381 Patent and/or the '509 Design Patent and/or induces others to infringe the '381 Patent and/or the '509 Design Patent. The conduct of DEFENDANT constitutes a willful and wanton disregard of Foothills' rights. Such conduct constitutes willful and wanton infringement, entitling Foothills to increased damages under 35

U.S.C. § 284. Further, this is an exceptional case entitling Foothills to recover its reasonable attorneys' fees under 35 U.S.C. § 285.

26. All conditions precedent to the bringing of this action have been performed or have occurred.

FIRST CLAIM FOR RELIEF
Direct Patent Infringement by Defendant
35 U.S.C. § 271(a)

27. Foothills incorporates the allegations of paragraphs 1 through 26 by reference, the same as if fully set forth herein.

28. 35 U.S.C. § 271(a) states that:

Whoever without authority makes, uses, offers to sell or sells any patented invention, within the United States, or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.

29. By its unauthorized manufacture, use, or sale of the ACCUSED PRODUCTS, DEFENDANT Billy Bob has directly infringed, and on information and belief continues to infringe, the '381 Patent and the '509 Design Patent and has thereby damaged Foothills.

30. DEFENDANT has had knowledge of the '381 patent and the '509 Design Patent for some time now and either knew or should have known that its sale of the ACCUSED PRODUCTS infringed the '381 patent and the '509 Design Patent, and induced others to infringe the '381 patent and the '509 Design Patent. DEFENDANT has therefore acted willfully and wantonly in disregard of Foothills' rights. Such conduct constitutes willful and wanton infringement, and Foothills is thereby entitled to increased damages under 35 U.S.C. §284. Further, this is an exceptional case entitling Foothills to recover its reasonable attorneys' fees

under 35 U.S.C. §285.

31. Foothills has been and will continue to be severely damaged by DEFENDANT's unlawful infringement. Unless such infringement is abated and enjoined by this Court, Foothills will suffer irreparable damage.

SECOND CLAIM FOR RELIEF
Inducing Infringement by Defendant
35 U.S.C. § 271(b)

32. Foothills incorporates the allegations of paragraphs 1 through 31 by reference, the same as if fully set forth herein.

33. 35 U.S.C. § 271(b) states that:

Whoever actively induces
infringement of a patent
shall be liable as an infringer.

34. By its unauthorized sale of the ACCUSED PRODUCTS and Impression Material, DEFENDANT Billy Bob, with full knowledge of the '381 Patent, has induced, encouraged, aided, and abetted others to infringe the '381 Patent and the '509 Design Patent and has thereby induced infringement of the '381 Patent and the '509 Design Patent, all to the damage of Foothills.

35. Upon information and belief, DEFENDANT has induced infringement willfully and wantonly and with full knowledge of the harm to Foothills and Foothills' rights; and therefore Foothills is entitled to increased damages under 35 U.S.C. §284. In addition, this is an exceptional case entitling Foothills to recover its attorneys' fees under 35 U.S.C. §285.

36. Foothills has been and will continue to be severely damaged by DEFENDANT's unlawful infringement. Unless such infringement is abated and enjoined by this Court, Foothills will suffer irreparable damage.

THIRD CLAIM FOR RELIEF
Contributory Infringement by Defendant
35 U.S.C. § 271(c)

37. Foothills incorporates the allegations of paragraphs 1 through 36 by reference, the same as if fully set forth herein.

38. 35 U.S.C. § 271(c) states that:

Whoever offers to sell or sells within the United States or imports into the United States a component of a patented machine, manufacture, combination, or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.

39. DEFENDANT has contributorily infringed the claims of the '381 Patent by its unauthorized sale of ACCUSED PRODUCTS knowing the same to be especially made for use in the infringement of the '381 Patent and not a staple article or commodity of commerce suitable for substantial noninfringing use.

40. DEFENDANT has had knowledge of the '381 patent for some time now and either knew or should have known that their sale of the ACCUSED PRODUCTS contributorily infringed the '381 patent, and induced others to infringe the '381 patent. DEFENDANT has therefore acted willfully and wantonly in disregard of Foothills' rights. Such conduct constitutes willful and wanton infringement, and Foothills is thereby entitled to increased damages under 35 U.S.C. §284. Further, this is an exceptional case entitling Foothills to recover its reasonable attorneys' fees under 35 U.S.C. §285.

41. Foothills has been and will continue to be severely damaged by DEFENDANT's unlawful infringement. Unless such infringement is abated and enjoined by this Court, Foothills will suffer irreparable damage.

WHEREFORE, Foothills prays for judgment against DEFENDANT and in favor of Foothills ordering, adjudging and declaring that:

1. Jurisdiction is present and venue is proper;
2. The '381 Patent is good and valid in law;
3. The '509 Design Patent is good and valid in law;
4. DEFENDANT is liable for infringement of the '381 Patent;
5. DEFENDANT is liable for infringement of the '509 Design Patent;
6. An accounting be had to determine the damages adequate to compensate Foothills for the aforesaid infringement and that judgment in favor of Foothills be thereupon entered against DEFENDANT, together with prejudgment interest;
7. The acts of infringement of DEFENDANT have been deliberate, willful, and wanton entitling Foothills pursuant to 35 U.S.C. § 284 to increased damages of three times the amount found or assessed;
8. A preliminary and permanent injunction be issued enjoining DEFENDANT, its privies, and those in active consort therewith from further acts of infringement of the '381 Patent and the '509 Design Patent and from aiding, abetting, or inducing or in any way contributing to the infringement of said Patents;
9. The instant case is an exceptional case and that Foothills be awarded its costs, expert witness fees, and reasonable attorneys' fees pursuant to 35 U.S.C. § 285;

10. DEFENDANT's entire inventory of ACCUSED PRODUCTS and IMPRESSION MATERIAL be delivered for destruction including the artificial fang tooth bodies, impression material and all packaging for the product as well as any reproduction, counterfeit, copy, or colorable imitation thereof including all plates, molds, dies, matrices and other means of making the infringing product and its packaging as described herein;

11. Foothills be granted such other and further relief as the Court may deem just and equitable.

A JURY TRIAL IS REQUESTED.

DATED this 19th day of April, 2011.

/s/ Brian D. Smith
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**ATTORNEYS FOR PLAINTIFF
FOOTHILLS CREATIONS LTD**

CERTIFICATE OF SERVICE

I hereby certify that on April 19, I electronically filed the foregoing **AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the parties of record.

/s/ *Brian D. Smith*