

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

OurPet's Company,
1300 East Street
Fairport Harbor, Ohio 44077,

Plaintiff,

v.

The Kong Company, LLC,
16191-D Table Mountain Parkway
Golden, Colorado 80403,

Defendant.

Case No. 1:11-cv-222

Judge Boyko

SECOND AMENDED
COMPLAINT FOR
PATENT INFRINGEMENT

(Jury Demand Endorsed Hereon)

NOW COMES the Plaintiff, *OurPet's Company*, and for its Second Amended Complaint
against the Defendant hereby alleges as follows:

THE PARTIES

1. The Plaintiff, OurPet's Company, is a corporation organized under the laws of Colorado, and has its principal place of business in Fairport Harbor, Ohio, which is in Lake County.
2. The Defendant, The Kong Company, LLC, is a corporation and has its principal place of business in Colorado.

JURISDICTION AND VENUE

3. This is an action for patent infringement. The patent claims arise under the patent laws of the United States, specifically 35 U.S.C. § 281. This Court has subject matter jurisdiction in this

1 matter pursuant to 28 U.S.C. §§ 1331, 1338, and 35 U.S.C. § 281 because this action arises
2 under the patent laws of the United States.

3 4. This Court has personal jurisdiction over the Defendant by virtue of their sale of products,
4 transaction of business, and solicitation of business within the State of Ohio, within this
5 judicial district and elsewhere.

6 5. Venue is proper in the Northern District of Ohio pursuant to 28 U.S.C. § 1391(b)(2) and/or
7 28 U.S.C. § 1400(b) because a substantial part of the events giving rise to the claims
8 occurred in this judicial district, the Defendant is subject to personal jurisdiction in this
9 district, and the infringement occurred within this judicial district.

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11 **FACTUAL ALLEGATIONS**

12 6. Since its founding in 1995, the Plaintiff has designed, produced, and marketed a broad line of
13 innovative, high-quality accessory and consumable pet products in the United States and
14 overseas.

15 7. The Plaintiff has dedicated extensive time to the understanding of pet aging and its critical
16 link to nature.

17 8. Along with proper nutrition, mental stimulation, physical exercise, and veterinary care, the
18 Plaintiff's products help to maintain the health and wellness of pets.

19 9. The Plaintiff strives to develop truly unique and innovative products. In fact, almost all of
20 the Plaintiff's products are patented and are the only ones of their kind in the marketplace.

21 10. The Plaintiff has become a leader in feeding systems to improve the health and comfort of
22 pets. It has also developed interactive toys that provide fun, rewarding mental and physical
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1 challenges to pets. It has also developed healthy consumables for achieving and maintaining
2 high mental, physical, and immune levels for pets.

3 11. Dr. Steve Tsengas is the founder and CEO of the Plaintiff corporation.

4 12. On February 1, 2011, United States Utility Patent No. 7,878,151, entitled "Fetch and
5 Retrieve Tossing Toy" (hereinafter referred to as the '151 patent) duly and legally issued to
6 Steven Tsengas, as inventor, for the aforementioned invention. (A true and accurate copy of
7 the '151 patent as issued is attached hereto as "Exhibit 1.")
8

9 13. All rights to the '151 patent, including but not limited to, the right to recover for
10 infringement thereunder, have been assigned to the Plaintiff, OurPet's Company.

11 14. The '151 patent is essentially a fetch and retrieve tossing pet toy for dogs.

12 15. The Plaintiff has widely and continuously promoted and sold its patented product. To date,
13 the Plaintiff has invested considerable money in marketing and advertising.

14 16. The Defendant has been and is currently making, using, offering for sale, selling, and/or
15 importing pet toys that infringe the '151 patent.

16 17. The Defendant has infringed the Plaintiff's patent by, including but not limited to, making,
17 using, offering for sale, selling, and importing their Kong Tugba Wubba™ product.

18 18. (See a claims chart comparing the Defendant's product to the noted claims in the Plaintiff's
19 '151 patent attached hereto as "Exhibit 2.")
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21 19. The Defendant has sold its infringing product in this judicial district in Ohio and elsewhere.
22 (See copies of sales receipts evidencing sales of infringing product in this judicial district
23 attached as "Exhibit 3.")
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1 20. The aforementioned activities of the Defendant have also injured and threaten future injury to
2 the Plaintiff. More specifically, the Defendant's activities have diminished the Plaintiff's
3 goodwill and caused the Plaintiff to lose sales that it otherwise would have made but for the
4 sales of the Defendant.

5 21. The Defendant is not authorized in any way to sell their infringing products or to use the
6 patent owned by the Plaintiff.
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8 22. The Plaintiff is entitled to an award of damages against Defendant.

9 **CLAIM NO. 1**

10 *(Patent Infringement 35 U.S.C. § 271)*

11 23. The Plaintiff hereby incorporates by reference each statement, whether written above or
12 below, as if each is fully re-written herein.

13 24. The Defendant has been and is currently making, using, offering for sale, selling, and/or
14 importing pet toys that infringe the '151 patent. (Exs. 1 & 2.)

15 25. The Defendant's conduct is an infringement of the '151 patent, and in violation of 35 U.S.C.
16 § 271 within this judicial district and elsewhere.

17 26. The Defendant will continue to make, use, offer for sale, sell, and import their infringing
18 products unless enjoined by this Court.
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20 27. The Defendant has been, and is, actively inducing infringement of the '151 patent, by
21 offering for sale and selling their infringing products to dealers at wholesale prices who have,
22 and will continue to, offer them for sale and sell them to end users.

23 28. The Defendant's infringement is, and at all times has been, deliberate, willful, with full
24 knowledge of the Plaintiff's rights, and wanton, and as a result, the Plaintiff is entitled to
25 treble damages pursuant to 35 U.S.C. § 284.
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1 29. This is an exceptional case within the meaning of 35 U.S.C. § 285, and the award of
2 appropriate attorney's fees is justified.

3 **CLAIM NO. 2**

4 *(Patent Infringement 35 U.S.C. § 271)*

5 30. The Plaintiff hereby incorporates by reference each statement, whether written above or
6 below, as if each is fully re-written herein.

7 31. On May 10, 2011, United States Design Patent D637,773 ('773 patent) duly issued to Steven
8 Tsengas as inventor, and was assigned to the Plaintiff OurPet's Company. (See a true and
9 accurate copy of the '773 Design Patent attached hereto as "Exhibit 4.")

10 32. The Defendant has been and is currently making, using, offering for sale, selling, and/or
11 importing pet toys that infringe the '773 patent.

12 33. The Defendant Kong's Tugga Wubba™ product infringes the '773 patent.

13 34. The Defendant has infringed the '773 patent because the Defendant's accused article
14 embodies the patented design of the '773 patent or any colorable imitation thereof.

15 35. The Defendant's product is substantially similar to the '773 design patent under the "ordinary
16 observer" test enunciated in *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665 (Fed. Cir.
17 2008); Citing *Gorham Co. v. White*, 81 U.S. 511 (1871).

18 36. The Defendant's conduct is an infringement of the '773 patent, and in violation of 35 U.S.C.
19 § 271 within this judicial district and elsewhere.

20 37. The Defendant will continue to make, use, offer for sale, sell, and import their infringing
21 products unless enjoined by this Court.

22 38. The Defendant has been, and is, actively inducing infringement of the '773 patent.
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1 39. The Defendant's infringement is, and at all times has been, deliberate, willful, with full
2 knowledge of the Plaintiff's patent rights, and wanton, and as a result, the Plaintiff is entitled
3 to treble damages pursuant to 35 U.S.C. § 284.

4 40. This is an exceptional case within the meaning of 35 U.S.C. § 285, and the award of
5 appropriate attorneys' fees is justified.
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7 **PRAYER FOR RELIEF / REQUEST FOR REMEDIES**

8 WHEREFORE, the Plaintiff prays that this Court enter an Order against the Defendant as
9 follows:

- 10 A) A preliminary injunction enjoining the Defendant from making, using, selling, or importing
11 any product that infringes upon the '151 and '773 patents;
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13 B) A permanent injunction enjoining the Defendant from making, using, selling, or importing
14 any product that infringes upon the '151 and '773 patents;
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16 C) An accounting for damages resulting from Defendant's patent infringement and the trebling
17 of such damages because of the knowing, willful, and wanton nature of the Defendant's
18 conduct;
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20 D) An assessment of interest on the damages so computed;
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22 E) An award of attorney's fees and costs in this action under 35 U.S.C. § 285;
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24 F) Judgment against Defendant indemnifying the Plaintiff from any claims brought against the
25 Plaintiff for negligence, debts, malpractice, product liability, or other breaches of any duty
26 owed by the Defendant to any person who was confused as to some association between the
Plaintiff and Defendant as alleged in this Complaint;

- 1 G) Judgment against Defendant for an accounting and monetary award in an amount to be
2 determined at trial;
- 3 H) Requiring Defendant to account to the Plaintiff for all sales and purchases that have occurred
4 to date, and requiring the Defendant to disgorge any and all profits derived by Defendant for
5 selling infringing product;
- 6 I) Requiring Defendant to provide full disclosure of any and all information relating to its
7 supplier or suppliers of infringing product;
- 8 J) Requiring Defendant to provide the location of any and all manufacturing equipment,
9 including but not limited to, molds used to manufacture infringing product;
- 10 K) Requiring Defendant to destroy any and all manufacturing equipment used to manufacture
11 infringing product or to deliver said equipment to the Plaintiff;
- 12 L) Ordering a product recall of infringing product for destruction;
- 13 M) Requiring Defendant to file with this Court and serve on the Plaintiff within thirty (30) days
14 of this Court's order a report setting forth the manner in which they complied with the order;
- 15 N) Requiring Defendant to provide to Plaintiff all sales records, including but not limited to,
16 email, mail, and advertising lists;
- 17 O) Damages according to each cause of action herein;
- 18 P) Prejudgment interest; and
- 19 Q) Any such other relief in law or equity that this honorable Court deems just.

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23 **JURY DEMAND**

24 WHEREFORE, the Plaintiff requests a trial by jury on all issues so triable.
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Most Respectfully Submitted,

/s/ David A. Welling

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Counsel for the Plaintiff

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served on all counsel of record on the date electronically time-stamped above via the Court's electronic filing system.

/s/ David A. Welling
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