

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SCHWING BIOSET, INC.,

Plaintiff,

v.

Civ. No. _____

PUMPACTION CORPORATION,
FALLESON ASSOCIATES, INC. and
BLUE HERON CONSTRUCTION COMPANY, LLC,

JURY TRIAL DEMANDED

Defendants.

COMPLAINT

Plaintiff, Schwing Bioiset, Inc. (“Schwing”), for its Complaint against Defendants, Pumpaction Corporation (“Pumpaction”), Falleson Associates, Inc. (“Falleson”) and Blue Heron Construction Company, LLC (“Blue Heron”) alleges as follows:

THE PARTIES

1. Plaintiff Schwing is a corporation organized under the laws of the state of Minnesota having a principal place of business at 350 SMC Drive, Somerset, WI 54025.
2. Upon information and belief, Defendant Pumpaction is a corporation organized under the laws of the state of Pennsylvania having a principal place of business at 250 Riverview Dr., Monessen, PA 15062.
3. Upon information and belief, Defendant Falleson is a domestic business Corporation organized under the laws of the state of New York, having a principal place of business at 3128 Fiddlehead Glen, Baldwinsville, New York 13027.

4. Upon information and belief, Defendant Blue Heron is a domestic limited liability company organized under the laws of the state of New York, having a principal place of business at 9289 Bonta Bridge Road, Jordan, NY 13080.

JURISDICTION AND VENUE

5. This is an action for patent infringement under the patent laws of the United States, 35 U.S.C. § 1 *et seq.*, and particularly 35 U.S.C. § 271.

6. This court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1338(a).

7. This court has personal jurisdiction over Defendants Pumpaction, Falleson and Blue Heron by reason of their continuous and systematic contacts with New York, and as further alleged herein. On information and belief, Defendants and its agents regularly transact and solicit business in New York by, among other things, selling or offering to sell positive displacement pump systems, and/or derive substantial revenue from sales in New York such that the maintenance of personal jurisdiction does not offend traditional notions of fair play and substantial justice.

8. Venue in the United States District Court for the Western District of New York is proper pursuant to 28 U.S.C. §§ 1391(b), 1391(c) and 1400(b).

COUNT I

INFRINGEMENT OF U.S. PATENT NO. 5,839,883

9. Plaintiff Schwing incorporates and re-alleges paragraphs 1 through 8.

10. On Nov. 24, 1998, U.S. Patent Number 5,839,883 entitled “SYSTEM AND METHOD FOR CONTROLLING A MATERIALS HANDLING SYSTEM” (“the ‘883 patent”) was duly and legally issued by the United States Patent and Trademark Office. A true and correct copy of the ‘883 patent is attached as Exhibit A to the Complaint.

11. Plaintiff Schwing is the owner by assignment of the entire right, title, and interest in and to the '883 patent with the right to sue for past, present, and future infringement of the '883 patent.

12. Upon information and belief, Defendants Pumpaction, Falleson and Blue Heron have been making, using, selling, offering for sale, and/or importing, without license or authority from Plaintiff Schwing, in this District and elsewhere in the United States, positive displacement pump systems that embody the inventions claimed in the '883 patent under 35 U.S.C. § 271.

13. Upon information and belief, in 2011, the Town of Amherst, New York sent out a Contract for Bid for a project which specifically required, in section 46 12 00, inventions claimed in the '883 patent.

14. Upon information and belief, Defendant Pumpaction submitted a bid on or about July 12, 2011 offering for sale a positive displacement pump system utilizing inventions claimed in the '883 patent under 35 U.S.C. § 271. Upon information and belief, Defendant Blue Heron is the contractor for the project and Defendant Falleson is the local sales representative for Pumpaction on the project.

15. Upon information and belief, Defendants won the bid for the project of paragraphs 11-12 without taking exception to providing the requirements related to the inventions claimed in the '883 patent.

16. Upon information and belief, Defendants Pumpaction, Falleson and Blue Heron will continue to directly infringe, contributorily infringe, and/or induce infringement of the '883 patent unless enjoined by the Court.

17. Plaintiff Schwing has been damaged by Defendants' infringement of the '883 patent, and will continue to be damaged by that infringement unless enjoined by this court.

18. Upon information and belief, Defendants have actual knowledge of the full contents of the '883 patent, and its prior and continuing infringement of the '883 patent was and is willful and deliberate.

COUNT II

TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONSHIP

19. Plaintiff Schwing re-alleges and incorporates by reference paragraphs 1 through 18.

20. Plaintiff Schwing alleges that it submitted a bid in response to the Contract for Bid of paragraph 11. The bid offered for sale a positive displacement pump system utilizing inventions claimed in its '883 patent and fulfilling all requirements in the specification accompanying the Contract for Bid.

21. Plaintiff Schwing alleges that due to the specific requirements of the Contract for Bid, Schwing is the only company that could meet the specification without taking exception to it and without infringing the '883 patent.

22. Upon information and belief, Defendants Pumpaction, Falleson and Blue Heron unreasonably interfered with the prospective contract and profitable business relationship between Plaintiff Schwing and the Town of Amherst, New York by bidding on the contract without taking exception to the requirements which utilize the inventions claimed in the '883 patent. Plaintiffs Pumpaction, Falleson and Blue Heron used dishonest, unfair, improper and wrongful means to win the contract by not disclosing that they could not fulfill all the requirements of the contract without infringing the '883 patent.

23. Upon information and belief, Defendant Pumpaction knew that the positive displacement pump system in their winning bid utilized inventions covered by the '883 patent.

24. Upon information and belief, Plaintiff Schwing would have won the contract for the project had Defendants Pumpaction, Falleson and Blue Heron not used dishonest, unfair, improper and wrongful means to win the contract.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Schwing prays for the following relief:

A. That Defendants Pumpaction, Falleson and Blue Heron, their officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them be found to have infringed the valid U.S. Patent No. 5,839,883, and be enjoined, preliminarily and permanently, from making, using, selling, offering for sale or importing into the United States products which infringe U.S. Patent No. 5,839,883;

B. That Plaintiff Schwing be compensated by Defendants Pumpaction, Falleson and Blue Heron for lost sales and all other damages caused by Defendants Pumpaction, Falleson and Blue Heron's infringement of U.S. Patent No. 5,839,883 under 35 U.S.C. § 284, in an amount to be determined by an accounting, but not less than a reasonable royalty, plus interest;

C. That the award of damages for infringement of U.S. Patent No. 5,839,883 be trebled as provided for by 35 U.S.C. § 284 for willful infringement by Defendants Pumpaction, Falleson and Blue Heron;

D. That Plaintiff Schwing be awarded its costs and attorneys' fees incurred in prosecuting this exceptional case, as provided for by 35 U.S.C. § 285, plus interest;

E. That Plaintiff Schwing be awarded damages for Defendants Pumpaction, Falleson and Blue Heron's tortious interference with Plaintiff Schwing's prospective business relationship; and

F. That Plaintiff Schwing be awarded such other relief as the Court deems just and proper.

JURY DEMAND

Plaintiff Schwing demands a jury trial on all issues so triable.

Dated: December 12, 2012

PHILLIPS LYTLE LLP

By: s/ Michael J. Berchou

Michael J. Berchou
3400 HSBC Center
Buffalo, New York 14203
(716) 847-8400
Fax: (716) 852-6100
mberchou@phillipslyte.com

Of Counsel:

David R. Fairbairn
Catherine A. Shultz
KINNEY & LANGE, P.A.
The Kinney & Lange Building
312 South Third Street
Minneapolis, MN 55415-1002
(612) 339-1863
Fax: (612) 339-6580
drfairbairn@kinney.com
cshultz@kinney.com

**ATTORNEYS FOR PLAINTIFF
SCHWING BIOSET, INC.**