

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

**TOP-CO INC. and TOP-CO CEMENTING
PRODUCTS INC.**

Plaintiff,

vs.

**SUMMIT ENERGY SERVICES, INC. d/b/a
SUMMIT CASING EQUIPMENT**

Defendant.

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CIVIL ACTION NO. _____

JURY TRIAL DEMANDED

ORIGINAL COMPLAINT

Plaintiffs TOP-CO INC. and TOP-CO CEMENTING PRODUCTS INC. (collectively “Top-Co”) hereby file this Original Complaint against Defendant SUMMIT ENERGY SERVICES, INC. d/b/a SUMMIT CASING EQUIPMENT for patent infringement, trademark infringement, unfair competition and tortious interference with business relations as set forth below.

I. PARTIES

1. Top-Co Inc. is a corporation organized under the laws of Canada, with its principal place of business in 7720 17 Street, Edmonton, Alberta Y6P 1S7.

2. Top-Co Cementing Products Inc. is a corporation organized under the laws of the State of Texas with its principal place of business located at 3443 N. Sam Houston Parkway West, Suite 200, Houston, Texas 77086.

3. On information and belief, Defendant Summit Energy Services d/b/a Summit Casing Equipment (“Summit”) is a corporation organized under the laws of the State of Oklahoma, with its principal place of business located at 6656 Corporation Parkway, Fort Worth,

Texas 76126. Summit may be served through its registered agent Andy Eldridge, 128 Century Drive, Cleburne, Texas 76033.

II. NATURE OF THIS ACTION

4. This is an action for patent infringement arising under the patent laws of the United States, particularly 35 U.S.C. §§ 271-287, trademark infringement under the Lanham Act, 15 U.S.C. §1125(a), as well as for trademark infringement under Texas State Law and other ancillary claims arising out of the same case or controversy.

III. JURISDICTION AND VENUE

5. This Court has exclusive subject matter jurisdiction over this action under 28 U.S.C. § 1338(a) and (b) and supplemental jurisdiction under 28 U.S.C. § 1367(a).

6. Defendant is subject to personal jurisdiction by virtue of its contacts with the State of Texas, and with the Southern District of Texas in particular. Defendant is voluntarily conducting business in this district.

7. Venue is proper in this district under 28 U.S.C. § 1391(b) and 1400(b).

IV. FACTS

8. On July 31, 2012, U.S. Design Patent No. D664,568 (“the ‘568 patent”) was duly and legally issued by the U.S. Patent & Trademark Office (“PTO”) to inventors Gregory Andrigo and Alfredo Sanchez for an ornamental design relating to a casing centralizer. A true and correct copy of the ‘568 is attached hereto as **Exhibit A**. The ‘568 patent is presumed valid pursuant to 35 U.S.C § 282.

9. Pursuant to their employment agreements, Messrs. Andrigo and Sanchez assigned all right, title and interest to the '568 patent to Top-Co. A true and correct copy of the assignment is attached hereto as **Exhibit B**.

10. The '568 patent is currently in full force and effect.

11. No other company is licensed to make, use or sell products that are covered by the '568 patent.

12. Top-Co makes, offers for sale and sells its Type 346 Top Reach Glider™ composite centralizer covered by the design of the '568 patent. Top-Co's Top Reach Glider™ composite centralizer has been very successful in the marketplace since introduction in 2009. Since that time, Top-Co has sold over 280,000 Top Reach Glider™ composite centralizers that incorporate the patented design.

13. Top-Co invested a considerable amount of time and money into the design and development of its Top Reach Glider™ composite centralizer.

14. Top-Co advertises its Top Reach Glider™ composite centralizer on its web site, in brochures and through other marketing means common in the industry.

15. Since about December 2010, Top-Co has continuously used its Top Reach Glider™ trademark in commerce in association with its centralizer throughout the United States, Canada and abroad. Top-Co uses its Top Reach Glider™ trademark on its product packaging, point-of-sale materials, web site and in its brochures, flyers and other marketing materials distributed to customers and others in the industry.

16. In about September 2011, Summit became a distributor for Top-Co, selling Top-Co products to Top-Co's customers in the industry. In its role as distributor, Summit represented Top-Co in the marketplace and offered for sale and sold, on behalf of Top-Co, Top Reach

Glider™ centralizers covered by the '568 patent for use in oil well projects with various customers of Top-Co.

17. As a Top-Co distributor, Summit was given and had access to internal business, confidential and other information belonging to Top-Co, including but not limited to Top-Co's customer lists, contacts and information; drawings, specifications, designs, and other development information related to Top-Co's Top Reach Glider™ composite centralizer; advertising and marketing materials developed by Top-Co for its Top Reach Glider™ composite centralizer; pricing strategy for Top-Co's Top Reach Glider™ composite centralizer; and internal sales information related to Top-Co's Top Reach Glider™ composite centralizer.

18. As a distributor of Top-Co, Summit offered for sale and sold Top-Co's composite centralizers using Top-Co's Top Reach Glider™ trademark.

19. On information and belief, without termination of its relationship with Top-Co or notice that it would no longer be representing Top-Co in the marketplace, in July 2012 Summit began manufacturing, offering for sale and selling a composite centralizer that infringes the '568 patent. On information and belief, Summit calls its infringing product the TorqGlider Composite Centralizer. A copy of Summit's literature advertising its TorqGlider centralizer is attached hereto as **Exhibit C**.

20. On information and belief, Summit has made, used, sold, and/or offered for sale and are currently making, using, offering for sale and/or selling, TorqGlider Composite Centralizers that infringe the '568 patent.

21. On information and belief, Summit has used Top-Co's internal information, including but not limited to, Top-Co's drawings, specifications, designs, and other development information related to Top-Co's Top Reach Glider™ centralizer to copy Top-Co's Top Reach

Glider™.

22. On information and belief, Summit has used Top-Co's internal information, including but not limited to, Top-Co's pricing strategy, customer lists, contacts and customer information to target customers of Top-Co's Top Reach Glider™ composite centralizer in order to divert sales from Top-Co.

23. On information and belief, Summit has used Top-Co's internal sales and pricing information related to Top-Co's Top Reach Glider™ composite centralizer in order to divert sales from Top-Co.

24. On information and belief, Summit has, in fact, diverted sales from Top-Co.

25. In connection with the sales of its infringing composite centralizer, Summit is using the TorqGlider mark which is confusingly similar to Top-Co's Top Reach Glider™ mark.

26. Summit's use of the TorqGlider mark, in fact, makes Summit's composite centralizer appear to be associated with Top-Co's composite centralizer.

27. Particularly since Summit was a distributor for Top-Co, there has been actual confusion in the marketplace about which product customers have purchased and are using. As a result, actual confusion has occurred and will continue to occur in the marketplace.

28. The natural, probable and foreseeable result of Summit's wrongful conduct has been and will continue to be to deprive Top-Co of the benefits of using its mark, to deprive Top-Co of goodwill, and to injure Top-Co's relations with present and prospective customers.

29. Top-Co is informed and believes, and on that basis alleges, that it will sustain damages as a result of Summit's wrongful conduct. Summit's wrongful conduct has also deprived and will continue to deprive Top-Co of opportunities for expanding its goodwill.

30. Top-Co is informed and believes, and on that basis alleges, that unless enjoined

by this Court, Summit intends to continue its course of conduct and wrongfully use, infringe upon, and otherwise profit from Top-Co's patented design, confidential information and trademark. As a direct and proximate result of the acts of Summit alleged above, Top-Co is informed and believes that it has already suffered irreparable damage.

31. Top-Co has no adequate remedy at law to redress all of the injuries that Summit has caused and intends to cause by its conduct. Top-Co will continue to suffer irreparable harm to its business, sustain damages, and see Summit gain unlawful profits until Summit's actions alleged above are enjoined by this Court.

V. CAUSES OF ACTION – PATENT INFRINGEMENT

32. The above and foregoing paragraphs are incorporated herein by reference.

33. Summit is making, using, offering for sale and/or selling products within this district that infringe the '568 patent design without authority or license from Top-Co.

34. Upon information and belief, Summit's infringing activities have been willful and deliberate.

35. As a result of Summit's infringing activities, Top-Co has suffered actual damage in an amount to be determined at trial. Additionally, as a result of the willful and deliberate nature of Summit's infringement, Top-Co is entitled to trebling of its actual damages and is entitled to recover its attorney's fees and costs incurred in prosecuting this action. *See* 35 U.S.C. §§ 284-285.

36. Summit's acts of infringement have caused irreparable harm to Top-Co for which there is no adequate remedy at law, and will continue to cause irreparable harm to Top-Co unless Summit is preliminarily and permanently enjoined by this Court.

TRADEMARK INFRINGEMENT

37. The above and foregoing paragraphs are incorporated herein by reference.

38. Top-Co has marketed its composite centralizer under the trademark Top Reach Glider™ since at least December 2010. Top-Co's mark is suggestive and was developed specifically for Top-Co's composite centralizer which allows for low drag centralization of casing, hence use of the "Glider" mark.

39. Top-Co has continuously used the trademark Top Reach Glider™ since 2010.

40. Summit has begun offering a composite centralizer identical to Top-Co's Top Reach Glider™ composite centralizer. Summit is marketing and selling that composite centralizer bearing the mark TorqGlider which is substantially and confusingly similar to Top-Co's mark.

41. The use of this confusingly similar mark by Summit has caused and will continue to cause consumers to be confused as to the source of Summit's composite centralizer.

42. By virtue of Summit's conduct, there has been and will continue to be confusion between Top-Co's and Summit's composite centralizers and the source of the centralizers. Summit's conduct constitutes infringement of Top-Co's trademark under the Lanham Act, which has damaged Top-Co.

43. In addition, Summit has advertised on its web site and distributed marketing materials in which it makes false and misleading claims and provides false and misleading descriptions, characteristics, and qualities related to its TorqGlider composite centralizer in violation of the Lanham Act.

44. The unauthorized and infringing use by Summit of Top-Co's trademark and of a

confusingly similar mark, as well as its false and misleading claims and descriptions used by Summit on its web site and in its marketing materials, unless enjoined, will cause irreparable harm, damage and injury to Top-Co's goodwill in its mark and product.

45. Summit's misleading acts and acts of infringement are willful and deliberate and, as a result, damages should be trebled and Top-Co should be awarded its attorney's fees and costs incurred in prosecuting this action.

46. Top-Co has been and will continue to be irreparably harmed, damaged and injured as a result of Summit's conduct in an amount to be determined at trial. In addition, Summit has unlawfully and wrongfully derived and will continue to derive income and profits from its infringing conduct.

UNFAIR COMPETITION

47. The above and foregoing paragraphs are incorporated herein by reference.

48. Summit, by virtue of the fact that it has marketed, advertised, used, and offered to consumers products infringing upon Top-Co's patented design and trademark, and has used false and misleading descriptions in its advertising and marketing materials, has engaged and continues to engage in unfair competition against Top-Co.

49. Such conduct includes, but is not limited to, surreptitiously raiding Top-Co's customer base and established goodwill, wrongful deception of the consuming public, wrongful designation as to the source, sponsorship and origin of goods and/or services, wrongful deprivation of Top-Co's good name and reputation, and wrongful deprivation of Top-Co's right to public recognition and credit as to true source of composite centralizers.

50. Summit has been marketing, advertising, and offering a composite centralizer

under the disputed mark and patented design resulting in consumer confusion as to the source of the products. Such conduct constitutes unfair trade practice and unfair competition under the Lanham Act and under state and common law.

51. Summit has been unjustly enriched through unfair competition and has caused Top-Co actual damage. Summit continues to unfairly compete with Top-Co and Top-Co is entitled to actual and punitive damages in an amount to be determined at trial.

TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS

52. The above and foregoing paragraphs are incorporated herein by reference.

53. As a result of Summit's deceptive and confusing conduct in offering the TorqGlider composite centralizer, as well as use of Top-Co's customer, internal business, confidential and other information obtained by Summit as a result of its distributor relationship with Top-Co, Summit has entered into business relations and obtained business contacts that would otherwise have been entered into and obtained by Top-Co.

54. Summit's acts of deceptively marketing, advertising and selling its TorqGlider composite centralizer has prevented Top-Co from entering into business relationships with previous Top-Co customers as well as with potential customers in the industry.

55. Summit's acts were purposeful and directed at preventing customers from entering into a business relationship with and purchasing composite centralizers from Top-Co, thereby diverting business relations from Top-Co to Summit.

56. Top-Co has suffered actual damage to reputation, goodwill, and sales to Top-Co as a result of Summit's deceptive acts.

57. Top-Co is entitled to damages in an amount to be determined at trial.

VI. JURY DEMAND

58. Trial by jury is demanded on all issues so triable.

VII. PRAYER

WHEREFORE Top-Co respectfully prays that this Court enter judgment against Summit, thereby granting Top-Co the following relief:

- a. a preliminary and permanent injunction enjoining Defendant, its affiliates, officers, agents, employees, servants and all persons in active concert or participation with them, individually and collectively, from continuing to infringe the '568 patent;
- b. a preliminary and permanent injunction enjoining Defendant, its affiliates, officers, agents, employees, servants and all persons in active concert or participation with them, individually and collectively, from continuing to infringe Top-Co's trademark;
- c. an equitable accounting from Defendant for any and all sales and/or profits or other benefit derived from Defendant's actions, infringement and other unlawful acts;
- d. an award of damages adequate to compensate Top-Co for Defendant's infringement of the '568 patent;
- e. an award of damages adequate to compensate Top-Co for Defendant's infringement of Top-Co's trademark, unfair competition, and tortious interference with prospective business relations, including actual and compensatory damages, lost profits, loss of business reputation, costs in bringing this action, costs of corrective advertising, together with interest and costs;
- f. a determination that Defendant's patent and trademark infringement have been willful and deliberate;

- g. a determination that this case is “exceptional” under 35 U.S.C. § 285, thereby entitling Top-Co to an award of its reasonable attorney’s fees and costs incurred in prosecuting this action;
- h. an award of treble damages based on the willful and deliberate nature of Defendant’s infringement;
- i. an accounting of damages resulting from Defendant’s infringement of the ’568 patent;
- j. an award of punitive damages in an amount necessary to punish Defendants and deter such conduct in the future;
- k. pre-judgment and post-judgment interest on all damages computed; and
- l. such other a further relief as the Court deems appropriate.

Respectfully submitted,

DRY & TASSIN, P.L.L.C.

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