

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA, ex rel.,)
and FLFMC, LLC.,)

Plaintiffs,)

v.)

WHAM-O, INC., and)
NYLABONE PRODUCTS,)

Defendants.)

Civil Action No.

JURY TRIAL DEMANDED

Filed Electronically

COMPLAINT

Plaintiffs for their Complaint herein, allege that:

Nature of the Action

1. This case is a civil action for, *inter alia*, false marking in violation of 35 U.S.C. § 292(a).

The Parties

2. Relator FLFMC brings this action in the name of the United States and its own name (collectively "Plaintiffs"), pursuant to 35 U.S.C. § 292(b). Plaintiff FLFMC is a Pennsylvania LLC with its principal place of business in Pennsylvania.

3. Defendant WHAM-O, Inc. is a Delaware Corporation with its principal place of business at 5903 Christie Avenue, Emeryville, California 94608.

4. Defendant Nylabone Products is a New Jersey Corporation with its principal place of business at 1 T.F.H. Plaza, Third Avenue and Union Street, Neptune, New Jersey 07753.

Jurisdiction and Venue

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1355(a), and 1338(a) and (b), as this action involves substantial claims arising under the patent laws of the United States.

6. Venue for this action is proper in the Western District of Pennsylvania pursuant to 28 U.S.C. §§ 1391(b) and (c), and 1395(a) because the asserted claims arose in this District and, on information and belief, Defendants, at all times material hereto, have done business in this District.

7. This court has personal jurisdiction over these Defendants, because, upon information and belief, Defendants have sold its falsely marked products in Pennsylvania and in this District and/or in the stream of commerce with knowledge that they would be sold in Pennsylvania and in this District. Upon information and belief, such sales in Pennsylvania and in this District of Defendants' products are substantial, continuous and systematic.

Background

8. United States Patent No. D310,691 ("the '691 patent") was filed on December 22, 1987 and issued on September 18, 1990.

9. Pursuant to the provisions of 35 U.S.C. § 154 then in effect, the '148 patent expired on September 18, 2004.

4. Defendants, or their agents, manufacture, sell, offer to sell, and/or advertise the product referred to as Frisbee® Flying Disc.

5. The Frisbee® Flying Disc is marked with patent No. D310,691.

First Cause of Action
(False Marking)

6. Plaintiffs repeat and re-allege paragraphs 1-10 as if set forth fully herein.

7. After September 18, 2004, Defendants or their agents marked upon, affixed to, or used in advertising in connection with items, including at least the Frisbee® Flying Disc, phrases referring to the D310,691 patent, implying that the item was patented.

8. Defendants or their agents did so for the purpose of deceiving the public.

Prayer for Relief

WHEREFORE, Plaintiffs pray that:

- A. This Court find that each Defendant has violated 35 U.S.C. § 292(a);
- B. This Court assess a fine in accordance with 35 U.S.C. § 292;
- C. This Court declare this case to be an exceptional case under 35 U.S.C. § 285 and award Plaintiffs their reasonable costs and attorneys' fees, together with interest, including pre-judgment interest, thereon; and
- D. This Court grant Plaintiffs such further and other relief (including attorney's fees) to which they may be entitled.

JURY DEMAND

Plaintiffs demand trial by jury on all issues to which it is entitled.

Respectfully submitted,

s/ David G. Oberdick

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Pa. I.D. No. 204609

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Meyer, Unkovic & Scott LLP

1300 Oliver Building

Pittsburgh, PA 15222

(412) 456-2800

Attorneys for Plaintiffs

Dated: March 2, 2010

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS UNITED STATES OF AMERICA, EX REL AND FLFMC, LLC DEFENDANTS WHAM-O, INC., and NYLABONE PRODUCTS
(b) County of Residence of First Listed Plaintiff ALLEGHENY COUNTY County of Residence of First Listed Defendant ALAMEDA COUNTY
(c) Attorney's (Firm Name, Address, and Telephone Number) David G. Oberdick Meyer, Unkovic & Scott LLP 535 Smithfield Street, Suite 1300 Pittsburgh, PA 15222 (412) 456-2800

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
1 U.S. Government Plaintiff 3 Federal Question (U.S. Government Not a Party)
2 U.S. Government Defendant 4 Diversity (Indicate Citizenship of Parties in Item III)
Citizen of This State 1 1 Incorporated or Principal Place of Business In This State 4 4
Citizen of Another State 2 2 Incorporated and Principal Place of Business In Another State 5 5
Citizen or Subject of a Foreign Country 3 3 Foreign Nation 6 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)
110 Insurance 120 Marine 130 Miller Act 140 Negotiable Instrument 150 Recovery of Overpayment & Enforcement of Judgment 151 Medicare Act 152 Recovery of Defaulted Student Loans (Excl. Veterans) 153 Recovery of Overpayment of Veteran's Benefits 160 Stockholders' Suits 190 Other Contract 195 Contract Product Liability 196 Franchise
PERSONAL INJURY 310 Airplane 315 Airplane Product Liability 320 Assault, Libel & Slander 330 Federal Employers' Liability 340 Marine 345 Marine Product Liability 350 Motor Vehicle 355 Motor Vehicle Product Liability 360 Other Personal Injury
PERSONAL INJURY 362 Personal Injury - Med. Malpractice 365 Personal Injury - Product Liability 368 Asbestos Personal Injury Product Liability 370 Other Fraud 371 Truth in Lending 380 Other Personal Property Damage 385 Property Damage Product Liability
PERSONAL PROPERTY 210 Land Condemnation 220 Foreclosure 230 Rent Lease & Ejectment 240 Torts to Land 245 Tort Product Liability 290 All Other Real Property
441 Voting 442 Employment 443 Housing/Accommodations 444 Welfare 445 Amer. w/Disabilities Employment 446 Amer. w/Disabilities Other 440 Other Civil Rights
510 Motions to Vacate Sentence Habeas Corpus: 530 General 535 Death Penalty 540 Mandamus & Other 550 Civil Rights 555 Prison Condition
610 Agriculture 620 Other Food & Drug 625 Drug Related Seizure of Property 21 USC 881 630 Liquor Laws 640 R.R. & Truck 650 Airline Regs. 660 Occupational Safety/Health 690 Other
710 Fair Labor Standards Act 720 Labor/Mgmt. Relations 730 Labor/Mgmt. Reporting & Disclosure Act 740 Railway Labor Act 790 Other Labor Litigation 791 Empl. Ret. Inc. Security Act
462 Naturalization Application 463 Habeas Corpus Alien Detainee 465 Other Immigration Actions
422 Appeal 28 USC 158 423 Withdrawal 28 USC 157 820 Copyrights 830 Patent 840 Trademark
861 HIA (1395ff) 862 Black Lung (923) 863 DIWC/DIWW (405(g)) 864 SSID Title XVI 865 RSI (405(g))
870 Taxes (U.S. Plaintiff or Defendant) 871 IRS—Third Party 26 USC 7609
400 State Reapportionment 410 Antitrust 430 Banks and Banking 450 Commerce 460 Deportation 470 Racketeer Influenced and Corrupt Organizations 480 Consumer Credit 490 Cable/Sat TV 810 Selective Service 850 Securities/Commodities/Exchange 875 Customer Challenge 12 USC 3410 890 Other Statutory Actions 891 Agricultural Acts 892 Economic Stabilization Act 893 Environmental Matters 894 Energy Allocation Act 895 Freedom of Information Act 900 Appeal of Fee Determination Under Equal Access to Justice 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)
1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from another district (specify) 6 Multidistrict Litigation 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
35 U.S.C. § 292
Brief description of cause: False marking

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ \$500 per offense CHECK YES only if demanded in complaint:
JURY DEMAND: [X] Yes [] No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE DOCKET NUMBER

DATE 3/2/10 SIGNATURE OF ATTORNEY OF RECORD [Signature]

FOR OFFICE USE ONLY
RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

JS 44A REVISED JUNE, 2009

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THIS CASE DESIGNATION SHEET MUST BE COMPLETED

PART A

This case belongs on the (Erie Johnstown X Pittsburgh) calendar.

- 1. ERIE CALENDAR - If cause of action arose in the counties of Crawford, Elk, Erie, Forest, McKean, Venango or Warren, OR any plaintiff or defendant resides in one of said counties.
- 2. JOHNSTOWN CALENDAR - If cause of action arose in the counties of Bedford, Blair, Cambria, Clearfield or Somerset OR any plaintiff or defendant resides in one of said counties.
- 3. Complete if on ERIE CALENDAR: I certify that the cause of action arose in _____ County and that the _____ resides in _____ County.
- 4. Complete if on JOHNSTOWN CALENDAR: I certify that the cause of action arose in _____ County and that the _____ resides in _____ County.

PART B (You are to check ONE of the following)

- 1. _____ This case is related to Number _____ Short Caption _____.
- 2. X This case is not related to a pending or terminated case.

DEFINITIONS OF RELATED CASES:

CIVIL: Civil cases are deemed related when a case filed relates to property included in another suit or involves the same issues of fact or it grows out of the same transactions as another suit or involves the validity or infringement of a patent involved in another suit

EMINENT DOMAIN: Cases in contiguous closely located groups and in common ownership groups which will lend themselves to consolidation for trial shall be deemed related.

HABEAS CORPUS & CIVIL RIGHTS: All habeas corpus petitions filed by the same individual shall be deemed related. All pro se Civil Rights actions by the same individual shall be deemed related.

PART C

1. CIVIL CATEGORY (Place x in only applicable category).

- 1. Antitrust and Securities Act Cases
- 2. Labor-Management Relations
- 3. Habeas Corpus
- 4. Civil Rights
- 5. Patent, Copyright, and Trademark
- 6. Eminent Domain
- 7. All other federal question cases
- 8. All personal and property damage tort cases, including maritime, FELA, Jones Act, Motor vehicle, products liability, assault, defamation, malicious prosecution, and false arrest
- 9. Insurance indemnity, contract and other diversity cases.
- 10. Government Collection Cases (shall include HEW Student Loans (Education), VA Overpayment, Overpayment of Social Security, Enlistment Overpayment (Army, Navy, etc), HUD Loans, GAO Loans (Misc. Types), Mortgage Foreclosures, S.B4. Loans, Civil Penalties and Coal Mine Penalty and Reclamation Fees.)

I certify that to the best of my knowledge the entries on this Case Designation Sheet are true and correct.

Date: 3/2/10

David J. Stender
ATTORNEY AT LAW

NOTE: ALL SECTIONS OF BOTH SIDES MUST BE COMPLETED BEFORE CASE CAN BE PROCESSED.

AO 440 (Rev. 12/09) Summons in a Civil Action (Page 2)

Civil Action No. 10-

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____; or

I returned the summons unexecuted because _____; or

Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Western District of Pennsylvania

UNITED STATES OF AMERICA, EX REL., and
FLFMC, LLC

Plaintiff

v.

WHAM-O, INC., and NYLABONE PRODUCTS

Defendant

Civil Action No. 10-

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Nylabone Products
1 T.F.H. Plaza
Third Avenue and Union Street
Neptune, NJ 07753

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

David G. Oberdick
Meyer, Unkovic & Scott, LLP
535 Smithfield Street
Suite 1300
Pittsburgh, PA 15222

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action No. 10-

PROOF OF SERVICE

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I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____; or

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Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc: