

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

PATENT RESEARCH INSTITUTE, L.L.C. §

Plaintiff, §

v. §

**JOHNSON & JOHNSON and
JOHNSON & JOHNSON
CONSUMER COMPANIES, INC.** §

Defendants. §

Civil Action No. 2:11-cv-00155

JURY TRIAL DEMANDED

COMPLAINT

I. NATURE OF THE CASE

1. This is an action for false patent marking under Section 292 of the Patent Act (35 U.S.C. § 292) which provides that any person may sue to recover the civil penalty for false patent marking. Plaintiff Patent Research Institute, L.L.C. brings this *qui tam* action on behalf of the United States of America against Defendants, Johnson & Johnson and Johnson & Johnson Consumer Companies, Inc. (collectively “Defendants”).

II. PARTIES

2. Plaintiff Patent Research Institute, L.L.C. is a Texas limited liability company with its principal place of business in Houston, Texas.

3. Defendant Johnson & Johnson is a New Jersey corporation having its principal place of business at One Johnson & Johnson Plaza, New Brunswick, New Jersey, 08933.

4. Defendant Johnson & Johnson Consumer Companies, Inc. is a New Jersey corporation having its principal place of business at 199 Grandview Road, Skillman, New Jersey, 08558.

III. JURISDICTION AND VENUE

5. The Court has jurisdiction of this action under 28 U.S.C. §§ 1331 and 1338(a).
6. The Court has personal jurisdiction over Defendants. Defendants have continuously conducted business within the State of Texas. Defendants have continuously offered for sale and sold, marked, and advertised the products that are the subject of this Complaint in the United States, the State of Texas, and the Eastern District of Texas.
7. Venue is proper in this district under 28 U.S.C. §§ 1391(b), 1391(c), and 1395(a).

IV. FACTS

8. Defendants have marked and continue to mark their Aveeno products (the “Falsely Marked Products”) with an inapplicable patent, U.S. Patent No. 6,410,062 (the “Falsely Marked Patent”). Such false marking by Defendants includes (a) marking the Falsely Marked Patent upon the Falsely Marked Products, (b) affixing the Falsely Marked Patent to the Falsely Marked Products and (c) using the Falsely Marked Patent in advertising in connection with the Falsely Marked Products.
9. U.S. Patent No. 6,410,062 (attached hereto as Exhibit 1) has no application to the Falsely Marked Products.
10. U.S. Patent No. 6,410,062 discloses various methods to treat various “inflammatory disorders and related conditions.”
11. U.S. Patent No. 6,410,062 describes a process and not a product like the Falsely Marked Products.
12. It was a false statement for Defendants to mark the Falsely Marked Products with an inapplicable patent.
13. Defendants are large, sophisticated companies.

14. Defendants have, and/or regularly retain, sophisticated legal counsel.
15. Defendants have many years of experience applying for patents, obtaining patents, licensing patents, and litigating patent infringement lawsuits.
16. Defendants acknowledge in regulatory filings with the federal government that their patents are “material” to their business. Defendants acknowledge that they utilize patents to protect their products and product packaging and that challenges to their patents are a risk to future results.
17. Defendants knew that the Falsely Marked Products were not covered by the Falsely Marked Patent.
18. Defendants knew that it was a false statement to mark the Falsely Marked Products with an inapplicable patent. Defendants also acknowledge in their regulatory filings the possibility that challenges to the Defendants’ patents could potentially affect the Defendants’ competitive position and ability to sell their products and could potentially require the payment of damages.

V. INJURY IN FACT TO THE UNITED STATES

19. Defendants' false marking has injured the United States and continues to do so.
20. Defendants' false marking has caused injuries to the sovereignty of the United States arising from Defendants' violations of federal law, specifically, Defendants' violation of 35 U.S.C. § 292(a).
21. Defendants' false marking has caused proprietary injuries to the United States and continues to do so.
22. The marking and false marking statutes exist to give the public notice of patent rights. Congress intended the public to rely on marking as a ready means of discerning the status of intellectual property embodied in an article of manufacture or design, such as the Falsely Marked

Products.

23. Federal patent policy recognizes an important public interest in permitting full and free competition in the use of ideas which are, in reality, a part of the public domain-such as those described in the Falsely Marked Patent.

24. Congressional interest in preventing false marking was so great that Congress enacted 35 U.S.C. §292(a) which seeks to encourage private parties to enforce the statute. By permitting members of the public to bring *qui tam* suits on behalf of the Government, Congress authorized private persons such as Plaintiff to help control false marking.

25. Defendants' acts of false marking deter innovation and stifle competition in the marketplace for the following reasons: (a) if an article that is within the public domain is falsely marked, potential competitors may be dissuaded from entering the same market; (b) false marks may also deter scientific research when an inventor sees a mark and decides to forego continued research to avoid possible infringement; and (c) false marking can cause unnecessary investment in design to avoid presumed patent infringement or costs incurred to analyze the validity or enforceability of a patent whose number has been marked upon a product with which a competitor would like to compete.

26. Defendants' false marking misleads the public into believing that the Falsely Marked Patent gives Defendants control of the Falsely Marked Products, and places the risk of determining whether the Falsely Marked Products are controlled by the Falsely Marked Patent on the public rather than on Defendants, thereby increasing the cost to the public of ascertaining whether Defendants in fact control the intellectual property embodied in the Falsely Marked Products.

27. In each instance where Defendants have represented that the Falsely Marked Products are

protected by the Falsely Marked Patent, a member of the public desiring to participate in the market for products similar to the Falsely Marked Products must incur the cost of determining whether the involved Falsely Marked Patent is valid and enforceable. Failure to take on the costs of a reasonably competent search for information necessary to interpret the Falsely Marked Patent, investigation into prior art and other information bearing on the quality of the patent, and analysis thereof can result in a finding of willful infringement, which may treble the damages a potential infringer would otherwise have to pay.

28. Defendants' false marking also creates a misleading impression that the Falsely Marked Products are technologically superior to other available products, as articles bearing the term "patent" may be presumed to be novel, useful, and innovative.

29. Every person or company in the United States is a potential entrepreneur with respect to the process, manufacture, or composition of matter described in the Falsely Marked Patent. Moreover, every person or company in the United States is a potential competitor of Defendants with respect to the Falsely Marked Products marked with the Falsely Marked Patent.

30. Each Falsely Marked Product and advertisement thereof is likely to discourage or deter members of the public from commercializing a competing product even though the Falsely Marked Patent has no legal authority to prevent any person or company in the United States from competing with Defendants in commercializing such products.

31. Defendants' marking of the Falsely Marked Products and advertising thereof may stifle competition with respect to similar products to an immeasurable extent, thereby causing harm to the United States in an amount that cannot be readily determined.

32. Defendants have wrongfully and illegally advertised a patent monopoly that they do not possess and, as a result, have benefited by increasing or maintaining, their market power or

commercial success with respect to the Falsely Marked Products.

33. Each individual false marking (including each time an advertisement with such marking is accessed on the internet), is likely to harm the public. Thus, each such false marking is a separate offense under 35 U.S.C. § 292(a).

34. Each offense of false marking creates a proprietary interest of the United States in the penalty that may be recovered under 35 U.S.C. § 292(b).

35. For the reasons stated in paragraphs 8 through 34 above, Defendants' false marking has caused injuries to the sovereignty of the United States arising from Defendants' violations of federal law, and has caused proprietary injuries to the United States.

VI. CLAIM

36. For the reasons stated in paragraphs 8 through 35 above, Defendants have violated 35 U.S.C. § 292 by falsely marking the Falsely Marked Products with intent to deceive the public.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for the following:

- A. An accounting of the number, sales, and revenue of any Falsely Marked Products;
- B. A judgment in favor of Plaintiff that Defendants' have falsely marked products in violation of 35 U.S.C. § 292 and imposing a civil fine of \$500 per each Falsely Marked Product and false marking offense or an alternative amount, as set by the Court, one-half of any such award to be paid to the United States;
- C. An award of pre-judgment and post-judgment interest on any monetary award;
- D. An injunction prohibiting Defendants and their officers, directors, agents, servants, employees, attorneys, licensees, successors, and assigns, and those in active concert or participation with any of them from violating 35 U.S.C. § 292;

E. An award of attorneys fees and costs, and other expenses and an enhancement of damages and penalties; and

F. Such other and further relief to which Plaintiff is entitled.

JURY DEMAND

Plaintiff demands a jury trial on all issues so triable.

Dated: March 9, 2011

Respectfully submitted,

/s/ Stuart M. Nelkin
Stuart M. Nelkin
Texas Bar No. 14884000
Carol Nelkin
Texas SBN: 14883500
Jay P. Nelkin
(Pro Hac Vice Motion to be filed)
NELKIN & NELKIN, P.C.
5417 Chaucer Drive
Houston, Texas 77005
(713) 526-4500 Telephone
(281) 825-4161 Facsimile
Attorneys for Plaintiff