

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

JUDGE HELLERSTEIN

TIMES THREE CLOTHIER, LLC,

Plaintiff,

v.

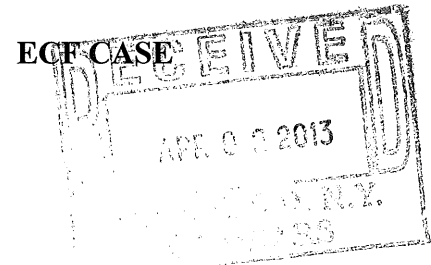
SPANX, INC.

Defendant.

13 CV 2157

Civil Action No. _____

JURY TRIAL DEMANDED



COMPLAINT FOR PATENT INFRINGEMENT

Times Three Clothier, LLC d/b/a/ Yummie Tummie (“Yummie Tummie”) sues Defendant Spanx, Inc. d/b/a Spanx by Sara Blakely (“Defendant Spanx by Sara Blakely”) and, on information and belief, alleges as follows:

Introduction

1. Yummie Tummie owns the designs claimed in United States Design Patent Nos. 606,285 (“the ‘285 Patent”); 616,627 (“the ‘627 Patent”); 622,477 (“the ‘477 Patent”); 623,377 (“the ‘377 Patent”) 665,558 (“the ‘558 Patent”) and 666,384 (“the ‘384 Patent”) (collectively “the patents-in-suit”). Defendant Spanx by Sara Blakely has copied Yummie Tummie’s patented designs in garments that it makes, uses, sells, and offers to sell, without Yummie Tummie’s permission, and has contributed to or induced, and continues to contribute to or induce, others to infringe the patents-in-suit. Yummie Tummie seeks damages and/or a disgorgement of Defendant Spanx by Sara Blakely’s total profits as well as its customers’ profits for patent infringement and an injunction preventing Defendant Spanx by Sara Blakely from making,

using, selling, or offering to sell, and from contributing to and inducing others to make, use, sell, or offer to sell, Yummie Tummie's patented designs without permission.

Jurisdiction and Venue

2. This is an action for patent infringement arising under the patent laws of the United States, 35 U.S.C. §§ 271 and 281, et seq. The Court has original jurisdiction over this patent infringement action under 28 U.S.C. §§ 1338(a).

3. Venue is proper in this Court because Yummie Tummie is located in the Southern District of New York and Defendant Spanx by Sara Blakely is responsible for acts of infringement occurring in the Southern District of New York as alleged in this Complaint, and has delivered or caused to be delivered its infringing products in the Southern District of New York.

Plaintiff Yummie Tummie

4. Yummie Tummie is a limited liability company organized and existing under the laws of the State of New York, with its principal place of business in New York, New York.

5. Yummie Tummie is an independent manufacturer of shapewear garments that embody innovative designs that are marketed, distributed, and sold under the well-known brand names Yummie Tummie®, Yummie by Heather Thomson®, Tummy Tank®, Tummylicious™, RIPT Fusion® and Core Form™ (collectively, "Yummie Tummie®"). Yummie Tummie's expansive Yummie Tummie® product line was conceived and designed by Heather Thomson, a fashion designer and creative director who has contributed to many acclaimed fashion collections, including Sean John by Sean Combs, Sweetface by Jennifer Lopez, and House of Deréon by Beyonce Knowles.

6. Yummie Tummie has invested significant time, effort and expense to protect its innovative designs and has a patent portfolio of eleven patents, including the patents-in-suit. Ms. Thomson's patented designs are embodied in an expansive line of Yummie Tummie® products, all of which offer consumers attractive and fashion-forward women's shapewear. Yummie Tummie has launched a range of Yummie Tummie® branded shapewear products based on its patented design, including a variety of styles of tops, apparel, and intimates for women of all sizes. Yummie Tummie's Yummie Tummie® line of shapewear is sold at such retailers as Saks Fifth Avenue, Nordstrom, The Home Shopping Network, Bloomingdale's and Lord & Taylor.

Yummie Tummie's Design Patents

7. The United States Patent and Trademark Office issued the '285 Patent on December 22, 2009. A copy of the '285 Patent is attached hereto as Exhibit 1. Through assignment, Yummie Tummie is the owner of all right, title, and interest, including rights for past infringements, in the '285 Patent.

8. The United States Patent and Trademark Office issued the '627 Patent on June 1, 2010. A copy of the '627 Patent is attached hereto as Exhibit 2. Through assignment, Yummie Tummie is the owner of all right, title, and interest, including rights for past infringements, in the '627 Patent.

9. The United States Patent and Trademark Office issued the '477 Patent on August 31, 2010. A copy of the '477 Patent is attached hereto as Exhibit 3. Through assignment, Yummie Tummie is the owner of all right, title, and interest, including rights for past infringements, in the '477 Patent.

10. The United States Patent and Trademark Office issued the '377 Patent on September 14, 2010. A copy of the '377 Patent is attached hereto as Exhibit 4. Through

assignment, Yummie Tummie is the owner of all right, title, and interest, including rights for past infringements, in the '377 Patent.

11. The United States Patent and Trademark Office issued the '558 Patent on August 21, 2012. A copy of the '558 Patent is attached hereto as Exhibit 5. Through assignment, Yummie Tummie is the owner of all right, title, and interest, including rights for past infringements, in the '558 Patent.

12. The United States Patent and Trademark Office issued the '384 Patent on September 4, 2012. A copy of the '384 Patent is attached hereto as Exhibit 6. Through assignment, Yummie Tummie is the owner of all right, title, and interest, including rights for past infringements, in the '384 Patent.

13. Yummie Tummie has complied with the statutory requirement of placing a notice of the patents-in-suit on all necessary garments it manufactures and sells.

Defendant Spanx by Sara Blakely and its Acts of Infringement

14. Defendant Spanx by Sara Blakely is a Georgia corporation, doing business in New York, NY through many retailers and a showroom.

15. Defendant Spanx by Sara Blakely has used and continues to use the designs of the patents-in-suit in products that it makes, uses, sells, and offers to sell, without Yummie Tummie's permission, including, but not limited to, Defendant Spanx by Sara Blakely's "The Total Taming Tank A226764," also known as "The Spanx Total Taming Tank," "the Top This Tank Style 1847" and "The Top This Cami Style 1846" (collectively the "Infringing Garments").

16. Defendant Spanx by Sara Blakely has contributed to or induced, and continues to contribute to or induce, others, including third party garment retailers, including, *inter alia*, JC Penny, Kohl's and QVC, and garment purchasers, to infringe at least one of the patents-in-suit by

using, offering for sale, and selling at least one of the Infringing Garments, which are copies of Yummie Tummie's patented designs, without Yummie Tummie's permission.

17. Defendant Spanx by Sara Blakely was aware of Yummie Tummie's patents at least as early as May 18, 2012 as a result of a letter Yummie Tummie sent to Defendant Spanx by Sara Blakely listing certain patents-in-suit thereby providing Defendant Spanx by Sara Blakely with actual knowledge of same.

18. On January 18, 2013, Yummie Tummie sent Defendant Spanx by Sara Blakely a cease and desist letter, in regard to the Infringing Garments demanding that Defendant Spanx by Sara Blakely refrain from further infringing Yummie Tummie's patents and compensate Yummie Tummie for its past infringement. A copy of the January 18, 2013 letter is attached as Exhibit 7. Since that time, Defendant Spanx by Sara Blakely's counsel responded to the January 18 letter which led to discussions between the parties in an attempt to resolve the matter. Prior to initiating such discussions, Defendant Spanx by Sara Blakely's counsel requested multiple extensions of time to respond to Yummie Tummie's letter. Yummie Tummie agreed to such extensions based on its good faith belief that Defendant Spanx by Sara Blakely intended to resolve the matter. However, in the midst of ongoing discussions initiated by Defendant Spanx by Sara Blakely, Defendant Spanx by Sara Blakely filed a Declaratory Judgment action in the Northern District of Georgia, entitled Spanx, Inc. v. Times Three Clothier, LLC, Case No. 13-cv-00710-WSD, on March 5, 2013 without notice to Yummie Tummie. Such action by Defendant Spanx by Sara Blakely evidences that Defendant Spanx by Sara Blakely intends to continue its willful and intentional infringement of Yummie Tummie's design patents asserted herein.

COUNT I
(DESIGN PATENT INFRINGEMENT, 35 U.S.C. §§ 271 AND 281)

19. Yummie Tummie incorporates the allegations contained in paragraphs 1 through 18 as though fully set forth herein.

20. Defendant Spanx by Sara Blakely has been and, on information and belief, still is making, using, offering to sell, selling, and/or importing in the United States Infringing Garments that infringe the '285 Patent in violation of 35 U.S.C. § 271(a).

21. On information and belief, Defendant Spanx by Sara Blakely has been and still is actively inducing others to infringe the '285 Patent in violation of 35 U.S.C. § 271(b).

22. On information and belief, Defendant Spanx by Sara Blakely's infringement has been intentional and willful, making this an exceptional case.

23. By reason of Defendant Spanx by Sara Blakely's infringement, Yummie Tummie has suffered, and unless Defendant Spanx by Sara Blakely's conduct is permanently enjoined, will continue to suffer, actual damages and irreparable harm, as to which it has no adequate remedy at law.

COUNT II
(DESIGN PATENT INFRINGEMENT, 35 U.S.C. §§ 271 AND 281)

24. Yummie Tummie incorporates the allegations contained in paragraphs 1 through 18 as though fully set forth herein.

25. Defendant Spanx by Sara Blakely has been and, on information and belief, still is making, using, offering to sell, selling, and/or importing in the United States Infringing Garments that infringe the '627 Patent in violation of 35 U.S.C. § 271(a).

26. On information and belief, Defendant Spanx by Sara Blakely has been and still is actively inducing others to infringe the '627 Patent in violation of 35 U.S.C. § 271(b).

27. On information and belief, Defendant Spanx by Sara Blakely's infringement has been intentional and willful, making this an exceptional case.

28. By reason of Defendant Spanx by Sara Blakely's infringement, Yummie Tummie has suffered, and unless Defendant Spanx by Sara Blakely's conduct is permanently enjoined, will continue to suffer, actual damages and irreparable harm, as to which it has no adequate remedy at law.

**COUNT III
(DESIGN PATENT INFRINGEMENT, 35 U.S.C. §§ 271 AND 281)**

29. Yummie Tummie incorporates the allegations contained in paragraphs 1 through 18 as though fully set forth herein.

30. Defendant Spanx by Sara Blakely has been and, on information and belief, still is making, using, offering to sell, selling, and/or importing in the United States Infringing Garments that infringe the '477 Patent in violation of 35 U.S.C. § 271(a).

31. On information and belief, Defendant Spanx by Sara Blakely has been and still is actively inducing others to infringe the '477 Patent in violation of 35 U.S.C. § 271(b).

32. On information and belief, Defendant Spanx by Sara Blakely's infringement has been intentional and willful, making this an exceptional case.

33. By reason of Defendant Spanx by Sara Blakely's infringement, Yummie Tummie has suffered, and unless Defendant Spanx by Sara Blakely's conduct is permanently enjoined, will continue to suffer, actual damages and irreparable harm, as to which it has no adequate remedy at law.

**COUNT IV
(DESIGN PATENT INFRINGEMENT, 35 U.S.C. §§ 271 AND 281)**

34. Yummie Tummie incorporates the allegations contained in paragraphs 1 through 18 as though fully set forth herein.

35. Defendant Spanx by Sara Blakely has been and, on information and belief, still is making, using, offering to sell, selling, and/or importing in the United States Infringing Garments that infringe the '377 Patent in violation of 35 U.S.C. § 271(a).

36. On information and belief, Defendant Spanx by Sara Blakely has been and still is actively inducing others to infringe the '377 Patent in violation of 35 U.S.C. § 271(b).

37. On information and belief, Defendant Spanx by Sara Blakely's infringement has been intentional and willful, making this an exceptional case.

38. By reason of Defendant Spanx by Sara Blakely's infringement, Yummie Tummie has suffered, and unless Defendant Spanx by Sara Blakely's conduct is permanently enjoined, will continue to suffer, actual damages and irreparable harm, as to which it has no adequate remedy at law.

COUNT V
(DESIGN PATENT INFRINGEMENT, 35 U.S.C. §§ 271 AND 281)

39. Yummie Tummie incorporates the allegations contained in paragraphs 1 through 18 as though fully set forth herein.

40. Defendant Spanx by Sara Blakely has been and, on information and belief, still is making, using, offering to sell, selling, and/or importing in the United States Infringing Garments that infringe the '558 Patent in violation of 35 U.S.C. § 271(a).

41. On information and belief, Defendant Spanx by Sara Blakely has been and still is actively inducing others to infringe the '558 Patent in violation of 35 U.S.C. § 271(b).

42. On information and belief, Defendant Spanx by Sara Blakely's infringement has been intentional and willful, making this an exceptional case.

43. By reason of Defendant Spanx by Sara Blakely's infringement, Yummie Tummie has suffered, and unless Defendant Spanx by Sara Blakely's conduct is permanently enjoined,

will continue to suffer, actual damages and irreparable harm, as to which it has no adequate remedy at law.

**COUNT VI
(DESIGN PATENT INFRINGEMENT, 35 U.S.C. §§ 271 AND 281)**

44. Yummie Tummie incorporates the allegations contained in paragraphs 1 through 18 as though fully set forth herein.

45. Defendant Spanx by Sara Blakely has been and, on information and belief, still is making, using, offering to sell, selling, and/or importing in the United States Infringing Garments that infringe the '384 Patent in violation of 35 U.S.C. § 271(a).

46. On information and belief, Defendant Spanx by Sara Blakely has been and still is actively inducing others to infringe the '384 Patent in violation of 35 U.S.C. § 271(b).

47. On information and belief, Defendant Spanx by Sara Blakely's infringement has been intentional and willful, making this an exceptional case.

48. By reason of Defendant Spanx by Sara Blakely's infringement, Yummie Tummie has suffered, and unless Defendant Spanx by Sara Blakely's conduct is permanently enjoined, will continue to suffer, actual damages and irreparable harm, as to which it has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Yummie Tummie respectfully requests that this Court:

1. Enter judgment in favor of Yummie Tummie;
2. Permanently enjoin Defendant Spanx by Sara Blakely and its predecessors, successors, divisions, subsidiaries, or joint ventures thereof, together with any and all parent or affiliated companies or corporations, and all officers, directors, employees, agents, attorneys, representatives, those acting in privity or concern with Defendant

Spanx by Sara Blakely, or on its behalf, from further infringing the '285 Patent, and from inducing others to infringe the '285 Patent;

3. Permanently enjoin Defendant Spanx by Sara Blakely and its predecessors, successors, divisions, subsidiaries, or joint ventures thereof, together with any and all parent or affiliated companies or corporations, and all officers, directors, employees, agents, attorneys, representatives, those acting in privity or concern with Defendant Spanx by Sara Blakely, or on its behalf, from further infringing the '627 Patent, and from inducing others to infringe the '627 Patent;
4. Permanently enjoin Defendant Spanx by Sara Blakely and its predecessors, successors, divisions, subsidiaries, or joint ventures thereof, together with any and all parent or affiliated companies or corporations, and all officers, directors, employees, agents, attorneys, representatives, those acting in privity or concern with Defendant Spanx by Sara Blakely, or on its behalf, from further infringing the '477 Patent, and from inducing others to infringe the '477 Patent;
5. Permanently enjoin Defendant Spanx by Sara Blakely and its predecessors, successors, divisions, subsidiaries, or joint ventures thereof, together with any and all parent or affiliated companies or corporations, and all officers, directors, employees, agents, attorneys, representatives, those acting in privity or concern with Defendant Spanx by Sara Blakely, or on its behalf, from further infringing the '377 Patent, and from inducing others to infringe the '377 Patent;
6. Permanently enjoin Defendant Spanx by Sara Blakely and its predecessors, successors, divisions, subsidiaries, or joint ventures thereof, together with any and all parent or affiliated companies or corporations, and all officers, directors, employees,

agents, attorneys, representatives, those acting in privity or concern with Defendant Spanx by Sara Blakely, or on its behalf, from further infringing the '558 Patent, and from inducing others to infringe the '558 Patent;

7. Permanently enjoin Defendant Spanx by Sara Blakely and its predecessors, successors, divisions, subsidiaries, or joint ventures thereof, together with any and all parent or affiliated companies or corporations, and all officers, directors, employees, agents, attorneys, representatives, those acting in privity or concern with Defendant Spanx by Sara Blakely, or on its behalf, from further infringing the '384 Patent, and from inducing others to infringe the '384 Patent;
8. Award Yummie Tummie its actual damages under 35 U.S.C. § 284 in an amount to be determined at trial;
9. Award Yummie Tummie enhanced damages up to three times the amount found or assessed under 35 U.S.C. § 284, as a result of Defendant Spanx by Sara Blakely's knowing and willful infringement;
10. Award Yummie Tummie the disgorged total profits of Defendant Spanx by Sara Blakely and its customers that sold or offered for sale the Infringing Garments under 35 U.S.C. §289 from infringing the patents-in-suit in an amount to be determined at trial;
11. Award Yummie Tummie punitive damages because of Defendant Spanx by Sara Blakely's knowing, willful, and deliberate bad faith acts of unfair competition in an amount to be determined at trial;
12. Award Yummie Tummie all of its actual costs and reasonable attorneys' fees in this action as authorized by 35 U.S.C. § 285; and

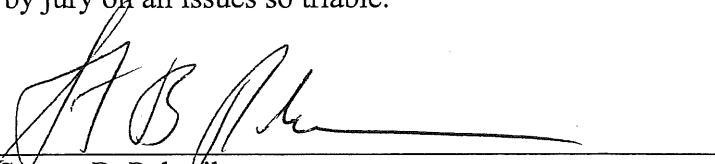
13. Grant to Yummie Tummie such other relief as may be just and warranted under the circumstances.

JURY TRIAL DEMAND

Yummie Tummie demands a trial by jury on all issues so triable.

Dated: April 2, 2013

By:



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