

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

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PROMAT LTD.,

Plaintiff,

v.

CANADIAN RUBBER  
INDUSTRIES LTD.,

Defendant.

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OPINION AND ORDER

02-C-0018-C

This is a civil case for declaratory, injunctive and monetary relief brought by plaintiff Promat Ltd. Plaintiff contends that defendant infringed plaintiff's U.S. Patent No. 5,653,195 by manufacturing and selling an animal mattress known as the "Moo Mattress," which is covered by the claims of plaintiff's patent. The case is before the court on plaintiff's unopposed motion for summary judgment.

I conclude that plaintiff has shown that defendant's manufacture and sale of its product, the "Moo Mattress," infringes the '195 patent and that plaintiff is entitled to summary judgment on the issue of infringement.

From the findings of fact proposed by plaintiff and unopposed by defendant, I find

that the following material facts are undisputed.

#### UNDISPUTED FACTS

Both plaintiff Promat Ltd. and Defendant Canadian Rubber Industries Ltd. are Canadian corporations with their principal places of business in Canada. Plaintiff is in the business of manufacturing and selling animal mattresses. It has a wholly owned subsidiary, Promat (USA) Inc., which assists in the manufacturing of the mattresses and has its principal place of business in Watertown, Wisconsin.

Plaintiff owns U. S. Patent No. 5,653,195, which issued on August 5, 1997. The patent claims an animal mattress.

Since at least November 14, 2000, defendant offered to sell a product known as the “Moo Mattress” in the United States and has sold such mattresses. It continued offering and selling the mattresses in the United States until at least December 17, 2001. Meltec Dairy Supplies began purchasing the “Moo Mattress” from defendant at least as early as January 12, 2001, and continued doing so until at least December 17, 2001. Defendant sold the “Moo Mattress” to others in the United States, including Don’s Dairy Supply in South Kortright, New York, and Roth Manufacturing in Loyal, Wisconsin. Devon Sales Inc. of Woodstock, Ontario advertised the “Moo Mattress” in the June 2002 issue of the Eastern Farm & Livestock Directory, which is distributed throughout the eastern United States.

Devon handed out copies of a “Moo Mattress” brochure on August 8, 2002, at the Empire Farm Days show in Seneca Falls, New York. Dan Kozlowsky of Kozlowsky Dairy Equipment Inc. in De Pere, Wisconsin, offered to sell “Moo Mattresses” to Larry Stahl of Luxemburg, Wisconsin, on August 9, 2002.

Meltec Dairy Supplies offered for sale and sold to others in the United States the “Moo Mattress” it bought from defendant. It offered the mattress for sale on its internet web site.

Emile Tieulie was defendant’s sales manager and was one of only three people managing defendant’s business in February 2001. Before he joined defendant, Tieulie had worked for Champagne Edition Inc. from approximately the fall of 1996 to approximately May 2000. While he worked at Champagne, the company was in the business of selling animal mattresses. Between February and December 1998, Champagne negotiated a license with plaintiff for the ‘195 patent. Tieulie participated in the license negotiation and discussed the scope of the ‘195 patent with Champagne.

Glenn Allen Cohen was the business manager of defendant and also a consultant to the company. He was one of the three people managing defendant’s business in February 2001. The company had no higher ranked employee than Cohen. Cohen was aware of the ‘195 patent before February 2001.

On February 23, 2001, plaintiff wrote defendant, asserting that defendant’s “Moo

Mattress” infringed the ‘195 patent. Defendant denied the infringement without consulting an American lawyer.

On September 20, 2001, plaintiff wrote to its dealers who sold plaintiff’s PASTURE MAT® animal mattress, telling them that the “Moo Mattress” was manufactured to compete with the PASTURE MAT animal mattress and asking them to inform plaintiff’s distributor of anyone buying or selling “Moo Mattresses.” On October 26, 2001, defendant threatened legal action against plaintiff in the United States for various torts. On January 16, 2002, plaintiff wrote to defendant to say that defendant’s October 26 threats were improper as a matter of law.

On January 11, 2002, plaintiff filed this action against defendant and Meltec Dairy Supplies. (Meltec has signed a consent judgment, stipulating to the validity and enforceability of the ‘195 patent and admitting that its sales, offers for sale and importation into the United States of the “Moo Mattress” infringed claims 1, 2, 6, 7, 9 and 10 of the ‘195 patent.)

Defendant never received a written non-infringement or invalidity opinion from a lawyer concerning the ‘195 patent.

Independent claim 1 of the ‘195 patent claims: “1. An animal mattress comprising a fabric enclosure having a plurality of separate compartments within the enclosure, and comminuted resiliently deformable rubber from used vehicle tires disposed loose within each

compartment.” Claims 2-9 depend from claim 1. They recite additional details about the animal mattress claimed in claim 1. Independent claim 10 recites an animal stall equipped with brisket and keeper boards, the animal mattress described in claim 1 and a top fabric blanket disposed over the mattress and attached to the brisket and keeper boards. The inventor did not give “comminuted” a special meaning in the specification of the ‘195 patent.

The “Moo Mattress” meets the “[a]nimal mattress” preamble of claim 1 because the “Moo Mattress” is an animal mattress. It meets the “fabric enclosure” limitation of claim 1 because it includes a fabric enclosure, which is made of a non-woven polypropylene fabric. The “Moo Mattress” meets the “plurality of separate compartments within the enclosure” limitation of claim 1 because the fabric enclosure of the “Moo Mattress” has 10 separate compartments. The “Moo Mattress” meets the “rubber from used vehicle tires” limitation of claim 1 because it uses used vehicle tire rubber. It meets the “disposed loose within each compartment” limitation of claim 1 because the used vehicle tire rubber in the “Moo Mattress” is disposed loose within the separate compartments. It meets the “resiliently deformable” limitation of claim 1 because the used vehicle tire rubber it uses is resiliently deformable.

In its ordinary meaning and as used in the patent, “comminuted” means to reduce in size to small pieces or particles. The used tire rubber in the “Moo Mattress” is reduced in

size by a series of shredders and granulators that shear and cut the tires into progressively smaller and smaller pieces until the rubber is reduced to the 3.5 to 16-mesh category (Particles that can fit through a 3.5 mesh screen are slightly less than 1/4 inch in dimension; particles that can fit through a 16 mesh screen are less than 1/16 inch in dimension.) The “Moo Mattress” meets the comminuted limitation of claim 1 because it contains used vehicle tire rubber that is reduced in size to small pieces or particles.

#### CONCLUSION

Plaintiff has demonstrated the lack of any genuine issue as to any material fact. It is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). As construed, the claims of its patent cover the mattress manufactured and sold by defendant. The only possible issue in the case is the meaning of the patent term, “comminuted.” However, it is undisputed that the inventors used the ordinary meaning of the term: “reduced to small pieces or particles.” Defendant’s “Moo Mattress” uses small pieces or particles of used rubber vehicle tires; thus, it infringes the claims of claim 1 of the ‘195 patent and the dependent claims.

#### ORDER

IT IS ORDERED that plaintiff Promat Ltd.’s motion for summary judgment of

infringement is GRANTED. A status conference will be held by telephone on Tuesday, January 7, 2003, at 9:00 a.m. CST to determine the course of further proceedings in this case. Counsel for plaintiff is to place the call. The telephone number for the judge's chambers is 608-264-5447.

Entered this 31st day of December, 2002.

BY THE COURT:

BARBARA B. CRABB  
District Judge