

1 David Fink
2 Fink & Johnson
3 7519 Apache Plume
4 Houston, TX 77071
5 Admission No. 299869
6 Tel. 713 729-4991
7 Fax: 713 729-4951
8 Email: texascowboy6@gmail.com
9 Attorney for the Plaintiff

10 UNITED STATES DISTRICT COURT
11 FOR THE SOUTHERN DISTRICT OF TEXAS
12 HOUSTON DIVISION

13 XP INNOVATIONS INC.,

14 Plaintiff,

15 vs.

16 BLACK RAPID, INC.

17 Defendant.

Civil Action No.

**COMPLAINT FOR DECLARATORY
JUDGMENT, UNFAIR COMPETITION,
AND TORTIOUS INTERFERENCE
WITH BUSINESS RELATIONSHIPS**

DEMAND FOR JURY TRIAL

18
19 NOW COMES Plaintiff, XP Innovations Inc. ("XP"), through its attorney, and files this
20 Complaint for Declaratory Judgment, Unfair Competition, and tortious interference with business
21 relationships against Black Rapid, Inc. ("Black Rapid").

22 **PARTIES**

- 23 1. XP is Texas Corporation having a mailing address of 1716 Lake Shore Drive,
24 Forth Worth, TX 76103-1517
25 2. Black Rapid is a Washington Corporation having a mailing address of 517 Aloha
26 Street, Seattle, WA 98109
27
28

JURISDICTION AND VENUE

3. This is an action for:
 - a. Declaratory Judgment under 28 U.S.C. § 2201 due the overt acts by Black Rapid to enforce its invalid U.S. Patent No. 8,047,729 (“‘729 Patent”) against XP to harm XP and unfairly compete with XP.
 - b. Unfair Competition due the overt acts by Black Rapid to enforce its invalid ‘729 Patent against XP to harm XP and unfairly compete with XP.
 - c. Tortious Interference with business relationships of XP due the overt acts by Black Rapid to enforce its invalid ‘729 Patent against XP to terminate XP’s business relationship with Millionway.
4. Venue is proper in this judicial district under 28 U.S.C. §§§ 1391.
5. On information and belief, the Black Rapid is subject to this Court’s specific and general personal jurisdiction, pursuant to due process and the Texas Long Arm Statute, because Black Rapid has substantial business activities in this forum, and its interactive web (www.blackrapid.com) site seeks distributors and customers in this forum.
6. On information and belief from the aforementioned web site maintained by Black Rapid, Black Rapid operates through eight dealers in Texas, two of which are located in Houston, TX.
7. Black Rapid has impliedly agreed to be subject to this Jurisdiction and Venue due to its extensive business activities in this Judicial District.

1 **BACKGROUND**

2 8. XP and Black Rapid are competitors in the same business area. Both parties sell
3 camera straps and related equipment.

4 9. Black Rapid has endeavored to destroy XP's business through threats through the
5 abusive and unreasonable use of the invalid '729 Patent.

6 10. The '729 Patent initially issued on November 1, 2011, and thereafter, through
7 inequitable conduct, a reexamined '729 Patent issued on March 5, 2013. The basis
8 for the inequitable conduct is that Black Rapid failed to provide a material
9 reference to the Patent and Trademark Office during the reexamination even
10 though Black Rapid was convinced that the amended claim 15 of the reexamined
11 '729 Patent was fully anticipated by a product that had been on sale by Millionway
12 for more than a year. In fact, Black Rapid sued Millionway in the Western
13 Division of Washington for patent infringement on January 8, 2013 during the
14 reexamination.

15 *Black Rapid, Inc. v. Millionway International, Inc. et al.; WDWA*

16 Case No. 2:13-CV-00036 MJP.

17 The reexamination certificate did not issue until almost two months later. Hence,
18 it is indisputable that the reference Black Rapid had was "material" by the
19 standards of the Patent Office.

20 11. Black Rapid was sent a letter on about February 19, 2013, during the
21 reexamination of the '729 Patent pointing out serious errors in its lawsuit in the
22 Western District of Washington. A copy of the aforementioned letter is in Ex. A.

23 12. Black Rapid dismissed the lawsuit in Washington, as expected, but then sued again
24 in the Central District of California on March 6, 2013. Apparently, Black Rapid
25 hates Houston as much as it hates Millionway. *Black Rapid, Inc. v. Millionway*
26 *International, Inc. et al.; CDCA, Case No. 2:13-CV-01607.*

- 1 13. Black Rapid failed to inform the District Judge in CDCA that Black Rapid had
2 deceived the Patent Office by withholding a material reference during the
3 reexamination despite the fact that Black Rapid believed the material reference
4 fully anticipated its amended claim 15, and Black Rapid had been informed of this
5 issue.
- 6 14. Black Rapid continued its misinformation to the District Judge in CDCA by
7 presenting an infringement analysis of the amended claim 15 of the '729 Patent
8 using a claim construction in complete conflict with the specification and drawings
9 of the '729 Patent even though the aforementioned letter in Ex. A provides a
10 correct and reasonable approach for a claim construction.
- 11 15. Black Rapid did not ask the District Court in CDCA to determine that the '729
12 Patent had any valid claims, or that any claim was being infringed. Thus, the
13 District Court did not determine if any claim of the '729 Patent was valid and
14 enforceable.
- 15 16. The District Court in CDCA Ordered a Default Permanent Judgment against
16 Millionway importing, selling etc. any valid infringed claim of the '729 Patent, and
17 Black Rapid has extended the Judgment to suppliers, distributors, and other
18 companies dealing with Millionway including XP.
- 19 17. Millionway in the past and in the present has never infringed any of the claims of
20 the '729 Patent so that a permanent injunction prohibiting infringing products
21 would not impact on Millionway; however, Black Rapid through its attorneys is
22 using the litigation, and the permanent injunction to threaten the business of
23 Millionway overtly by threatening XP which sells Millionway products.
- 24
25
26
27
28

1 18. Ex. B is a letter (without enclosures) sent by the attorneys for Black Rapid to XP.
2 Portions of the letter have been underlined for this Complaint to draw attention to
3 them. The letter asserts that the injunction “covers but is not limited to the “Carry
4 Speed” camera sling product line”. Carry Speed is a trademark of an online web
5 site selling Millionway products. Black Rapid attorneys know that patent
6 infringement is based on a product and its relationship to a patent claim, and not a
7 group of products selling under a common trademark.

8 **COUNT ONE**

- 9 19. Millionway incorporates paragraphs 1 through 18 herein.
10 20. Black Rapid failed to provide the Patent Office with a reference Black Rapid knew
11 was “material” to the prosecution during the reexamination. Thus, Black Rapid
12 was engaged in inequitable conduct, and the ‘729 Patent is invalid and
13 unenforceable.

14 **COUNT TWO**

- 15 21. Millionway incorporates paragraphs 1 through 18 herein.
16 22. Black Rapid has accused XP of patent infringement of the ‘729 Patent even though
17 Black Rapid knows that the ‘729 Patent is invalid, and unenforceable. Thus, this is
18 a case of actual controversy as to the validity and enforcement of the ‘729 Patent.

19 **COUNT THREE**

- 20 23. Millionway incorporates paragraphs 1 through 18 herein.
21 24. Black Rapid is engaged in unfair competition by intimidating Millionway’s
22 suppliers, distributors, and customers with the threat of litigation even though the
23 ‘729 Patent is invalid and unenforceable, and for products outside any reasonable
24 scope of the claims, even if the ‘729 Patent were valid and enforceable. The
25 obvious intention of Black Rapid is to destroy the business of Millionway through
26 unfair competition.
27
28

COUNT FOUR

- 1
- 2 25. Millionway incorporates paragraphs 1 through 18 herein.
- 3 26. Black Rapid is engaged in tortious interference with business relations between by
- 4 intimidating Millionway's suppliers, distributors, and customers with the threat of
- 5 litigation even though the '729 Patent is invalid and unenforceable, and for
- 6 products outside any reasonable scope of the claims, even if the '729 Patent were
- 7 valid and enforceable. The obvious intention of Black Rapid is to destroy the
- 8 business relationship and any business agreements of Millionway.
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

JURY DEMAND

27. Pursuant to Fed. R. Civ. P. 38, Plaintiff hereby demands a jury trial as to all issues in this lawsuit.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

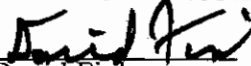
1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff respectfully requests this Court to:

- 3 a. enter judgment that the '729 Patent is not infringed by any XP product;
- 4 b. enter judgment that the '729 Patent is invalid;
- 5 c. enter judgment that Black Rapid was engaged in unfair competition with XP;
- 6 d. enter judgment that Black Rapid has engaged tortious interference with the
- 7 business relationship of XP and Millionway;
- 8 e. Enter judgment that Black Rapid committed inequitable conduct during the
- 9 prosecution of the reexamination of the '729 Patent;
- 10 f. require Black Rapid to pay all of XP's attorney fees and costs for this case;
- 11 g. award XP lost profits due to Black Rapid's activities against Millionway;
- 12 h. award XP such other and further relief as this Court may deem just and equitable;
- 13 and
- 14 i. enjoin Black Rapid from engaging in any improper activities that might harm XP
- 15 directly or indirectly in the future.

16 THE PLAINTIFF

17 XP INNOVATIONS INC.

18 
19 David Fink
20 Fink & Johnson
21 7519 Apache Plume
22 Houston, TX 77071
23 Admission No. 299869
24 Tel. 713 729-4991
25 Fax: 713 729-4951
26 Email: texascowboy6@gmail.com
27 Attorney in Charge for the Plaintiff
28

EX. A

ADLER & ASSOCIATES

P.O. BOX 710509
HOUSTON, TEXAS 77271-0509

WRITER'S DIRECT DIAL
(713)-270-5391
WRITER'S DIRECT FAC.S.
(713)- 270-5361
E. MAIL: ben@adlerandassociates.com

INTELLECTUAL PROPERTY LAW
(PATENT, BIOTECHNOLOGY, COMPUTER,
TRADEMARK & TRADE SECRET LAW)

February 19, 2013

Mr. George Rondeau
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101

Re: Black Rapid v. Millionway International et al. Complaint

Dear George:

I am responding to your letter of January 7, 2013.

I am not authorized to accept the Complaint for any of the Defendants.

I strongly suggest that you withdraw the Complaint to avoid potentially serious liability to your firm, and possibly your client.

We will ask the Court to require Black Rapid, and your law firm to pay my client for all attorney costs and fees to deal with this and any other lawsuit based on the patent, and its reissue. In addition, we will ask the Court for punitive penalties against Black Rapid and your law firm to discourage abuse of the judicial process and for unreasonable conduct. We are contemplating a penalty of at least \$100,000 each to discourage any additional baseless litigation by Black Rapid, particularly in view of the many errors pointed out in detail herein, concerning both factual and legal issues.

The following is a brief summary of the defenses, countersuits, and sanctions to be urged against your firm and your client:

1. In contrast to your Complaint, Mr. Hsu is neither a stockholder nor an officer in Millionway International, Inc. or Dot Line Corp. Hence, your premise in the Complaint for including Mr. Hsu is completely wrong.

2. The Complaint has serious defects with respect to personal jurisdiction, and venue in general.

3. The defects in the Complaint will trigger the filing of Motions under Fed. R. Civ. P. 8 and 12.

4. Upon service of the Complaint, a Motion under Fed. R. Civ. P. 11 will be filed. If the case continues, we will assert 35 U.S.C. §284.

5. The patent cited in the Complaint will soon cease to exist and will be replaced by a reexamination patent. The only patent claim that survived the reexamination is patent claim 14. The Complaint, however, fails to identify any claim being infringed, thereby raising another issue for the Court to consider if non-existing claims are being asserted.

6. Even if you were able to convince the Court miraculously to replace the patent number cited in the Complaint with a new patent number, or refiled the Complaint, you are faced with intervening rights for all of the amended claims and the new claims. See *Marine Polymer Tech. v. Hemcon*, 672 F. 3d 1350 (Fed. Cir. 2012).

7. Claim 14, the only surviving claim from the reexamination has three important elements which relate to non-infringement:

1) "an elongated first strap having first and second portions, the first portion of the first strap sized to be positioned over a shoulder of the user and extend downward there from towards a hip of the user". In simple terms, a long shoulder strap, not a hand strap.

2) "a coupler having a first portion and a second portion, the first portion of the coupler sized and shaped to engage with the engagement portion of the camera".

3) "second portion of the coupler includes a ball lock pin and the first portion of the coupler includes a ball lock socket".

Analysis Of The Elements of Claim 14

The Court looks to the specification and drawings initially to determine the meaning of claim terms for a claim construction. A study of the specification and drawing reveals that the claimed strap is much longer than the uni-strap with hand strap. This is sufficient to avoid infringement. The uni-strap with hand strap also does not include the ball socket arrangement. Hence, there is no infringement of claim 14 by the uni-strap with hand strap.

Claim 14 claims a "coupler" and such a term has no inherent meaning in general. Thus, the Court would look at the specification and drawings to determine what this term means. The Court will construe the patent claim term "coupler" as though it were written in the classic form of something that does a function under

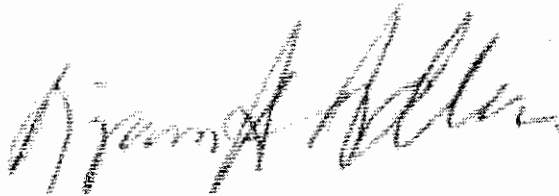
35 U.S.C. §112, 6th paragraph, which allows a claim to describe a component in terms of its function. The usual form is “means plus function”, but Courts have accepted “short cuts” by patent attorneys.

Court have held that the scope of a term claimed as “means plus function” is limited to what is disclosed in the patent specification as filed. All of the relevant drawings, and the specification limit the coupler to a specific connection **directly** to the camera. The accused products incorporate a plate that is attached to the camera, and an attachment is made to the plate for the connection to the strap. As you may know, ShutterBug magazine has described the use of a plate as an important innovation. This is important because it shows the Court that the plate was not added to avoid the claims.

8. Your firm knew about the accused products yet the products were never brought to the Patent Examiner's attention. The Court is likely to view this as fraud on the Patent Office. In addition, your firm had the opportunity to specifically include a claim in the reexamination to cover an attachment with a plate, but elected not to include such a claim.

In view of the analysis *supra*, the above-referenced Complaint should be withdrawn immediately. If you have any questions, please contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Benjamin Adler", written in a cursive style.

Benjamin Aaron Adler, Ph.D., J.D.

cc.: Ye Xu

EX. B



Suite 2200
1201 Third Avenue
Seattle, WA 98101-3045

Benjamin J. Byer
206.757.8105 tel
206.757.7105 fax

benbyer@dwt.com

Via EMAIL and U.S. MAIL

June 12, 2013

Xavier De La Paz
XP PhotoGear,
126 York Street, Suite 200
Ottawa, ON K1N 575

Re: **Black Rapid, Inc. v. Millionway International, Inc. and Dot Line**
United States District Court for the Central District of California
No. 2:13-cv-01607-SJO-SPx

Dear Mr. De La Paz:

Millionway International, Inc. operates a website at www.carryspeed.com in which it markets and sells consumer camera equipment under the "Carry Speed" name, including its camera sling product line. The Carry Speed website states that XP Photo Gear distributes its products within the United States. Furthermore, your website, www.xpphotogear.com, lists products from the Carry Speed camera sling product line for sale. This letter attaches a screenshot showing XP Photo Gear listed as Millionway's sole United States distributor and a screenshot showing the products from the Carry Speed camera sling product line on your website.

Yesterday the United States District Court for the Central District of California issued a permanent injunction enjoining Millionway International, Inc. and its agents, servants, employees and all persons acting under their permission and authority, from infringing United States Patent No. 8,047,729 ("the '729 patent). These people and entities are thereby forbidden from making, using, selling, offering to sell, or importing any infringing product, or from inducing others to do the same. This covers but is not limited to the "Carry Speed" camera sling product line and any use, sale, offer for sale, or importation of those products. The injunction is effective June 11, 2013 and extends until the '729 patent expires. This letter encloses copies of the Court's injunction and accompanying order. Although all sales and offers for sale of these products constitutes infringement of the '729 patent, after receiving notice of this injunction continued participation with Millionway's improper actions further exposes all persons involved to serious contempt of court sanctions.

DWT 22128889v1 0083874-000111

Anchorage
Bellevue
Los Angeles

New York
Portland
San Francisco

Seattle
Shanghai
Washington, D.C.


www.dwt.com

Shopify, Inc.
June 12, 2013
Page 2

Please immediately respond in writing confirming receipt of this letter and that XP PhotoGear has ceased all infringing activities, including all advertng and sales efforts related to the Carry Speed camera sling product line.

Very truly yours,

Davis Wright Tremaine LLP



Benjamin J. Byer

BJB:mnb

Enclosures: Screenshot of Carry Speed website listing XP PhotoGear as Millionway's sole United States distributor
Screenshot of XP PhotoGear website listing products from the Carry Speed camera sling product line for sale
Order Granting Plaintiff's Motion for Default Judgment
Judgment Granting Black Rapid, Inc. Default Judgment Against Millionway International, Inc.

cc: info@xpphotogear.com
Black Rapid, Inc.