

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO.: _____

A.G. FINDINGS & MFG. CO. d/b/a
BALLISTIC CASE CO., a Florida Corporation,

Plaintiff,

v.

VALOR COMMUNICATION, INC.,
a California Corporation,

Defendant.

**VERIFIED COMPLAINT FOR PATENT
INFRINGEMENT, TRADE DRESS
INFRINGEMENT, UNFAIR
COMPETITION, AND BREACH OF
CONTRACT**

JURY DEMAND

VERIFIED COMPLAINT

Plaintiff, A.G. FINDINGS & MFG. CO. d/b/a BALLISTIC CASE CO., a Florida corporation (hereinafter “A.G. Findings”), by and through its undersigned counsel, hereby alleges in its Complaint against defendant, VALOR COMMUNICATION, INC., a California corporation (hereinafter “Valor”), as follows:

JURISDICTION AND VENUE

1. This is an action for patent infringement under 35 U.S.C. § 271(a), trade dress infringement and unfair competition arising the Lanham Act, 15 U.S.C. § 1125(a)(1)(A), and breach of contract and unfair business practices under the laws of the State of Florida.

2. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331, 1332, 1338(a)-(b), 1367(a), 15 U.S.C. § 1121(a), the laws of the State of Florida, including violations of the State of Florida’s unfair competition laws under the Deceptive and Unfair Trade Practices Act, Fla. Stat. §§ 501.201 to 501.213 and by agreement of the parties pursuant to an October 23, 2012 Settlement Agreement.

3. Venue is proper in this district under 28 U.S.C. §1391(b)(2) as a substantial part of the events giving rise to the claims occurred in this District.

4. Valor is subject to the specific personal jurisdiction of this Court under Florida law, at least including Florida's long-arm statute. F.S. § 48.193 (1)(b), (f)(1)-(2) and Federal Rule of Civil Procedure 4.

THE PARTIES

5. A.G. Findings is a Florida corporation with its principal place of business in Sunrise, Florida.

6. Valor is a California corporation with its principal place of business in City of Industry, California.

7. Valor is in the business of importing, making, selling, and offering to sell infringing mobile device cases in this District and throughout the United States, including in online catalogs accessible throughout the State of Florida.

FACTUAL BACKGROUND

A.G. Findings

8. A.G. Findings is well-known in the United States for designing and manufacturing creative and protective mobile device cases. Using state-of-the-art materials and fashionable designs, A.G. Findings is recognized in the industry for providing superior quality and stylish products.

9. A.G. Findings markets, offers for sale, and sells protective mobile device cases under the trademarks BALLISTIC® and SG™. The SG™ cases feature a distinctive combination of protective and aesthetic features that have made the SG™ cases popular amongst consumers and retailers. Indeed, sales of the SG™ cases eclipsed twenty million dollars in the past few years

and the SGTM cases are sold by service providers, such as AT&T® and SPRINT® throughout the United States and in this District, as well as by major retailers, such as Sam's Clubs. A.G. Findings has further spent hundreds of thousands of dollars marketing its SGTM cases throughout the United States.

10. The SGTM case is offered for several makes and models of cell phones including LG, Samsung, Motorola, Apple, Blackberry, among others. Screenshots of SGTM cases for Samsung S2 and S4 models are shown in Exhibit A as exemplary A.G. Findings SGTM cases.

11. Each of the SGTM cases includes aesthetic non-functional features that consumers recognize as emanating from A.G. Findings, or its Florida registered fictitious name, Ballistic. In particular, each SGTM case includes aesthetic features on its corners, back and side portions, and further includes an aesthetic arrangement of alternating lower durometer material with higher durometer material, that make the overall appearance of the SGTM cases, regardless of the make and model, recognizable by the consumers.

12. Owing to its distinctive aesthetic features, its substantial sales, and the vast expenditure of advertising by A.G. Findings, the SGTM case has acquired secondary meaning with consumers seeking to purchase a protective and stylish cell phone case, and who recognize the aesthetic features and overall appearance of the SGTM case as emanating from Ballistic. Accordingly, A.G. Findings has unregistered trade dress rights to its SGTM case.

13. A.G. Findings is the owner by assignment of U.S. Design Patent No. D682,260 issued on May 14, 2013 entitled MOBILE DEVICE CASE ("the '260 Patent"). Exhibit B. The '260 Patent is in full force and effect. The sole claim of the '260 Patent is directed toward a mobile device case as shown in the drawings of the '260 Patent.

Valor

14. Valor is in the business of importing, offering for sale, and selling mobile device cases at least through online retailers such as Amazon, and by and through its website at the domain www.2valor.com, throughout the United States and in this District.

15. Valor is importing, marketing, offering for sale, and selling, mobile device cases to consumers in this District under at least its trademark ASMYNA®, which cases are confusingly similar to the SG™ cases, and which cases are marketed and sold to the same consumers that A.G. Findings sells its SG™ cases to. In particular, Valor is selling and/or offering for sale mobile device cases for at least Samsung, Apple, LG, and Blackberry makes and models that incorporate the source identifying non-functional features of their corresponding A.G. Findings' SG™ case. Front and back pictures of ASMYNA® protective cases for the Samsung S2 and S4 are shown in Exhibit C. The A.G. Findings SG™ cases shown in Exhibit A are virtually identical to their corresponding Valor cases shown in Exhibit C.

16. On October 23, 2012, A.G. Findings and Valor entered into a Settlement Agreement (the "Agreement") whereby A.G. Findings would dismiss its Complaint for, among other counts, trade dress infringement of A.G. Findings' SG™ line of cases in exchange for Valor compensating A.G. Findings' for its infringement, and further agreeing not to manufacture, or cause to be manufacture, or import, any "confusingly similar variants" of A.G. Findings' SG™ line of cases¹. Valor further agreed not to challenge the validity of A.G. Findings' trade dress rights to its SG™ line of cases. *Id.* The previous Complaint filed against Valor by A.G.

¹ The Agreement is marked "confidential" on its face. Although the Agreement permits disclosure under a Protective Order if required by, among other things, Federal or state law or pursuant to a Court Order and after providing notice of such, out of an abundance of caution, plaintiff has not attached the actual Agreement. Plaintiff will produce the Agreement for *in camera* inspection should the Court require.

Findings is styled *A.G. Findings v. Valor Communication, Inc. et al.* Case No. 12-60517-Civ-SCOLA. The case was dismissed without prejudice in view of the Agreement.

17. On April 12, 2013, undersigned counsel sent a letter to counsel for Valor regarding Valor's continued sale of mobile device cases that are confusingly similar to A.G. Findings' SGTM line of cases in breach of the Agreement. Exhibit D.

18. On May 1, 2013, counsel for Valor emailed undersigned counsel, stating in part, "Valor has completely changed that so that Valor's case has no remote resemblance," and further disagreed with undersigned counsel's claim that that Valor was in breach of the Agreement. Exhibit E.

19. On July 5, 2013, undersigned counsel sent a follow-up letter to Valor's counsel disputing the positions taken by Valor and further explaining A.G. Findings' positions. Exhibit F.

20. The Parties continued to try to resolve their dispute, however, on August 19, 2013, in a letter to undersigned counsel, counsel for Valor made it clear that Valor will not cease sales of its confusingly similar variants of A.G. Findings' SGTM line of cases, and reargued many of the same positions it previously argued. Exhibit G. Left with no options, A.G. Findings filed the instant lawsuit.

21. Valor has continued selling confusingly similar variants of A.G. Findings' SGTM line of cases in breach of the Agreement and willfully continues to infringe A.G. Findings' trade dress.

22. Valor's mobile device cases, such as the Luxurious Lattice Dazzling TotalDefense Protector Cover cases shown in Exhibit C, embody the patented design of the mobile device case shown in the '260 Patent or are colorable imitations thereof.

23. Valor has full knowledge of the '260 Patent and has continued selling infringing mobile device cases despite that knowledge.

**COUNT I – INFRINGEMENT OF UNITED STATES
DESIGN PATENT NO. D682,260
(35 U.S.C. § 271)**

24. A.G. Findings incorporates paragraphs 1- 23 from above.

25. Valor has been and still is directly infringing the '260 patent by, upon information and belief, importing, making, selling, offering for sale and using certain mobile device cases that incorporate the invention disclosed in the '260 Patent, including, without limitation, the Luxurious Lattice Dazzling TotalDefense Protector Cover mobile device cases shown in Exhibit C attached hereto.

26. Valor's conduct has caused, and, if not enjoined, will continue to cause, irreparable harm and damage to the rights of A.G. Findings in its business, reputation, and goodwill.

27. Valor's sale of infringing mobile device cases has been willful.

**COUNT II – TRADE DRESS INFRINGEMENT
15 U.S.C. § 1125(a)**

28. A.G. Findings incorporates paragraphs 1-23 from above.

29. Valor's mobile device cases incorporate the non-functional aesthetic features of A.G. Findings' SGTM cases that have acquired secondary meaning in the marketplace.

30. Valor's offering for sale and/or sale the mobile device cases identified above are likely to cause confusion, mistake, or to deceive as to the affiliation, connection, or association of Valor with A.G. Findings, or as to the origin, sponsorship, or approval of Valor's mobile device cases by A.G. Findings.

31. Valor's conduct have caused, and, if not enjoined, will continue to cause, irreparable harm and damage to the rights of A.G. Findings in its business, reputation, and goodwill.

32. Valor's sale of infringing mobile device cases has been willful.

COUNT III – FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT
(FLA. STAT. §§501.201 TO 501.213)

33. A.G. Findings incorporates paragraphs 1-23 from above.

34. Valor's actions constitute unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce in violation of Florida Statute §501.204.

35. Valor willfully used or practiced these unlawful acts under §501.204, and knew or should have known that its acts were unlawful and would damage A.G. Findings and injure consumers deceptively.

36. A.G. Findings has been damaged directly and proximately by defendants' unlawful actions.

37. A.G. Findings is entitled to recover actual damages, plus reasonable attorneys' fees and costs for defendants' violation of the Florida Deceptive and Unfair Trade Practices Act.

COUNT IV– BREACH OF CONTRACT

38. A.G. Findings incorporates paragraphs 1- 23 from above.

39. The Agreement between A.G. Findings is valid and enforceable and includes adequate consideration for resolution of the prior litigation between A.G. Findings and Valor.

40. By selling confusingly similar variants of A.G. Findings' SGTM line of mobile device cases, Valor has materially breached the Agreement.

41. Valor has financially damaged A.G. Findings' by its breach of the Agreement.

JURY DEMAND

42. A.G. Findings requests trial by a jury for all issues so triable.

PRAYER FOR RELIEF

A.G. Findings requests the Court:

- A. Pursuant to 35 U.S.C. § 285 and/or Ch. 501, Florida Statutes, award A.G. Findings actual damages, attorneys' fees and court costs.
- B. Pursuant to 35 U.S.C. § 283 and/or 15 U.S.C. § 1116(a), enjoin the importation and sale of any and all of defendant's products that are infringements of A.G. Findings' design patent and/or are likely to cause confusion in the marketplace with A.G. Findings' products;
- C. Pursuant to 35 U.S.C. §§ 284 and/or 289 and/or 15 U.S.C. § 1117(a), order defendants to pay to A.G. Findings any profits realized from the sale of any infringing products, any damages sustained by A.G. Findings, and the cost of this action;
- D. Pursuant to 35 U.S.C. §§ 284, find defendant's infringing conduct wilful and order defendants to pay A.G. Findings three times its damages;
- E. Pursuant to 15 U.S.C. § 1118, order defendants to deliver to A.G. Findings for destruction, all labels, signs, prints, packages, wrappers, receptacles, and advertisements in the possession of defendants bearing the trade dress subject of the violation, or any reproduction, counterfeit, copy, or colorable imitation thereof, and all plates, molds, matrices, and other means of making the same;
- F. Award A.G. Findings its compensatory damages, including its incidental and consequential damages, and its lost profits for defendant's breach of the Agreement.
- G. Award A.G. Findings such other and further relief as the Court deems just and proper.

Dated: October 3, 2013

Respectfully Submitted,

By: s/ Alan M. Weisberg
Alan M. Weisberg, Esq.
aweisberg@cwiplaw.com
Florida Bar No. 479349
Garrett Ari Barten, Esq.
gbarten@cwiplaw.com
Florida Bar No. 55371
CHRISTOPHER & WEISBERG, P.A.
200 East Las Olas Boulevard, Suite 2040
Fort Lauderdale, Florida 33301
(954) 828-1488 (Telephone)
(954) 828-9122 (Facsimile)
Attorneys for Plaintiff,
A.G. FINDINGS & MFG. CO.

506098

VERIFICATION

I, Alan Kleinman, CFO , hereby verify that I have read and understood the foregoing Complaint and that the information herein is true and correct to the best of my knowledge and belief and I am duly authorized to make this verification as the plaintiff in this action.

Dated: October 2, 2013

