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CLERK US DISTRICT COURT
NORTHERN DIST. OF TX
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DEPUTY CLERK YRP

POLYGUARD PRODUCTS, INC.,

Plaintiff,

v.

HENRY COMPANY, LLC,

Defendant.

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CIVIL ACTION NO.

8 - 1 2 CV - 2 2 6 9 N

COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff complains of Defendant and for cause of action alleges:

THE PARTIES

1. Plaintiff, Polyguard Products, Inc. (Polyguard), is a corporation organized and existing by virtue of the laws of the State of Oklahoma which maintains an office and principal place of business at 3801 So. Interstate Highway 45, Ennis, Ellis County, Texas 75119-0804.

2. Defendant, Henry Company, LLC (Henry), is a limited liability company organized and existing by virtue of the laws of the State of California having an office and place of business at 999 North Sepulveda Blvd. – Suite 800, El Segundo, California 90245-

2761 which is doing business in the Northern District of Texas. Service may be had on Henry by service on:

CT Corporation System
818 West Seventy Street – 2nd Floor
Los Angeles, California 90017

JURISDICTION AND VENUE

3. This is a suit arising under the Trademark Laws (Lanham Act) of the United States, namely 15 U.S.C. §1051, *et seq.* This Court has jurisdiction under United States Code, Title 28, Section 1331 (Federal question), Section 1338(a) (Trademark) and Section 2201 (Declaratory Judgment Act).

4. This Court has personal jurisdiction over Henry because, on information and belief, Henry conducts business in this District by maintaining an office and manufacturing facility in this District and by advertising and selling its products to residents of this District.

5. Venue is proper in this District under United States Code, Title 28, Section 1391.

6. An actual controversy has arisen between the Parties. Henry has threatened litigation against Polyguard, asserting that Polyguard is infringing Henry's trademark rights and engaging in unfair competition under Federal Trademark Law.

GENERAL ALLEGATIONS

I. Activities of the Parties

7. Polyguard is a nationally recognized leader in the architectural building materials field in general and manufactures and sells a family of protective coatings in the nature of moisture and vapor barriers under the trademarks **AIRLOK** and **AIRLOK FLEX**.

8. Polyguard's **AIRLOK** and **AIRLOC FLEX** products have been widely sold and used throughout the United States and internationally since at least as early as August of 2004.

9. Polyguard is the owner of U.S. Trademark Registration No. 3,087,079 for the mark **AIRLOK** used in connection with thermoplastic-based protective coatings for wall and floor surfaces to prevent the passage or transfer of moisture, air and vapor (International Class 2).

10. Polyguard's right to use the mark **AIRLOK** and to maintain the mark on the Register has become incontestable pursuant to the provisions of 15 U.S.C. §1065.

11. Polyguard is the owner of U.S. Trademark Registration No. 3,084,281 for the mark **AIRLOK FLEX** used in connection with thermoplastic-based protective coatings for wall and floor surfaces to prevent the passage or transfer of moisture, air and vapor (International Class 2).

12. Polyguard's right to use the mark **AIRLOK FLEX** and to maintain the mark on the Register has become incontestable pursuant to the provisions of 15 U.S.C. §1065.

13. On information and belief, Henry manufactures and sells a line of vapor barrier products under the mark **Air-Bloc** and has recently obtained U.S. Registration No. 3,700,855 for the mark **Air-Bloc** used in connection with elastomeric membranes in liquid form (International Class 2); for non-permeable air and vapor barrier membranes (International Class 17); and prefabricated modified bitumen sheet membranes (International Class 19).

II. The present dispute and controversy

14. On or about June 29, 2012, Polyguard received a letter from Jordan A. LaVine, an attorney at Flaster Greenberg, counsel to Henry. A copy of that letter is attached hereto as Exhibit A. In that letter Mr. LaVine alleged, *inter alia*;

- i) Henry owns U.S. Registration No. 3,700,855 for the mark **Air-Bloc**;
- ii) Polyguard's use of its **AIRLOK** mark is likely to cause confusion with Henry's **Air-Bloc** mark because the marks are similar in sight, sound and meaning and Polyguard's products are substantially identical to the goods sold under Henry's **Air-Bloc** mark; and
- iii) Polyguard's use of its **AIRLOK** mark infringes Henry's trademark rights and constitutes unfair competition under Federal trademark law.

15. Mr. LaVine's letter further requests "that Polyguard agree to voluntarily cease its use of the *AirLok* mark" and threatened "that if Polyguard does not agree to cease use of the *AirLok* mark, Henry will have no choice but to take such further action against Polyguard as is necessary to protect its valuable trademark rights in the *Air-Bloc* mark."

16. Mr. LaVine's letter further threatened taking any action, "including seeking injunctive relief and damages," if Polyguard refuses to comply with Henry's demands.

17. Polyguard denies that any action of Polyguard infringes any valid and enforceable trademark rights of Henry or constitutes an act of unfair competition.

18. As a result of the letter, a real and substantial controversy exists between Polyguard and Henry touching the legal relationship between the parties regarding their respective trademarks.

CLAIMS FOR RELIEF

COUNT ONE

(Declaratory Judgment of Non-Infringement of Trademarks, 15 U.S.C. § 1051 et seq.)

19. Polyguard incorporates by reference the allegations contained in paragraphs 1 through 18, inclusive.

20. Henry has claimed that Polyguard's use of Polyguard's **AIRLOK** trademark in connection with Polyguard's vapor barrier products constitutes trademark infringement and has threatened to bring suit against Polyguard on this basis.

21. An actual, present and justiciable controversy has arisen between Polyguard and Henry concerning Polyguard's right to use Polyguard's **AIRLOK** trademark in connection with Polyguard's vapor barrier products.

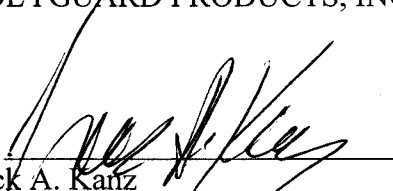
22. Polyguard seeks declaratory judgment from this Court that its use of the **AIRLOK** trademark in connection with its vapor barrier products does not constitute trademark infringement or unfair competition.

PRAYER FOR RELIEF

WHEREFORE, Polyguard respectfully requests that the Court:

- (a) Enter judgment according to the declaratory relief sought;
- (b) Award Polyguard its costs in this action;
- (c) Grant to Polyguard such other and further relief to which Polyguard may be entitled, in law and in equity, or as the circumstances of the case may require and to this Court seem proper and just.

POLYGUARD PRODUCTS, INC.

by 
Jack A. Kaniz

Texas Bar No. 11094000
502 So. Cottonwood Drive
Richardson, Texas 75080
Tel 972.234.1394
Fax 972.234.5171

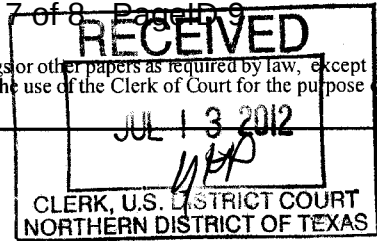
John M. Cone
Texas Bar No. 04660100
Megan M. O'Laughlin
Texas Bar No. 24013563
HITCHCOCK EVERT, LLP
750 No. Saint Paul Street – Suite 1110
Dallas, Texas 75201
Tel 214.808.7002
Fax 214.953.1121

ATTORNEYS FOR PLAINTIFF

Richardson, Texas
July 13, 2012

The JS 44 civil coversheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM)

ORIGINAL



I. (a) PLAINTIFFS

Polyguard Products, Inc.

DEFENDANTS

Henry Company, LLC

(b) County of Residence of First Listed Plaintiff Ellis County (EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant Los Angeles County (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) Attorneys (Firm Name, Address, and Telephone Number) Jack A. Kanz, Esq. 502 So. Cottonwood Drive Richardson, TX 75080 972.234.1394

Attorneys (If Known) Jordan A. LaVine 3-12CV-2269N Flaster Greenberg

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship and business status. Includes categories like Citizen of This State, Citizen of Another State, and Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from another district (specify), 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 15 USC §1051 et seq.

Brief description of cause: Trademark infringement

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) PENDING OR CLOSED: (See instructions):

JUDGE DOCKET NUMBER

DATE SIGNATURE OF ATTORNEY OF RECORD

13 July 2012

Handwritten signature of attorney

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I. (a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. Origin. Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.**
 Example: U.S. Civil Statute: 47 USC 553
 Brief Description: Unauthorized reception of cable service

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS 44 is used to reference cases that are related to this filing, if any. If a related case exists, whether pending or closed, insert the docket numbers and the corresponding judge names for such cases. A case is "related" to this filing if the case: (1) involves some or all of the same parties and is based on the same or similar claim; (2) involves the same property, transaction, or event; (3) involves substantially similar issues of law and fact; and/or (4) involves the same estate in a bankruptcy appeal.

Date and Attorney Signature. Date and sign the civil cover sheet.