

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS**

PAKAGE APPAREL, INC.

Plaintiff,

v.

TOMMY JOHN, INC.,

Defendant.

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CAUSE NO. 4:23-cv-4337

JURY TRIAL DEMANDED

COMPLAINT FOR PATENT INFRINGEMENT

Plaintiff Pakage Apparel, Inc. d/b/a BN3TH (“Plaintiff” or “BN3TH”) brings this action against Tommy John, Inc. (“Defendant” or “Tommy John”), for patent infringement and shows the following:

INTRODUCTION

1. Underwear. Everyone wears it, but few talk openly about it. But when discussed, active men acknowledge that typical underwear fails to support, relieve pressure and prevent chaffing during sports and other periods of activity.

2. Enter BN3TH. To the joy of men everywhere, support and fashion arrived just a few short years ago. Using their own bodies as a test subjects, the inventors developed an innovative pouch to support their jewels comfortably and securely during exercise.¹ With the advent of pouch undergarments, like briefs and underpants, swimsuits, and board shorts, came styles and colors. Support with fashion became the yardstick by which active men measured their undergarments.

3. To protect BN3TH’s innovative, comfortable, and supportive underwear, BN3TH

¹ *Where BN3TH Began – BN3TH’s co-founders share the original story of pouch underwear,* <https://www.youtube.com/watch?v=ILyM3PfyYWY>.

filed its first U.S. patent application on December 31, 2010. BN3TH's patent portfolio now includes numerous U.S. patents and foreign patents for its undergarments, including United States Patent No. 10,834,974 titled *Garments for Men* (the "'974 Patent").

4. Recognizing the demand and value of BN3TH's pouch, Tommy John recently introduced its Hammock Pouch underwear. After learning of the Hammock Pouch, BN3TH contacted Tommy John to inform it of BN3TH's patent rights in the '974 Patent. Despite this, Tommy John just kept on selling, opting to keep its pouch offerings on its store hangers and website. Tommy John does not have a license to any of BN3TH's patents, including the '974 Patent. Patent law as well as fundamental fairness in the marketplace demands Tommy John should and must pay for its infringement of the '974 Patent.

5. Tommy John has infringed and is still infringing one or more claims of the '974 Patent by making, using, selling, and offering to sell in the United States, including in this District, and importing into the United States, products that implement the '974 Patent's pouch technology. Examples of potentially infringing products include Tommy John's Hammock Pouch underwear such as 360 Sport Hammock Pouch, Second Skin Hammock Pouch, Cool Cotton Hammock Pouch, Air Hammock Pouch, and TJ Cotton Stretch Hammock Pouch, in their various styles, lengths, and iterations (the "Accused Products").

6. This list of Accused Products is non-limiting and based on information currently available to BN3TH. BN3TH reserves the right to modify the list of Accused Products as discovery progresses, including as new products are released during the pendency of this case.

THE PARTIES

7. Plaintiff Pakage Apparel Inc. d/b/a BN3TH is an entity organized pursuant to the laws of British Columbia, Canada, with its principal place of business in North Vancouver, British Columbia, Canada.

8. Defendant Tommy John, Inc., is a corporation organized and existing under the laws of the State of Delaware and doing business in Texas as the term “doing business” is understood in law. This suit arose from Defendant’s business in this state. Tommy John engages in business in Texas and maintains a regular place of business at 5135 W. Alabama St., Suite 7140, Houston, Texas 77056, but has not designated an agent for service of process. It may be served through the Secretary of State as its agent for service of process. Alternatively, Defendant may be served wherever it may be found. Tommy John has a principal place of business at 100 Broadway Ste 1101 New York, NY, 10005-4504.

JURISDICTION AND VENUE

9. This is an action for patent infringement arising under the patent laws of the United States of America, Title 35 of the United States Code.

10. This Court has subject matter jurisdiction over the matters asserted in this Complaint under 28 U.S.C. §§ 1331 and 1338(a) and 35 U.S.C. § 271 *et seq.*

11. This Court’s exercise of personal jurisdiction over Tommy John complies with both the Texas long-arm statute and the Due Process Clause of the Fourteenth Amendment. Tommy John has purposely directed its activities toward Texas and has availed itself of the privileges of conducting activities in this state.

12. Tommy John conducts continuous and systematic business in this District, including by selling infringing products to residents of this District and by soliciting business

from residents in this District.

13. Tommy John maintains a retail store in Houston, Texas, and markets, offers, sells, and distributes the Accused Products throughout the United States, including in the state of Texas and in this judicial District.

14. Tommy John's Houston location is in the world-famous Galleria at 5135 W. Alabama St., Suite 7140, Houston, Texas 77056 where it sells and offers to sell infringing products.

15. Tommy John also promotes and advertises its infringing products through its sales brochures, which it mails to residents in this District.

16. Tommy John also markets and sells its infringing products to consumers in this District through its website.

17. Venue is proper under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to the claim occurred in this district and 28 U.S.C. § 1400(b) because Tommy John has committed acts of infringement and has a regular and established place of business in this district.

18. Tommy John has committed acts of infringement in this District and has a regular and established place of business here, including its store in Houston, Texas.

PLAINTIFF AND ITS PATENT RIGHTS

19. BN3TH is the leader in the design of innovative, comfortable, engineered apparel, including in the field of engineered and supportive men's undergarments. BN3TH has been manufacturing, promoting and selling undergarments for men since 2010. Plaintiff's product has unique functional features, including a supportive pouch and, in some instances, stitching which emphasizes the pouch of the undergarment.

20. BN3TH and Tommy John compete directly in interstate and international commerce in regard to the sale of products covered by the '974 Patent, including in Texas and in this judicial district.

21. On November 17, 2020, the U.S. Patent and Trademark Office (“USPTO”) duly and lawfully issued the '974 Patent, a true and correct copy of which is attached as Exhibit 1. The '974 Patent has a filing date of July 9, 2018, with priority filing date of December 31, 2010.

22. Plaintiff Pakage Apparel is the assignee and sole owner of the '974 Patent.

DEFENDANT AND ITS UNLAWFUL ACTIVITY

23. The acts of Defendant as set out herein were done with full knowledge of the rights of Plaintiff. Defendant has been making, using, selling, and offering to sell, and importing infringing products, including the Accused Products in the United States. Defendant’s Accused Products include those sold under the Tommy John brand with a feature that Tommy John refers to as the “Hammock Pouch.” As identified above, the Accused Products include at least Tommy John’s 360 Sport Hammock Pouch, Second Skin Hammock Pouch, Cool Cotton Hammock Pouch, Air Hammock Pouch, and TJ Cotton Stretch Hammock Pouch, in their various styles, lengths, and iterations. Exemplary photographs of these Accused Products are attached as Exhibit 2. Tommy John’s infringing conduct involving the Accused Products has occurred in interstate commerce, including in Texas, and this judicial district.

24. At no time has Tommy John had any express or implied authorization, license or permission to practice the invention claimed in BN3TH’s Asserted Patent.

25. Prior to filing this action, BN3TH put Tommy John on notice of BN3TH’s rights in the Asserted Patent and of Tommy John’s infringement thereof. BN3TH requested that Tommy John cease and desist from its infringing activities, but Tommy John refused. As a result, Tommy John’s ongoing infringement of the '974 Patent is willful.

COUNT I
INFRINGEMENT OF U.S. PATENT NO. 10,834,974

26. BN3TH realleges and incorporates herein by reference the allegations in each of the preceding paragraphs as if fully set forth herein.

27. The '974 Patent is valid and enforceable under U.S. patent laws.

28. The '974 Patent names Dustin Douglas Bigney and Shawn Robert Ellis as inventors.

29. Tommy John has directly infringed, continues to infringe, and has induced or contributed to the infringement of the '974 Patent by making, using, selling, and offering for sale, in the United States, and importing into the United States, without authority or license, the Accused Products in violation of 35 U.S.C. § 271(a).

30. The Accused Products are non-limiting examples that were identified based on publicly available information. BN3TH reserves the right to identify additional infringing activities, products, and services, including based on information obtained during discovery.

31. By way of example only, the Accused Products meet all the limitations of at least independent Claim 1 of the '974 Patent, either literally or under the doctrine of equivalents. Claim 1 is directed to a male garment.

32. Claim 1 of the '974 Patent recites:

A male garment comprising:

[1] a body including a front portion and having leg openings for a wearer's legs;

[2] a waistband attached by a waistband seam at an upper edge of the body;

[3] a stretch panel attached to the body inside the front portion, the stretch panel comprising a sheet of elastically resilient four-way stretch material having a top edge attached to the body at a top location, a bottom edge attached to the body at a bottom location, side edges attached to the body at side seams extending substantially continuously along either side of the front portion and an opening for receiving a wearer's genitals;

[4] the stretch panel being resiliently elastic both in a direction between the top edge and the bottom edge and in a direction between the side edges, the stretch panel having a length when unstretched smaller than a length measured along the front portion between the top and bottom locations and a width when unstretched smaller than a width measured along the front portion between the side seams such that the front portion is gathered from side-to-side and top-to-bottom by the stretch panel and defines a three-dimensional pouch between the stretch panel and the front portion for receiving the wearer's genitals and holding the wearer's genitals while the garment is being worn.

33. The Tommy John Air Hammock Pouch is representative of the Accused Products and is used as an exemplar to demonstrate infringement of Claim 1 of the '974 Patent by all Accused Products, which all infringe Claim 1 of the '974 Patent in the same manner.

34. With respect to the first limitation [1] of Claim 1, as shown in the annotated photo below, the Tommy John Air Hammock Pouch underwear includes a body with a front portion and has leg openings for a wearer's legs.



35. As shown in the annotated photo below, the Hammock Pouch underwear meets the second limitation [2]. The Hammock Pouch includes a waistband attached by a waistband

seam at an upper edge of the body.



36. As identified in the annotated photo above, the Hammock Pouch meets the third limitation [3] of Claim 1. It includes a stretch panel attached to the body inside the front portion, the stretch panel comprising a sheet of elastically resilient four-way stretch material. The stretch panel includes a top edge attached to the body at a top location, a bottom edge attached to the body at a bottom location, and side edges attached to the body at side seams extending substantially continuously along either side of the front portion. The stretch panel also includes an opening for receiving a wearer's genitals.

37. The Hammock Pouch includes the fourth limitation as well. As seen in the two annotated photos above, and when reviewed in-person, the Hammock Pouch underwear's stretch panel is resiliently elastic both in a direction between the top edge and the bottom edge and in a direction between the side edges. The stretch panel has a length when unstretched smaller than a length measured along the front portion between the top and bottom locations and a width when unstretched smaller than a width measured along the front portion between the side seams such

that the front portion is gathered from side-to-side and top-to-bottom by the stretch panel and defines a three-dimensional pouch between the stretch panel and the front portion for receiving the wearer's genitals and holding the wearer's genitals while the garment is being worn.

38. Tommy John was aware of the '974 Patent at least as early as November 20, 2020, when BN3TH sent Tommy John's Chief Executive Officer, Tom Patterson, a letter putting Tommy John on notice of BN3TH's patent rights and the infringement of the '974 Patent by Tommy John's Hammock Pouch underwear.

39. On information and belief, Tommy John knew that the Accused Products infringe the '974 Patent, or at a minimum believed there was a high probability that the Accused Products were covered by BN3TH's patent, but willfully blinded itself to BN3TH's patent rights and the infringing nature of the Accused Products.

40. The foregoing allegations are based on publicly available information and a reasonable investigation of the structure and operation of the Accused Products.

41. BN3TH reserves the right to modify this description of alleged infringement, including, for example, on the basis of information about the Accused Products that it obtains during discovery.

42. The infringement details provided for Claim 1 of the '974 Patent are exemplary of the Accused Products, and BN3TH intends to assert additional claims of the '974 patent beyond Claim 1.

43. As a direct and proximate result of Tommy John's acts of infringement of the '974 Patent, BN3TH has suffered and will continue to suffer economic injury and damages and is entitled to relief under 35 U.S.C. § 284.

44. Tommy John will continue to infringe the '974 Patent unless enjoined by this

Court. As a direct and proximate result of Tommy John's acts of infringement of the '974 Patent, BN3TH has suffered, and will continue to suffer, irreparable harm for which there is no adequate remedy at law. BN3TH is entitled to permanent injunctive relief under 35 U.S.C. § 283.

45. The facts and circumstances surrounding the subject of this lawsuit make this an "exceptional case" under 35 U.S.C. § 285 and as such, BN3TH is entitled to recover its attorney fees under 35 U.S.C. § 285.

PRAYER FOR RELIEF

BN3TH respectfully asks this Court to summon Defendant Tommy John to appear and answer this Complaint, and after being heard on the merits, grant judgment in favor of BN3TH as follows:

- (a) Find Defendant liable for direct infringement of the '974 Patent;
- (b) Enjoin Defendant through a preliminary and permanent injunction, from infringing the '974 Patent for the full term thereof;
- (c) Award BN3TH damages for Defendant's infringement of the '974 Patent under 35 U.S.C. §284;
- (d) Find that this case is exceptional under 35 U.S.C §285 and award BN3TH attorneys' fees;
- (e) Award reasonable and necessary costs; and
- (f) For a judgment and an award of such other and further relief as the Court may deem just and proper.

JURY DEMAND

In accordance with FED. R. CIV. P. 38 and 39, BN3TH asserts its rights under the Seventh Amendment to the United States Constitution and demands a trial by jury on all issues that may be so tried.

Dated: November 17, 2023

Respectfully submitted,

/s/ John F. Luman III

John F. Luman III

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