

1 Daniel T. Shvodian, Bar No. 184576
2 PERKINS COIE LLP
3 3150 Porter Drive
4 Palo Alto, CA 94304
5 Tel: 650.838.4300 / Fax: 650.737.5461
6 DShvodian@perkinscoie.com

7 Attorney for Plaintiff MPL Brands NV, Inc.

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 MPL BRANDS NV, INC. d/b/a
11 PATCO BRANDS,

12 Plaintiff,

13 v.

14 BUZZBALLZ, LLC,

15 Defendant.

Case No.

**COMPLAINT AND JURY
DEMAND**

1 Plaintiff MPL Brands NV, Inc. d/b/a Patco Brands (“MPL”) seeks a declaratory
2 judgment that MPL does not infringe U.S. Patent No. 11,738,904 (the “’904 patent”) assigned to
3 Defendant BuzzBallz, LLC (“Defendant”) and to prevent Defendant from continuing to make
4 objectively baseless, bad faith, and false and misleading public allegations that MPL has infringed
5 the ’904 patent.

6 **PRELIMINARY STATEMENT**

7 This is an action for declaratory judgment arising under the patent laws of the
8 United States, Title 35 of the United States Code and unfair competition under California law.
9 MPL seeks a declaratory judgment that MPL does not infringe the ’904 patent, and to recover for
10 any and all damages occasioned by false and misleading statements made by Defendant to the
11 United States Patent and Trademark Office during prosecution of the ’904 patent and its related
12 applications.

13 On September 15, 2023, Defendant filed a complaint in the Western District of
14 Texas alleging that MPL’s Big Sipz products infringe claim 1 of the ’904 patent. *See BuzzBallz,*
15 *LLC v. MPL Brands NV, Inc.*, Case No. 1:23-cv-01115 (W.D. Tex.). MPL’s Big Sipz products,
16 however, do not infringe the ’904 patent. In response to Defendant’s infringement allegations,
17 counsel for MPL sent counsel for Defendant a notice letter pursuant to 35 U.S.C. § 285 on October
18 16, 2023. MPL’s Section 285 letter set forth, in detail, why MPL’s products do not infringe the
19 ’904 patent and why Defendant’s claims of patent infringement are baseless and frivolous.

20 On November 2, 2023, Defendant filed a first amended complaint in the Western
21 District of Texas. In its first amended complaint, Defendant dropped its allegations that MPL’s
22 Big Sipz products infringe claim 1 of the ’904 patent. After Defendant dropped its allegations of
23 patent infringement, MPL and Defendant entered discussions concerning a covenant not to sue for
24 alleged infringement of the ’904 patent. As of the date of this Complaint, Defendant has refused
25 to sign a covenant not to sue MPL for alleged infringement of the ’904 patent. Accordingly, MPL
26 has filed this lawsuit.

1 **THE PARTIES**

2 MPL Brands NV, Inc. d/b/a Patco Brands (“MPL”) is a Nevada corporation with
3 its headquarters at 71 Liberty Ship Way, Sausalito, CA 94965.

4 On information and belief, Defendant BuzzBallz, LLC is a limited liability
5 company organized under the laws of the State of Texas with its principal place of business in
6 Dallas County, Texas. On information and belief, Defendant is the assignee of the '904 patent.

7 **JURISDICTION AND VENUE**

8 Jurisdiction is proper because this action arises under the Declaratory Judgment
9 Act, 28 U.S.C. § 2201 *et seq.*, and under the patent laws of the United States, Title 35 of the United
10 States Code.

11 This Court has subject matter jurisdiction over this action under 28 U.S.C.
12 §§ 1331, 1338(a), and 2201(a). In addition, the parties herein are citizens of different states and
13 the amount in controversy exceeds \$75,000.

14 In addition, this Court has supplemental jurisdiction over any claims for which it
15 may be deemed not to have original jurisdiction pursuant to 28 U.S.C. § 1367, as those claims are
16 so related to the claims falling within this Court’s original jurisdiction that they form part of the
17 same case or controversy.

18 This Court has personal jurisdiction over Defendant at least because the actions
19 taken by Defendant are aimed at interference with MPL’s product development, sales, and business
20 activities in the State of California. Additionally, on information and belief, Defendant sells its
21 BuzzBallz products in this District through distributors that reside in this District and intentionally
22 directs its products to consumers in this District.

23 Venue is proper in this District under 28 U.S.C. § 1391(b)-(c) because MPL is
24 located in this District at 71 Liberty Ship Way, Sausalito, CA 94965. Venue is also proper in this
25 District because a substantial part of the events giving rise to the claims occurred in this District.
26 Venue is also proper because MPL’s products accused of infringement are designed, developed,
27 and stored in the forum, and therefore a substantial part of the property that is the subject of the
28

1 action is located here. Additionally, the acts that Defendant accuses of infringement took place in
2 this District.

3 An actual and justiciable controversy exists between the parties. Defendant
4 previously asserted in the Western District of Texas that MPL's Big Sipz products allegedly
5 infringe the '904 patent. Defendant refuses to guarantee MPL that it will not reassert frivolous
6 allegations of infringement concerning the '904 patent and refuses to enter into a covenant not to
7 sue. The frivolous allegations of patent infringement and conduct by Defendant threaten injury to
8 MPL. The bad faith tactics that Defendant engaged in to patent the container claimed in the '904
9 patent have caused and continue to cause MPL harm.

10 **FACTUAL BACKGROUND**

11 MPL produces ready-to-drink alcoholic cocktails marketed under the tradename
12 Big Sipz. MPL began production of its Big Sipz products at least as early as May of 2022.

13 Like MPL, Defendant produces ready-to-drink alcoholic cocktails. On
14 information and belief, Defendant's products are packaged in a can that resembles a truncated
15 spherical shape, where its sides are convex from top to bottom.

16 On information and belief, Defendant has been selling ready-to-drink alcoholic
17 cocktails since before February 25, 2020.

18 The '904 patent titled "Container" issued on August 29, 2023 to the named
19 inventor Merrilee Kick. On information and belief, the '904 patent is assigned to Defendant.

20 The '904 patent is part of a patent family that originated with Application No.
21 12/762,934, filed on April 19, 2010. On its face, the '904 patent claims to be a continuation of the
22 '934 application through an intervening patent and abandoned application.

23 On April 19, 2010, applicant Merrilee Kick, with the assistance of prosecution
24 counsel, filed application no. 12/762,934 (the "'934 application") titled "Container" with the
25 United States Patent and Trademark Office ("USPTO"). The '934 application contained five
26 figures and a specification.

27 On May 3, 2010, the USPTO issued a notice to file corrected application papers,
28

1 asking the applicant to submit replacement drawings for figures 1-4 because “they must be
2 reasonably free from erasures and must be free from alterations overwriting, interlineations, folds,
3 and copy marks.” (Exhibit A at 31-32.)

4 Instead of only submitting the requested corrections to the figures, the applicant
5 filed a substantially revised detailed description along with new and redrawn figures that
6 improperly injected new matter into the application.

7 These additions included explanations to the detailed description, at least four new
8 figures (6-9), and additions to all previously submitted figures 1-5.

9 On October 20, 2011, the USPTO published the ’934 application as U.S. Pat. Pub.
10 No. 2011/0253720.

11 The ’934 application was prosecuted by the USPTO for nearly ten years. On
12 information and belief, during prosecution of the ’934 application, the assignee intentionally
13 delayed prosecution of the ’934 patent by engaging in bad faith tactics.

14 After nearly ten years of prosecution, the ’934 application issued as U.S. Patent
15 No. 10,604,296 (the “’296 patent”) on March 31, 2020. (Exhibit B.)

16 All claims of the ’296 patent require, among others, two critical claim limitations.
17 First, each claim of the ’296 patent requires a container comprising . . . “a side wall substantially
18 convex in both horizontal and vertical direction.” Second, each claim of the ’296 patent requires
19 that the “interior of said container body has a truncated spherical shape.”

20 The prosecution history of the ’934 application is rife with rejections from the
21 examiner, where the applicant overcame the examiner’s rejections by relying on these two critical
22 limitations.

23 For example, on February 7, 2013, the examiner rejected the claims of the ’934
24 application in view of JP 105032248 (“Yoshida”). (Exhibit A at 132-33.) In response to the
25 examiner’s rejection, the applicant argued that “independent claim 1 is not anticipated by *Yoshida*
26 since *Yoshida* fails to teach a container having a convex side wall. *Yoshida* instead teaches a plastic
27 molded container that has a substantially cylindrical shaped side wall. *Yoshida* does not teach the
28

1 feature of a convex side wall.” (Exhibit A at 190.)

2 As another example, on July 31, 2014, the examiner again rejected the claims of
3 the ’934 application in view of Yoshida. (Exhibit A at 305-06.) In response to the examiner’s
4 rejection, the applicant amended the claims to recite that “the interior of said container body has a
5 truncated spherical shape.” (Exhibit A at 318.)

6 In the examiner’s notice of allowance for the ’934 application, the examiner
7 provided their reasons for allowance. Specifically, the examiner stated that “[n]one of the prior
8 art of record is seen to disclose or suggest the limitation of claim 1 that the container side wall and
9 the horizontally-extending base are shaped so that an interior of said container body has a truncated
10 spherical shape; wherein the container body is made out of resin; wherein the container body is
11 formed using a blow molding process; wherein the container side wall extends uninterruptedly
12 between the circulate neck and the horizontally-extending base.” (Exhibit A at 653.)

13 On February 25, 2020, Ms. Kick, with the assistance of prosecution counsel, filed
14 Application No. 16/800,195 (the “’195 application”) titled “Container.”

15 The ’195 application was prosecuted by the USPTO for over two years.

16 In the examiner’s notice of allowance for the ’195 application, the examiner
17 provided their reasons for allowance. Specifically, the examiner stated that “[n]one of the prior
18 art of record is seen to disclose or suggest the limitation of claim 1 that the container side wall and
19 horizontally-extending base are shaped so that an interior of said container body has a truncated
20 spherical shape; wherein the container body is made of our resin; wherein the container body is
21 formed using a blow molding process; wherein the container side wall extends uninterruptedly
22 between the circular neck and the horizontally-extending base.” The examiner made similar
23 statements for independent claims 10 and 21.

24 The ’195 application issued as U.S. Patent No. 11,338,955 (the “’955 patent”) on
25 May 24, 2022. (Exhibit C.)

26 On its face, the ’955 patent claims that it is a continuation of the ’934 application.

27 Every claim of the ’955 patent requires that the container body of the claimed
28

1 container has a “truncated spherical shape.”

2 On January 27, 2022, Ms. Kick, with the assistance of prosecution counsel, filed
3 Application No. 29/824,813 (the “’813 application”) titled “Container.”

4 All three figures of the ’813 application are directed to an ornamental design of a
5 container with a truncated spherical shape.

6 The application data sheet for the ’813 application claims that it is a continuation
7 of the ’955 patent, which is a continuation of the ’296 patent. After multiple rejections, the ’813
8 application was abandoned on January 1, 2024.

9 On August 16, 2022, Ms. Kick, with the assistance of prosecution counsel, filed
10 Application No. 17/819,989 (the “’989 application”) titled “Container.” On its face, the ’989
11 application claims that it is a continuation of the ’296 patent through the intervening ’813
12 application and ’955 patent. The ’989 application claimed a priority date of April 19, 2010.

13 On information and belief, during prosecution of the ’989 application, the
14 applicants attempted to draft claims that are directed to MPL’s Big Sipz products, not the truncated
15 spherical shape of Defendant’s BuzzBallz products.

16 The ’989 application was published by the USPTO on December 8, 2022 as U.S.
17 Pat. Pub. No. 2022/0388708. The USPTO granted the ’989 application on August 29, 2023 as
18 U.S. Patent No. 11,738,904. (Exhibit D.)

19 No claims of the ’904 patent (original, amended, or new) recite “a side wall
20 substantially convex in both horizontal and vertical direction,” as recited in each claim of the ’296
21 patent.

22 No claims of the ’904 patent recite that the “interior of said container body has a
23 truncated spherical shape,” as recited in each claim of the ’296 patent, or that the container body
24 of the claimed container has a “truncated spherical shape,” as recited in each claim of the ’955
25 patent.

26 Every claim of the ’904 patent requires that “an actual volume of the liquid
27 contained in the container is equal to, or less than, 211.5 mL.”
28

1 United States Patent laws require that the claims of a patent particularly point out
2 and distinctly claim the subject matter of the invention. 35 U.S.C. § 112. One purpose of this
3 definiteness requirement is to provide the public with notice of what the patent owner owns and
4 what would constitute infringement of the patent.

5 MPL began developing its Big Sipz products after issuance of the '296 patent and
6 publication of the '195 application (which later issued as the '955 patent).

7 MPL expended significant capital, time, and effort in designing and developing
8 the can and packaging for its Big Sipz products. MPL intentionally designed the can and
9 packaging for its Big Sipz products to avoid the subject matter recited in the '296 patent and '955
10 patent. Specifically, Big Sipz products at least do not contain the “truncated spherical shape”
11 recited in each and every claim of the '296 patent and '955 patent.

12 Defendant has never accused MPL of infringing any claim of the '296 patent or
13 '955 patent.

14 On information and belief, instead of competing in the marketplace with MPL,
15 Defendant decided to file an action for trademark and patent infringement in the Western District
16 of Texas on September 15, 2023. *See BuzzBallz, LLC v. MPL Brands NV, Inc.*, Case No. 1:23-cv-
17 01115 (W.D. Tex.).

18 One of Defendant's causes of action was an allegation that MPL's Big Sipz
19 products infringe claim 1 of the '904 patent.

20 Defendant dropped its frivolous claim for patent infringement without prejudice
21 less than two months later, after receiving a notice letter from MPL pursuant to 35 U.S.C. § 285.

22 In the months that followed, MPL attempted to bring finality to Defendant's
23 frivolous claims of patent infringement by negotiating a covenant not to sue.

24 After the parties negotiated a covenant not to sue, Defendant refused to sign the
25 covenant. On information and belief, Defendant's actions demonstrate that it filed the complaint
26 in the Western District of Texas for anticompetitive purposes only because it is concerned about
27 the competing with MPL's Big Sipz products in the marketplace.
28

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Declaratory Judgment that MPL Does Not Infringe U.S. Patent No. 11,738,904)

MPL repeats and realleges each and every allegation contained in the paragraphs above as if fully set forth herein.

Defendant has alleged and continues to allege that MPL infringes the '904 patent. Defendant refuses to enter into a covenant not to sue concerning the '904 patent.

MPL has not infringed and does not infringe any enforceable claim of the '904 patent, including claim 1, directly or indirectly, literally or under the doctrine of equivalents, through the manufacture, use, sale, and/or offer for sale of MPL's Big Sipz products.

All claims of the '904 patent require that "wherein a lower point of the container side wall extends downwardly from the middle portion of the container side wall to the horizontally-extending portion of the container body, said lower portion being greater in diameter along its entirety than the horizontally-extending portion, including the bottom, thereby rendering the container body stemless."

MPL's Big Sipz products do not satisfy at least the limitation "wherein a lower point of the container side wall extends downwardly from the middle portion of the container side wall to the horizontally-extending portion of the container body, said lower portion being greater in diameter along its entirety than the horizontally-extending portion, including the bottom, thereby rendering the container body stemless."

As a result of the acts described in the foregoing paragraphs, there exists a substantial controversy of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

A judicial determination is necessary and appropriate so that MPL may ascertain its rights regarding the '904 patent.

MPL is entitled to a judicial declaration that it has not infringed and does not infringe the '904 patent.

SECOND CLAIM FOR RELIEF

(Unfair Competition Under California Bus. Prof. Code § 17200 *et seq.*)

MPL repeats and realleges each and every allegation contained in the paragraphs above as if fully set forth herein.

The actions of Defendant described herein constitute unlawful, unfair, and/or deceptive business acts or practices under California Business and Professions Code § 17200 *et seq.* and the common law of the State of California.

During the filing and prosecution of the '934 application, the '195 application, and the '989 application, the applicants owed a duty of good faith and candor in dealing with the USPTO. *See* 37 C.F.R. § 1.56.

During prosecution of the '195 application and '989 application, the applicants were aware that the '934 application issued as the '296 patent with, among others, two critical claim limitations: (1) a container comprising . . . “a sidewall substantially convex in both horizontal and vertical direction,” and (2) that the “interior of said container body has a truncated spherical shape.”

The applicants were aware that the examiner issued a notice of allowance because the claims of the '296 patent require: (1) a container comprising . . . “a sidewall substantially convex in both horizontal and vertical direction,” and (2) that the “interior of said container body has a truncated spherical shape” that were not found in the prior art.

During prosecution of the '989 application, the applicants were aware that the '195 application issued as the '955 patent with, among others, one critical claim limitation—that the claimed container has a “truncated spherical shape.”

The applicants were aware that the examiner issued a notice of allowance because the claims of the '955 patent require that the claimed container has a “truncated spherical shape” which was not found in the prior art.

Throughout prosecution of the '989 application, however, the applicants failed to disclose to the USPTO that the two critical limitations to the '296 patent, and the critical limitation

1 of the '955 patent were not recited in the claims of the '989 application.

2 On information and belief, the applicants deliberately removed critical limitations
3 material to the patentability of the '296 and '955 patents in a failed attempt to draft patent claims
4 that cover MPL's Big Sipz products.

5 On information and belief, the applicants deliberately chose not to make the
6 USPTO aware that critical limitations had been removed from all claims of the '989 application,
7 in violation of their duty of candor and good faith owed to the USPTO.

8 As a result of the applicants' actions before the USPTO, the USPTO granted a
9 notice of allowance for the '989 application without examining critical prior art and without
10 including two limitations material to the patentability of the predecessor '296 and '955 patents.

11 During prosecution of a patent application, the addition of new matter is clearly
12 prohibited. *See* 35 U.S.C. § 132(a); 37 C.F.R. § 1.121(f); MPEP §§ 608.02.

13 A preliminary amendment filed after the filing date of the application is not
14 considered part of the original disclosure of the application. 37 C.F.R. § 1.115(a)(2).

15 During prosecution of the '934 application, in response to the USPTO's notice to
16 file corrected application papers, the applicants improperly added new matter that cannot be
17 considered part of the disclosure of the '934 application and/or relied upon for claiming priority in
18 subsequent applications.

19 Specifically, the applicants improperly added at least disclosure that the volume
20 of the container discussed in the '934 application is equal to or less than 211.5 mL.

21 On information and belief, the applicants were aware that disclosure concerning
22 the volume of the container discussed in the '934 application is not entitled to a priority date of
23 April 19, 2010, but instead is entitled to a priority date of February 25, 2020, at the earliest.

24 During prosecution of the '989 application, the applicants failed to disclose to the
25 examiner that the limitation of claim 1 reciting "an actual volume of the liquid contained in the
26 container is equal to, or less than, 211.5 mL" was not part of the '934 application, and that no
27 claims of the '904 patent are entitled to a priority date of April 19, 2010.
28

1 The applicants failed to disclose that the earliest priority date available for all
2 claims of the '989 application is February 25, 2020, the filing date of the '195 application.

3 On information and belief, Defendant has been selling ready-to-drink alcoholic
4 cocktails since before February 25, 2020, which renders its BuzzBallz products prior art to all
5 claims of the '904 patent.

6 On information and belief, the applicants failed to disclose Defendant's own
7 products as prior art during prosecution of the '989 application.

8 On October 11, 2011, the '934 application was published by the USPTO as U.S.
9 Pat. Pub. No. 2011/0253720.

10 On information and belief, the applicants were aware that U.S. Pat. Pub. No.
11 2011/0253720 is prior art to all claims of the '904 patent.

12 On information and belief, the applicants chose not to make the USPTO aware of
13 critical prior art in their possession and control in violation of the duty of candor and good faith
14 owed to the USPTO.

15 Prior to issuance of the '904 patent, MPL invested significant time, effort, and
16 resources developing its Big Sipz containers such that they are outside the scope of all claims in
17 the '955 and '296 patents.

18 MPL has never been accused of infringing any claim of the '296 or '955 patents.

19 MPL's significant investment occurred before the '989 application was published
20 as U.S. Pat. Pub. No. 2022/0388708 on December 8, 2022.

21 On information and belief, after issuance of the '904 patent, Defendant filed a
22 complaint for infringement of the '904 patent against MPL solely for anticompetitive purposes.

23 Although Defendant dropped its frivolous claim of infringement of the '904
24 patent, Defendant refuses to ensure MPL that it will not later attempt to continue pursuit of this
25 frivolous claim.

26 As a result of Defendant's frivolous allegations of patent infringement, conduct
27 before the USPTO, and refusal to enter into covenant not to sue concerning the '904 patent, MPL
28

1 will be forced to redesign its Big Sipz product or spend significant resources litigating against
2 Defendant.

3 As a result of Defendant's public and frivolous allegations of patent infringement,
4 MPL's business and reputation have been harmed, and MPL has suffered loss of good will.

5 **REQUEST FOR RELIEF**

6 MPL respectfully requests the following relief:

7 That the Court enter a judgment declaring that MPL has not infringed and does not
8 infringe any enforceable claims of the '904 patent;

9 That the case be deemed exceptional;

10 That MPL be awarded increased damages pursuant to 35 U.S.C. § 285 or as
11 otherwise permitted by law;

12 For an award of attorneys' fees and costs pursuant to 35 U.S.C. § 285 or as
13 otherwise permitted by law;

14 That the allegations of infringement made by Defendant are baseless and have
15 been made in bad faith;

16 That Defendants violated the duty of candor and good faith to the USPTO;

17 That in making such baseless allegations and violating the duty of candor and good
18 faith with the USPTO, Defendant is liable for unfair competition under California state law.

19 That MPL be awarded its actual damages resulting from unfair competition
20 complained of herein, in an amount to be determined at trial; and

21 That the Court award MPL any other relief as the Court may deem just, equitable,
22 and proper.

23 **DEMAND FOR TRIAL BY JURY**

24 Pursuant to Federal Rule of Civil Procedure 38, MPL Brands NV, Inc. d/b/a Patco
25 Brands hereby demands a trial by a jury on all issues in its Complaint.
26
27
28

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

Dated this 1st day of March 2024

By: /s/ Daniel T. Shvodian
Daniel T. Shvodian, Bar No. 184576
PERKINS COIE LLP
3150 Porter Drive
Palo Alto, CA 94304
Tel: 650.838.4300/Fax: 650.737.5461
DShvodian@perkinscoie.com

*Attorneys for Plaintiff MPL Brands NV, Inc.
d/b/a Patco Brands*