IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

FLEXI-MAT CORPORATION,
an Illinois corporation,

Plaintiff,

v.

DALLAS MANUFACTURING COMPANY, INC., a Texas corporation, **BJ'S WHOLESALE CLUB, INC.**, a Delaware corporation, and **DOSKOCIL MANUFACTURING COMPANY, INC.**, a Texas corporation,

Defendants.

Civil Action No. 04 10162 DPW

JURY TRIAL DEMANDED

FIRST AMENDED COMPLAINT

Plaintiff, Flexi-Mat Corporation ("Flexi-Mat"), by its undersigned attorneys, complains against defendants Dallas Manufacturing Company, Inc. ("Dallas Mfg."), BJ's Wholesale Club, Inc. ("BJWC"), and Doskocil Manufacturing Company, Inc. ("Doskocil") (collectively, the "defendants") as follows:

NATURE AND STATUTORY BASIS OF ACTION

1. This civil action arises under the Federal Patent Act, as provided for by 35 U.S.C. §§ 100, *et seq.*

THE PARTIES

2. Plaintiff Flexi-Mat is a corporation duly organized and existing under the laws of the State of Illinois, having its principal place of business at 2244 South Western Ave., Chicago, Illinois 60608. Flexi-Mat makes and sells pet beds and other products.

3. Upon information and belief, defendant Dallas Mfg. is a corporation duly

organized and existing under the laws of the State of Texas, having its principal place of business at 4215 McEwen Road, Dallas, Texas 75244. Upon information and belief, defendant Dallas Mfg. is an importer and distributor of pet beds and other pet products, and imports and distributes pet beds to defendant BJWC in this district and elsewhere in the United States.

4. Upon information and belief, defendant BJWC is a corporation duly organized and existing under the laws of the State of Delaware, having its principal place of business at 1 Mercer Road, Natick, Massachusetts 01760-2400. Upon information and belief, defendant BJWC owns and operates warehouse club stores in this district and elsewhere in the United States which offer for sale and sell pet beds and other products. These stores are known as "BJ's Wholesale Club."

5. Upon information and belief, defendant Doskocil is a corporation duly organized and existing under the laws of the State of Texas, having its principal place of business at 4209 Barnett Blvd., Arlington, Texas 76017. Upon information and belief, Doskocil manufactures, distributes, and sells pet beds and other products to retailers and consumers in this district and elsewhere in the United States and has sold pet beds to BJWC.

JURISDICTION AND VENUE

6. Jurisdiction is expressly conferred on this Court under 35 U.S.C. §§ 271 and 281 and 28 U.S.C. §§ 1331 and 1338(a).

7. Personal jurisdiction over defendants is vested in this Court since, upon information and belief, defendants have committed one or more of the acts complained of herein within the United States and within this state and district pursuant to Mass. Gen. Laws c. 223A ¶3 (2000). In particular, Dallas Mfg. has imported into the United States and sold in this district pet beds to BJWC that infringe the asserted patent, and BJWC has offered to sell and has sold in

this district Dallas Mfg.'s infringing pet beds. Doskocil has offered to sell and has sold its pet products and various other products in this state such that its connections with the state are substantial, continuous and systematic. Upon information and belief, Doskocil has also sold pet beds that infringe the asserted patent to BJWC, and BJWC has offered to sell and is selling those pet beds with labels identifying BJWC as the distributor in Natick, Massachusetts.

8. Venue is proper in the United States District Court for the District of Massachusetts, pursuant to 28 U.S.C. §1391(b) and (c) and 1400(b), because a substantial part of the events or omissions giving rise to the claims herein occurred in this district.

FACTUAL BACKGROUND

9. United States Letters Patent No. 5,765,502 ("the '502 patent"), entitled "Pet Bed With Removable Bolster," was duly and legally issued by the United States Patent and Trademark Office on June 16, 1998. A true and correct copy of the '502 patent is attached as **Exhibit A**.

10. The inventor of the '502 patent, Scott Haugh, assigned to plaintiff Flexi-Mat his entire right, title and interest to this patent. Flexi-Mat owns the entire right, title and interest in and to the '502 patent, including the right to sue and recover damages for infringement.

11. Upon information and belief, defendant Dallas Mfg. imports into the United States and distributes pet beds which are made substantially as claimed and described in the '502 patent. These pet beds are sold to defendant BJWC, which in turn offers for sale and sells the pet beds under the name "Berkley & Jensen Premium Quality Bolster Pet Bed" to purchasers in this district and elsewhere in the United States. A sample of this pet bed is shown in **Exhibit B** and bears a label identifying Dallas Mfg. as the source.

12. Upon information and belief, defendant Doskocil manufactures, offers to sell and

sells pet beds which are made substantially as claimed and described in the '502 patent. These pet beds are sold to defendant BJWC, which in turn offers for sale and sells the pet beds under the name "Berkley & Jensen Premium Quality Bolster Pet Bed" to purchasers in the United States. A sample of this pet bed is shown in **Exhibit C** and bears a label with Doskocil's address.

COUNT I
INFRINGEMENT OF U.S. PATENT NO. 5,765,502 BY DALLAS MFG. AND BJWC

13. Plaintiff Flexi-Mat hereby incorporates the allegations of paragraphs 1-12 as if fully set forth herein.

14. Defendant Dallas Mfg. has infringed and/or has induced others to infringe and/or has committed acts of contributory infringement of one or more claims of the '502 patent. Dallas Mfg.'s infringing activities include, but are not limited to, importing into the United States and selling to BJWC stores in this district and elsewhere in the United States pet beds that are offered for sale and sold under the name "Berkley & Jensen Premium Quality Bolster Pet Bed." as shown in **Exhibit B**. The "Berkley & Jensen Premium Quality Bolster Pet Bed" is made substantially as claimed in the '502 patent.

15. Defendant BJWC has infringed and/or has induced others to infringe and/or has committed acts of contributory infringement of one or more claims of the '502 patent. BJWC's infringing activities include, but are not limited to, offering for sale and selling pet beds under the name "Berkley & Jensen Premium Quality Bolster Pet Bed," as shown in **Exhibit B.**

16. Upon information and belief, defendants' infringement of the '502 patent has been willful and deliberate.

17. The availability of defendants' infringing products has damaged Flexi-Mat in several ways. For example, the patented products sold by Flexi-Mat are no longer exclusively

available from Flexi-Mat and instead appear to be commodity products also offered by BJWC and distributed by Dallas. Therefore, Flexi-Mat's patented product is less desirable to customers. The commodity image is emphasized by the fact that the defendants are offering the infringing products at a substantially lower price than Flexi-Mat, and consequently, on information and belief, diverting sales from Flexi-Mat.

18. As a consequence of the defendants' infringing activities regarding the '502 patent, plaintiff Flexi-Mat has suffered monetary damages and is entitled to an award of monetary damages pursuant to 35 U.S.C. § 284 in an amount yet to be determined.

19. As a consequence of the defendants' infringing activities regarding the '502 patent, plaintiff Flexi-Mat has suffered and will continue to suffer irreparable harm unless the defendants are enjoined by this Court.

COUNT II
INFRINGEMENT OF U.S. PATENT NO. 5,765,502 BY DOSKOCIL AND BJWC

20. Plaintiff Flexi-Mat hereby incorporates the allegations of paragraphs 1-12 as if fully set forth herein.

21. Defendant Doskocil has infringed and/or has induced others to infringe and/or has committed acts of contributory infringement of one or more claims of the '502 patent. Doskocil's infringing activities include, but are not limited to, making, offering for sale and selling to BJWC stores in the U.S. pet beds under the name "Berkley & Jensen Premium Quality Bolster Pet Bed", as shown in **Exhibit C**.

22. Upon information and belief, defendants' infringement of the '502 patent has been willful and deliberate.

23. The availability of defendants' infringing products has damaged Flexi-Mat in several ways. For example, the patented products sold by Flexi-Mat are no longer exclusively

available from Flexi-Mat and instead appear to be commodity products also offered by BJWC and distributed by Doskocil. Therefore, Flexi-Mat's patented product is less desirable to customers. The commodity image is emphasized by the fact that the defendants are offering the infringing products at a substantially lower price than Flexi-Mat, and consequently, on information and belief, diverting sales from Flexi-Mat.

24. As a consequence of the defendants' infringing activities regarding the '502 patent, plaintiff Flexi-Mat has suffered monetary damages and is entitled to an award of monetary damages pursuant to 35 U.S.C. § 284 in an amount yet to be determined.

25. As a consequence of the defendants' infringing activities regarding the '502 patent, plaintiff Flexi-Mat has suffered and will continue to suffer irreparable harm unless the defendants are enjoined by this Court.

JURY DEMAND

Plaintiff Flexi-Mat demands a trial by jury on all matters and issues triable by jury.

PRAYER FOR RELIEF

WHEREFORE, plaintiff, Flexi-Mat Corporation, prays for the following relief:

A. That defendants Dallas Mfg., BJWC and Doskocil, and their officers, agents, servants, employees, successors, assigns, parent, subsidiaries, affiliated or related companies, attorneys and all persons in active concert and/or participation with them who receive notice, be preliminarily and permanently enjoined and restrained from making, using, selling, offering to sell, or importing pet beds that infringe the '502 patent, including, but not limited to, the "Berkley & Jensen Premium Quality Bolster Pet Bed," or otherwise engaging in acts of infringement, inducing others to infringe, and/or contributing to the infringement of the '502 patent.

B. That this Court order each defendant to:

i) communicate to all persons requesting the infringing pet beds that each defendant is prohibited from further advertisement or sale of the respective infringing pet bed; and

ii) notify in writing all recipients of each catalog in which any defendant has advertised or offered for sale the respective infringing pet bed, all prospective purchasers of that product, and all persons inquiring about that product, whether orally, in writing, or via the Internet, that defendants are prohibited from further advertisement or sale of the respective infringing pet bed.

C. That this Court order defendants Dallas Mfg. and Doskocil to provide to Flexi-Mat all past and future customer purchase orders received by them relating to the sale of their respective infringing pet beds or any pet bed of similar design as shown in **Exhibit B** and Exhibit C that Dallas Mfg. and Doskocil have caused to be imported into, made or sold in the United States.

D. That defendants be directed to file in Court, and to serve on plaintiff Flexi-Mat, within thirty (30) days after entry of the above injunction and order, a report in writing, under oath, setting forth in detail the manner and form in which they have complied with the above injunction and order.

E. That this Court award to Flexi-Mat damages adequate to compensate Flexi-Mat for the infringement of the '502 patent by each of the defendants.

F. That this Court award increased damages against each of the defendants up to three times the actual damages pursuant to 35 U.S.C. § 284.

G. That this Court enter an order declaring this an exceptional case pursuant to 35 U.S.C. § 285 and award to Flexi-Mat its attorneys' fees, costs and expenses.

H. That this Court award to Flexi-Mat such other and further relief as may be just and appropriate.

FLEXI-MAT CORPORATION

Dated: ~~July __, 2004~~ 8/31/04

By: _____

John J. Cotter (BBO #554524)
William Meunier
Testa, Hurwitz & Thibeault, LLP
125 High Street
Boston, MA 02110
Telephone: (617) 248-7000
Facsimile: (617) 248-7100

Of Counsel:
Larry L. Saret (*pro hac vice*)
Manotti L. Jenkins (*pro hac vice*)
MICHAEL BEST & FRIEDRICH LLP
401 N. Michigan Avenue, Suite 1900
Chicago, Illinois 60611-4274
Telephone: (312) 222-0800
Facsimile: (312) 222-0818

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