LAW OFFICE OF
Edward J. Carroll
2733 ROUTE 209
KINGSTON, NEW YORK 12401

EDWARD J. CARROLL

TEL (845) 338-5977
FAX (845) 338-5975

PARALEGAL
DEBRA LEACOCK

TTAB

911 79716

October 31, 2007

United States Patent and Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Re: School Specialty, Inc. v. Seat Sack, Inc
Serial No. 78/955,618
Mark: SEAT SACK
Filed: August 18, 2006
Published: May 29, 2007

Dear Sirs:

Please be advised that my office represents Seat Sack, Inc. in an action now pending in the United States District Court for the Southern District of New York, entitled *Seat Sack, Inc. v. Childcraft Education Corp.; U.S. Office Products Co.; U.S. Office Products North Atlantic District, Inc. and School Specialty, Inc.,* bearing case number 07-CIV-3344 (RJH) (DFE). This action was originally commenced on March 2, 2007 in the Supreme Court of the State of New York under index number 103040 / 07 and was thereafter transferred to the Federal Court, by application of the defendants, including School Specialty, Inc.

As you can see, this Federal litigation, which is still pending, involves Seat Sack, Inc. and School Specialty, Inc., which is the same entity which is now opposing Seat Sack's registration involving its mark, "Seat Sack", before the Trademark Trial and Appeal Board. A review of Seat Sack, Inc.'s complaint in that Federal litigation also reveals that the same factual and legal issues, including that of plaintiff's trademark rights to "Seat Sack" to which School Specialty, Inc. now submits opposition, were previously submitted by all parties for judicial determination in the United States District Court.

Enclosed herewith please find, for your review the following documents, which are self-explanatory. They include:

Defendants' Notice of Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6) and Memorandum of Law in support of Defendants' Motion to Dismiss and Motion for a More Definite Statement, both dated June 27, 2007;
Plaintiff's Notice of Cross-Motion for a Preliminary Injunction (**which includes**

[redacted]

11-01-2007

Plaintiff's Summons and Verified Complaint), dated July 24, 2007; Childcraft Defendants' Reply Memorandum of Law in Support of Motion to Dismiss, dated August 8, 2007; Reply Memorandum of Law in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiff's Cross Motion for a Preliminary Injunction, dated August 30, 2007; Childcraft Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction, dated August 23, 2007; Childcraft Defendants' Amended Rule 26(a) Disclosures, dated August 27, 2007; Declaration of Virginia Murphy, dated August 23, 2007; Declaration of Cathy S. Klinger, dated August 23, 2007; Declaration of Mark E. Schmidt, dated August 23, 2007.

Pursuant to the rules of this Board, Seat Sack, Inc. respectfully submits that all issues now before this Board be consolidated and transferred for judicial determination to the United States District Court for the Southern District of New York.

Seat Sack, Inc. respectfully submits, to this Honorable Board, that such relief is appropriate in that all of the issues involve the mark, "Seat Sack" and that both this proceeding and the Federal litigation involve common issues of law and fact. Seat Sack, Inc. further requests that all proceedings be suspended until such a determination is made. By way of a copy of this correspondence, I am requesting that Edward M. Livingston, Seat Sack, Inc.'s counsel of record before the Board, make and file a Motion to Suspend these proceedings.

In the alternative, if such a consolidation and transfer is not granted, Seat Sack, Inc. respectfully requests that Seat Sack Inc.'s counsel of record be granted an extension of time to file a response to School Specialty's opposition with the Trademark Trial and Appeal Board.

Naturally, if you have any questions, please do not hesitate to contact my office.

By way of a copy of this correspondence, with enclosures, my office is notifying both Nicholas A. Kees, Esq., counsel for School Specialty, Inc., and Edward M. Livingston, Esq., of this application.

Very truly yours,

Edward J. Carroll (SR)

Edward J. Carroll
EJC/sd

cc.: Godfrey & Kahn, S.C.
Attn: Nicholas A. Kees, Esq.
780 North Water Street
Milwaukee, WI 53202-3590
By fax (414) 273-5198 and Overnight Mail

Livingston Firm
Edward M. Livingston, Esq.
963 Trail Terrace Drive
Naples, FL 34103-2329
(without enclosures)
By fax (239) 261-3773

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADMARK TRIAL AND APPEAL BOARD

----------x

School Specialty, Inc. v. Seat Sack, Inc
Serial No. 78/955,618
Mark: SEAT SACK
Filed: August 18, 2006
Published: May 29, 2007

AFFIDAVIT OF SERVICE

----------x

STATE OF NEW YORK)
COUNTY OF ULSTER) ss.:

I, SUZANNE DOWNIE, being duly sworn, deposes and says:

1. That I am not a party to the above entitled action and am over the age of 18 years and reside in Olivebridge, New York.

2. That on the 1st day of November, 2007, I served a true copy of the enclosed documents: Defendants' Notice of Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6) and Memorandum of Law in support of Defendants' Motion toDismiss and Motion for a More Definite Statement, both dated June 27, 2007; Plaintiff's Notice of Cross-Motion for a Preliminary Injunction (**which includesPlaintiff's Summons and Verified Complaint**), dated July 24, 2007; Childcraft Defendants' Reply Memorandum of Law in Support of Motion to Dismiss, dated August 8, 2007; Reply Memorandum of Law in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiff's Cross Motion for a Preliminary Injunction, dated August 30, 2007; Childcraft Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction, dated August 23, 2007; Childcraft Defendants' Amended Rule 26(a) Disclosures, dated August 27, 2007; Declaration of Virginia Murphy, dated August 23, 2007; Declaration of Cathy S. Klinger, dated August 23, 2007; Declaration of Mark E. Schmidt, dated August 23, 2007,

by mailing the same in a sealed envelope with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, by overnight mail, addressed to the last known address of the addressee(s) as indicated below:

Godfrey & Kahn, S.C.
Attn: Nicholas A. Kees, Esq.
780 North Water Street
Milwaukee, WI 53202-3590

Suzanne Downie
SUZANNE DOWNIE

Sworn to before me this
1st day of November, 2007.

NOTARY PUBLIC

EDWARD J. CARROLL
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN ULSTER COUNTY
COMMISSION EXPIRES JUNE 30, 2011

May 23, 2007

Honorable Richard J. Holwell
United States District Judge
Southern District of New York
United States Courthouse
500 Pearl Street
New York, New York 10007

Re: Seat Sack, Inc.,
Vs: Childcraft Education Corp.; US Office Products Company; US Office Products North Atlantic District, Inc.; and School Specialty, Inc.,
07-CV-3344(RJH)(DFE)

Dear Judge Holwell:

Please be advised that my office represents plaintiff, Seat Sack, Inc. in regard to the above entitled action.

This correspondence is in response to defense counsel's letter, dated May 3, 2007, a copy of which is enclosed for your convenience.

BACKGROUND

Defense counsel does not dispute that the defendants are in the business are marketing and distributing educational aides, products and supplies to educational institutions. Defense counsel also does not dispute that in late 1999, at least one of defendants, Childcraft Education Corp., entered into an agreement whereby it agreed that it would serve as a distributor of Seat Sack, a product developed by plaintiff, Seat Sack, Inc. for which the plaintiff holds a patent. Seat Sack is an organizational device which is secured to the back of a student's chair containing compartments to organize the student's supplies. It is by virtue of this fiduciary relationship, breached by the defendant, and its further acts of defrauding the public by substituting its own "knock off product", for the plaintiff's product, that the plaintiff now brings suit against these defendants.

After plaintiff filed a complaint in the Supreme Court of the State of New York, County of New York, and Childcraft and School Specialty were served, defense counsel moved

to remove the case to the United States District Court for the Southern District of New York. To my knowledge, no order has been yet made or entered officially transferring this action to this Court. However, plaintiff does not oppose this application, provided that this Court determines that it will not only exercise jurisdiction concerning the federal causes of action, but also its jurisdiction to determine the supplemental state law claims which are found in plaintiff's underlying causes of action.

It is respectfully submitted that the allegations in plaintiff's complaint are not vague.

Specifically, plaintiff alleges that while the defendant was acting in a fiduciary capacity, as plaintiff's distributor, with the promise to use due diligence and good faith in selling plaintiff's product, and after plaintiff had allowed defendant the inclusion of its product in defendant's catalog, with a notice to purchasers that additional orders could be made through the defendant's company, Childcraft Education Corp. secretly established a web site to defraud the plaintiff. The defendant utilized plaintiff's trade name and product to attract customers for the sale of its own "knock off product", which it sold in direct competition with the plaintiff. When a user searched for the word "seat sack", instead of using due diligence to promote plaintiff's product, the defendant utilized this web site to automatically transfer the customer to its own "knock off product" known as a "seat pocket". The customer was then presented with an artificially rigged purchase price, whereby plaintiff's product was sold by defendant for more than the defendant's own "knock off product", thereby inducing the purchaser to purchase defendant's product over the plaintiff's product, or, as occurred on many occasions, while customers still believed that they were purchasing plaintiff's product. After the purchase, the defendant's "knock off product" was then supplied and the profits were retained by the defendant. These actions, carried out without the knowledge and consent of the plaintiff, resulted in a breach of a fiduciary duty owed to plaintiff in that defendant, while acting as plaintiff's distributing agent, did commit acts of "self-dealing" by utilizing the plaintiff's good will, trade name and patented product to sell its own "knock off product" and to induce breaches of contract with plaintiff's customers whereby the defendant realized vast profits at the plaintiff's expense.

Defense counsel claims that attorney's fees may not be recovered by the plaintiff in this action. This claim is meritless. For more than 70 years, New York Courts have held that a fiduciary may be surcharged with another interested party's counsel fees where the fiduciary is guilty of misconduct that necessitated the expense. See *In re Estate of Garvin*, 256 NY 518, 520 (1931); *Parker v. Rogerson*, 49 A.D.2d 689, 709, 370 N.Y.S.2d 753 (4th Dept., 1973); *In re Estate of Estate of Liss,* 102 Misc.2d 617, 618, 424 N.Y.S.2d 92, 93 (Sup. Ct. Orange County, 1980). *Matter of Campbell*, 138 A.D.2d 827, 829 (1988). See *In the Matter of Rose BB*, 16 A.D.3rd at 803. Under such circumstances, the wrongdoer becomes an insurer against losses and bears the risk of the uncertainty that his actions created. *Parker v. Rogerson*, supra, 49 A.D.2d at 708, 370 N.Y.S.2d at 754. The

surcharge is imposed based upon a breach of trust arising out of self-dealing. See *In re Estate of Bausch*, 280 A.D. 482, 490, 115 N.Y.S.2d 278, 284 (4th Dept., 1952) (citations omitted). And, the surcharge includes all legal expenses and disbursements reasonably expended by objectants in their successful efforts to obtain redress. See *In re Estate of Bausch*, supra, 280 A.D. at 494, 115 N.Y.S.2d at 288. Here, this action seeks such redress. See *April v. April*, 245 A.D. 841, 281 N.Y.S. 538 (2nd Dept., 1935) aff'd as modified, 272 N.Y. 331, 6 N.E.2d 43 (1936); *In re Estate of Feinberg*, 82 N.Y.S.2d 879 (Sur. Ct., N.Y. Co., 1948) aff'd 275 A.D. 925, 90 N.Y.S.2d 690 (1st Dept., 1949); *In re Estate of Dalsimer*, 160 Misc. 906, 296 N.Y.S. 209 (1st Dept., 1937).

This is not simply a claim for a failure to provide contractual promises. Instead, the defendant(s), has(have) carried out a scheme of "self-dealing" to defraud the plaintiff, among many other contributing suppliers, to gain the public's interest in the good will and value of their products, while counterfeiting them, and then utilizing misleading and deceptive advertising to sell those counterfeits. Their acts have converted sales and the proceeds of which should have gone to the plaintiff, instead of the defendant's coffers. Public confusion is clearly set forth in the facts of this case which support plaintiff's causes for unfair competition, fraud, conversion, and unjust enrichment. Control of the plaintiff's product and advertising was provided to the defendant in good faith. This good faith and the plaintiff's rights were violated as a result of the illegal acts of the defendant(s).

As such, the defendant's claims that the causes of action set forth in plaintiff's complaint, including and/or a request for an award of "attorney's fees", under federal statutory law and/or state law are unwarranted and without merit.

Clearly, many other causes of action are set forth in the plaintiff's complaint which sufficiently state federal causes of action. As such, no comment is made concerning these issues.

Discovery has not yet been provided by the defendant(s), nor have deposition(s) been held to clarify the particulars of the case. Therefore, defendant's application is premature.

Due to the foregoing, it is respectfully submitted that defense counsel requests for permission to move to dismiss the First, Second, Third, Fourth, Sixth and Thirteenth Causes of action should be denied.

CONFERENCES

Please be advised that I am presently confined to a wheelchair in my residence due to recent reconstructive surgery, with external fixation of my right foot, ankle and leg, due

to a motor vehicle accident. My surgery was performed on May 9, 2007 at Yale-New Haven Hospital in Connecticut. As a result of the foregoing, I am incapable of leaving my residence, which fortunately is where my office is located. I am still able to participate in telephone conferences and hope to continue all in-office preparation of this case until my condition permits, with the approval of my physicians more mobility.

I therefore request the Court's, and counsels indulgence in avoiding personal appearances until that time.

Should you have any questions, please do not hesitate to contact my office.

Very truly yours,

Edward J. Carroll

EJC/md
Enclosure

cc w/enc.: ORRICK, HERRINGTON & SUTCLIFFE, LLP
Attorneys for Defendants - Childcraft Education Corp., and School Specialty, Inc.
Att: Richard W. Mark, Esq., (RM6884)
666 Fifth Avenue
New York, New York 10103

YOUNG, CONAWAY, STARGATT & TAYLOR, LLP
Attorneys for Defendants - US Office Products Company and US Office Products North Atlantic District, Inc.
Att: Sean M. Beach, Esq.
P.O. Box 391
Wilmington, Delaware 19899-0391

Richard W. Mark
David M. Fine
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, NY 10103
Telephone: (212) 506-5000
Facsimile: (212) 506-5151

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SEAT SACK, INC., Plaintiff, -against- CHILDCRAFT EDUCATION CORP.; US OFFICE PRODUCTS COMPANY; US OFFICE PRODUCTS NORTH ATLANTIC DISTRICT, INC.; and SCHOOL SPECIALTY, INC., Defendants.	CASE NO. 07-CIV-3344 (RJH)(DFE) **NOTICE OF MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 9(b) AND 12(b)(6)**

PLEASE TAKE NOTICE that, upon the annexed Declaration of Anthony S. Baish, executed on June 27, 2007 and the exhibits thereto, the accompanying Memorandum of Law, and upon all pleadings filed herein, defendants Childcraft Education Corp and School Specialty, Inc. ("Childcraft") will move this Court, before the Honorable Richard J. Holwell, United States District Judge, in the United States Courthouse for the Southern District of New York, 500 Pearl Street, Courtroom 17B, New York, New York, 10007-1312, for an order dismissing the Verified Complaint in the above-referenced action (dated February 6, 2007) pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure on August 8, 2007, or any date thereafter convenient to the Court and parties.

PLEASE TAKE FURTHER NOTICE that, in accordance with this Court's May 31 2007 order, plaintiff shall file its opposition to the motion on or before July 25, 2007, and Childcraft shall file its reply on or before August 8, 2007.

Dated: June 27, 2007

Respectfully submitted,

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: s/ Richard W. Mark

Richard W. Mark
David M. Fine
666 Fifth Avenue
New York, NY 10103

Attorneys for Defendants,
Childcraft Education Corp. and
School Specialty, Inc.

OF COUNSEL:

Nicholas A. Kees
Anthony S. Baish
Mark E. Schmidt
GODFREY & KAHN, S.C.
780 North Water Street
Milwaukee, WI 53202-3590

To: Edward J. Carroll, Esq.
Attorney for Plaintiff
2733 Route 209
Kingston, NY 12401

Sean M. Beach, Esq.
Young Conaway Stargatt & Taylor, LLP
Attorneys for USOP Liquidating LLC
(f/k/a US Office Products Company and
US Office Products North Atlantic District, Inc.)
P.O. Box 391
Wilmington, DE 19899-0391

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SEAT SACK, INC.,	:	
Plaintiff,	:	
-against-	:	CASE NO. 07-CV-3344 (RJH)(DFE)
CHILDCRAFT EDUCATION CORP.; US OFFICE PRODUCTS COMPANY; US OFFICE PRODUCTS NORTH ATLANTIC DISTRICT, INC.; and SCHOOL SPECIALTY, INC.,	:	**DECLARATION OF ANTHONY S. BAISH**
Defendants.	:	

I, Anthony S. Baish, under penalty of perjury, hereby declare as follows:

1. I make this Declaration on personal knowledge of the facts and circumstances set forth herein .

2. I am one of the attorneys for Defendants Childcraft Education Corp. and School Specialty Inc.

3. Attached hereto as Exhibit 1 is a true and correct copy of the Complaint filed by Plaintiff Seat Sack, Inc. in the above-referenced action.

4. Attached hereto as Exhibit 2 is a true and correct copy of the Product Distribution Agreement between Defendant Childcraft Education Corp. and Plaintiff Seat Sack, Inc.

Dated this 27th day of June, 2007.

Anthony S. Baish

Anthony S. Baish

mw1337794_1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

SEAT SACK, INC.,

Plaintiff,

-against-

CHILDCRAFT EDUCATION CORP.; US OFFICE PRODUCTS COMPANY; US OFFICE PRODUCTS NORTH ATLANTIC DISTRICT, INC.; and SCHOOL SPECIALITY, INC.,

Defendants.

----------x

VERIFIED COMPLAINT

Index # 103040/07
Date Filed: 3/5/2007

Plaintiff, complaining of the defendants, by its attorney, EDWARD J. CARROLL, ESQ., as and for its verified complaint respectfully sets forth and alleges as follows:

1. Plaintiff, SEAT SACK, INC., was and still is at all times hereinafter mentioned:

A. A foreign corporation organized under and by virtue of the laws of the State of Florida having a principal place of business situated at 5910 Taylor Road, in the City of Naples, State of Florida 34109, and a mailing address of P.O. Box 9732, Naples, Florida 34101; and

B. Established for the purpose of engaging in the business of manufacturing and selling, by wholesale and retail marketing, a certain

product known as a "Seat Sack" which is used by pupils to organize their school supplies by hanging plaintiff's device over the back of their chair(s) and utilizing individual pouches contained therein for storage of school supplies, including but not limited to books, pencils, pens, etc.

2. At all times herein mentioned, plaintiff's aforementioned device was known to the defendants to be protected under and by virtue of State and Federal Law, including but not limited to the United States Patent Number: Des. 358, 731 issued to plaintiff on or about May 30, 1995.

3. Upon information and belief and at all times hereinafter mentioned, defendants, CHILDCRAFT EDUCATION CORP., was and still is a domestic corporation organized under and by virtue of the laws of the State of New York on or about October 24, 1952 in the County of New York, State of New York which maintains a principal place of business situated at 2918 Old Tree Drive, Lancaster, PA 17603.

4. Upon information and belief and at all times hereinafter mentioned, defendant, CHILDCRAFT EDUCATION CORP., did and still does authorize C T Corporation System, 111 8th Avenue, New York, New York 10011 to act as its designated agent for the service of legal process.

5. Upon information and belief and at all times hereinafter mentioned, defendants, US OFFICE PRODUCTS COMPANY and US OFFICE

PRODUCTS NORTH ATLANTIC DISTRICT, INC., are both foreign corporations which were incorporated in the State of Delaware and authorized to do business in the State of New York with a designated agent for service of process at 440 New York Avenue Northwest, Suite 310, Washington, DC 20005. SCHOOL SPECIALITY, INC., is a foreign corporation originally incorporated in the State of New York and thereafter discontinued and then incorporated in the State of Delaware but which is authorized to do business in the State of New York with a designated agent for service of process at C T Corporation System, 111 8th Avenue, New York, New York 10011.

6. That at all times hereinafter mentioned herein, all of the above named defendants have acted in concert with CHILDCRAFT EDUCATION CORP. in committing those acts against plaintiff as are alleged hereinafter herein.

7. Upon information and belief and at all times hereinafter mentioned, each of the defendants have/has held itself/themselves out to the general public, including plaintiff, as a distributor(s) for the wholesale and retail sale of various school products and services, including plaintiff's aforesaid "Seat Sack" organizer, to municipal and private schools, their districts, and/or their authorized agents and/or employees throughout the world, including the United States of America and specifically within the State of New York, for use in their daily educational curriculum.

8. Upon information and belief and at all times herein mentioned, the defendants did transact business within the State of New York and/or did commit a tortious act within that state, and/or did commit a tortious act without that State, all causing injury and damages to the plaintiff and/or did enter into a agreement with plaintiff which is the subject of this litigation within that State and regularly does or solicits business, or does engage in any other persistent course of conduct, and/or derives substantial revenue from goods used or consumed or services rendered in the State of New York, and/or expects or should reasonably expect that its acts will have consequences in the State of New York and/or derives substantial revenue from interstate or international commerce and/or owns, uses or possesses real property situated within the State of New York.

9. Upon information and belief, at all times hereinafter mentioned, defendants have transacted and/or continue to transact business in the County of New York and the State of New York and are subject to the jurisdiction of this Court.

10. This action arises under the Federal Trademark Act, 15 U.S.C. Section 1051, et seq., and other laws adopted by the State of New York, including but not limited to the Uniform Fiduciaries Act; unfair trade practices and unlawful packaging trade; and unfair competition; and Section 360-l of the

General Business Law of the State of New York. Subject matter jurisdiction over this action is also conferred upon this Court by 15 U.S.C. Sections 1121 and 1125, 28 U.S.C. Section 1331 and 28 U.S.C. Section 1338 and jurisdiction pendent thereto.

AS AND FOR A FIRST CAUSE OF ACTION IN BASED IN FRAUD IN THE INDUCEMENT IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENANTS

11. Plaintiff, SEAT SACK, INC., repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "10" of plaintiff's complaint as if those allegations were fully set forth at length herein.

12. On, about or during the month of November, 1999, plaintiff, as a result of fraudulent misrepresentations made by defendants and/or its employees while acting within the scope of their authority and in furtherance of the business interests of said defendants, did enter into an agreement with the defendants, whereby plaintiff agreed to allow the defendants to act as its distributor for present and future sales of plaintiff's aforesaid "Seat Sack", and defendants agreed to so act, in a fiduciary capacity and on behalf of plaintiff, as plaintiff's distributor for this product to municipal and private schools, their districts, and/or their authorized agents and/or employees throughout the world, including the United States of America and specifically within the State of

New York, for use by their pupils in their daily educational curriculum.

13. Upon information and belief, on, about or immediately proceeding the making of the aforesaid agreement, defendants, through its/their agents and/or employees, fraudulently represented to the plaintiff, for the sole purpose of inducing the plaintiff to enter into the aforesaid agreement, and with the intent to deceive, cheat and defraud plaintiff, and with full knowledge that the statements so made by them were not true, that:

A. The defendants would at all times act as plaintiff's fiduciary and distributor and would protect and promote the best interests of plaintiff and its aforesaid product; that defendants would faithfully adhere to and perform all of its/their obligations under the aforesaid agreement; and would distribute plaintiff's product in a good faith and diligent manner, and would promote plaintiff's product in all markets via promotional and catalog sales; and

B. All payments obtained as a result of any sale of plaintiff's aforesaid product would be timely made and accounted for; that defendants would carry out the distribution of plaintiff's product(s) using good business distribution practices; and would protect plaintiff's product as a protected patented device; would protect and promote plaintiff's property right in said device; that all of the plaintiff's existing and future customers would be serviced in the same manner and at the same rates and prices; that new sales

and markets for plaintiff's aforesaid product would be pursued by defendants on behalf of the plaintiff within and without the country; that defendants would not compete in the manufacture and/or distribution of said product or any likeness thereof, nor commit a breach of its fiduciary duty by entering into contracts for said product or any likeness thereof with any existing or future customers desiring plaintiff's product or any facsimile thereof; and that the defendants would at all times protect the integrity and solvency of the plaintiff's product and business; and

C. That the defendants would not act in any manner contrary to its fiduciary capacity as a distributing agent for the plaintiff's product; and

D. That plaintiff's business and/or its product(s) protected by a registered patent and/or trademark and/or its mark would be accurately promoted and protected in the general market for the benefit of the plaintiff.

14. On or about November, 1999, plaintiff herein wholly believing and relying upon the aforesaid statements and representations so made by the defendants and having no opportunity to ascertain the proof of any falsity thereof prior to the commencement of their agreement, did enter into an agreement with defendants whereby plaintiff did hold out the defendants to be its lawful distributor and non-exclusive licensee; and did allow the defendants to include plaintiff's product in their catalog and advertisements and did

thereafter provide "Seat Sacks" to defendants for subsequent sale to the general public, including the aforesaid private and municipal school districts and their agents and/or employees, up to and including August, 2004, and has sporadically continued to do so up to and including the present.

15. Upon information and belief, at the time of the making of the aforesaid agreement, defendants had notice of each and every term and condition and representation so made by its representatives and knew that the plaintiff was relying thereon.

16. Upon information and belief, each and every statement, representation, covenant and promise so made by defendants herein was false and untrue and known by the defendants to be so at the time said statement was made and all of said statements were intentionally and fraudulently made with the intent to cheat and defraud the plaintiff herein.

17. That from the inception of defendants' knowledge and possession of the plaintiff's aforesaid product and contact with plaintiff's customers and market, defendants have failed to perform its/their obligations under its aforesaid distributorship agreement and has/have acted in breach of its/their fiduciary responsibility to plaintiff.

18. That defendants' unlawful acts committed since 1999 were done with gross malice and without the knowledge and consent of plaintiff and

represent a continuing course of conduct against plaintiff and other entities similarly situated. These acts included but were not limited to the following:

A. That defendants did create a "knock off product" in direct competition to plaintiff's "Seat Sack" which was known as a "Seat Pocket" which was identical to plaintiff's "Seat Sack" and did advertise and solicit, for the manufacture and/or distribution and sale of same to, from and within the countries of China and Taiwan and the United States; and

B. That defendants did also establish and create an internet website for the manufacture, sale and distribution of the aforesaid "knock off product" which automatically transferred a customer searching for plaintiff's "Seat Sack" to defendants' site which provided all information necessary to purchase defendants' "Seat Pocket". The foregoing acts were done for the purpose of inducing breaches of contract between plaintiff and its prior, existing and/or future customers and/or for the confusion and deception of the general public which believed that they were purchasing plaintiff's product; and

C. Defendants further did, without just cause, artificially increase the purchase price of plaintiff's product that it was distributing as plaintiff's fiduciary in an amount greater than the purchase price of its own "Seat Pocket" to induce its customers to purchase its product and to deprive the plaintiff of any opportunity to compete in the open market; and

D. That defendants consistently misled and manipulated the plaintiff's customers into believing that they were purchasing plaintiff's product when they were actually purchasing defendants' product; and

E. Defendants withheld knowledge of its foregoing unfair business practices from the plaintiff to preclude plaintiff from competing with sales of defendants' "knock off product", although defendants were still acting as plaintiff's fiduciary and distributor; and

F. That defendants have refused to act in the best interests of plaintiff as its fiduciary and instead, acted in a competitive, unlawful manner for the purpose of stealing plaintiff's protected product, sales and market.

19. That at all times hereinafter mentioned, said defendants were and still are in default of its/their contractual obligations to the plaintiff herein.

20. That the plaintiff has allowed defendants numerous opportunities to cure the aforesaid defaults and/or unlawful conduct and defendants have failed and/or refused to remedy same and/or refrain from such unlawful conduct in the future.

21. As a result of defendants' failure and/or refusal to cease its/their unlawful conduct and remedy its/their default and deceptive practices, plaintiff has sustained lost profits in sales, together with ancillary damages and continues to suffer from same, a diminishing market, together with damage to

its good name, reputation product, and other unwarranted costs and damages.

22. Plaintiff has fully performed all of its duties and obligations under the distributorship agreement, including but not limited to manufacturing a product in a timely fashion; ensuring that said product was fit for the purpose for which it was manufactured; providing defendants with an ample supply of product and in a timely fashion; and advising its customers and market that defendants were acting as its distributor and including for the purpose of reordering merchandise defendants' name, address and contact telephone numbers on its product.

23. As a result of the foregoing, the plaintiff has fully performed its obligations under the aforesaid agreement but the obligations to be performed by the defendants have not been met.

24. Defendants have refused and/or failed to meet its/their obligations and as a result, said defendants have defaulted.

25. Plaintiff has demanded in a timely and reasonable manner that said defendants fully perform its/their obligations pursuant to its agreement and that defendants provide plaintiff with an accounting of all sales of its "Seat Sack" and defendants' "Seat Pocket" from the inception of the distributorship of plaintiff's product, together with all monies obtained from the sale thereof; and that defendants refrain from the unlawful conduct set forth herein, but

defendants have wrongfully failed, refused or neglected to do so as of this date.

26. That due to defendants' unlawful conduct of unfair business practice and deception, plaintiff has sustained the loss of its past, present and/or future customers and market and has otherwise sustained additional compensatory damages.

27. That the aforesaid conduct of the defendants was willful, and/or grossly malicious, and/or reckless and/or was calculated to cause and did cause harm to said plaintiff which has no adequate remedy at law.

28. By reason of the false and fraudulent statements made by the defendants to the plaintiff herein and the deceptions and fraud practiced by the defendants upon the plaintiff, defendants have unlawfully obtained and deprived plaintiff of profits to which it is entitled and rendered plaintiff's investments in its product useless.

29. As a result of the foregoing, plaintiff, SEAT SACK, INC., has sustained damages including but not limited to compensatory damages in the sum of $5,000,000.00 and is entitled to punitive, exemplary and treble damages from the defendants in the sum of $15,000,000.00.

AS AND FOR A SECOND CAUSE OF ACTION FOR FRAUD IN FAVOR OF THE PLAINTIFF AND AGAISNT THE DEFENDANTS

30. Plaintiff, SEAT SACK, INC., repeats, reiterates and realleges each

and every allegation contained in paragraphs "1" through "29" of plaintiff's complaint as if fully set forth at length herein.

31. Due to the acts set forth in plaintiff's complaint, committed by the defendants with gross malice and with the intention of stealing the plaintiff's trade secrets and protected product the plaintiff has been defrauded herein due to the loss of sales and market growth.

AS AND FOR A THIRD CAUSE OF ACTION FOR CONVERSION IN FAVOR OF THE PLAINTIFF AND AGAISNT THE DEFENDANTS

32. Plaintiff, SEAT SACK, INC., repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "31" of plaintiff's complaint as if fully set forth at length herein.

33. That the defendants have converted monies and the proceeds of sales due plaintiff without the knowledge and consent of plaintiff and as a result of those diverted sales and inducements of breaches of contract; breaches of a fiduciary relationship, defendants have taken possession for its/their own use and benefit proceeds from the sale of plaintiff's product and/or by sale of a "knock off product" monies due plaintiff from 1999 up to and including the present.

AS AND FOR A FOURTH CAUSE OF ACTION FOR DECEPTIVE TRADE, UNFAIR BUSINESS PRACTICES, MISAPPROPRIATION OF TRADE SECRETS AND UNFAIR COMPETITION IN FAVOR OF THE PLAINTIFF AND AGAINST DEFENDANTS

34. Plaintiff, SEAT SACK, INC., repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "33" of plaintiff's complaint as if fully set forth at length herein.

35. The acts of defendants complained of herein were done with gross malice and represent an ongoing course of conduct by the defendants against all entities supplying it with protected products, including the plaintiff herein due to the defendants' deceptive trade and practices while acting as plaintiff's distributor and fiduciary, plaintiff has sustained diminution of its product, market and name.

AS AND FOR A FIFTH CAUSE OF ACTION FOR BREACH OF CONTRACT IN FAVOR OF PLAINTIFF AND AGAINST THE DEFENDANTS

36. Plaintiff, SEAT SACK, INC., repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "35" of plaintiff's complaint as if fully set forth at length herein.

37. Upon information and belief, plaintiff has performed all the conditions of the contract so required of it.

38. Upon information and belief, plaintiff repeatedly demanded of the

defendants that it/they undertake and complete all of the covenants and promises agreed to as to heretofore mentioned herein.

39. Upon information and belief, defendants have wholly failed to meet its/their obligations under the contract or to return all of the profits obtained by their unlawful conduct and to refrain from continued violations of law more particularly set forth herein, together with all damages sustained by plaintiff as a result of the defendants' breach of contract.

40. As a result of the foregoing, the defendants have breached its/their contracts entered into with the plaintiff and no reasonable basis exists for the defendants' refusal to fully undertake and complete those covenants agreed to by the defendants as heretofore stated herein.

AS AND FOR A SIXTH CAUSE OF ACTION FOR AN AWARD OF ATTORNEY'S FEES AND COSTS IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANTS

41. Plaintiff, SEAT SACK, INC., repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "40" of plaintiff's complaint as if fully set forth at length herein.

42. As a result of the continued fraudulent actions of the defendants while acting as a fiduciary and in breach of that duty to the plaintiff, plaintiff has sustained legal fees and incurred disbursements in seeking compensatory

damages and injunctive relief. As a result of the foregoing, plaintiff is entitled to an award of attorney's fees and costs of litigation in a sum deemed reasonable by the Court.

AS AND FOR A SEVENTH CAUSE OF ACTION IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANTS FOR UNLAWFUL USE OF PLAINTIFF'S PATENTED PRODUCT

43. Plaintiff, SEAT SACK, INC., repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "42" of plaintiff's complaint as if fully set forth at length herein.

44. Plaintiff, SEAT SACK, INC., is the owner of a lawful patent for its product which is the subject of this litigation, together with a trade name, trademarks and service marks, including the famous trademark "Seat Sack" which has been diligently exploited by defendants.

45. SEAT SACK, INC. has actively used the aforesaid name and mark for many years prior to entering the aforesaid distributor agreement through a wide variety of commercial activities. Such activities have included:

A. The sale of merchandise bearing the name and mark "Seat Sack TM, INC.", has been continuously sold within the United States and up to the execution of the aforesaid distributor agreement, plaintiff has derived and continues to derive substantial royalties therefrom.

46. Upon information and belief, SEAT SACK, INC. has also diligently enforced and protected its trademark through, e.g. vigilant policing of the marketplace and of trademark registers throughout the world, and through the use of clipping services, at great cost and expense. Seat Sack, Inc. has aggressively and successfully protected unauthorized uses of its trademark by third parties.

47. Defendants, including CHILDCRAFT EDUCATION CORP., have been distributing and selling unauthorized merchandise embodying the mark and/or the names, trademarks and/or likenesses of "Seat Sack, Inc." at and around numerous retail and wholesale stores in violation of the rights of plaintiffs under the Lenham Act and in violation of the Federal Trademark Act, 15 U.S.C. Section 1051, et seq., and under related and other laws of the State of New York, including but not limited to Section 360-l of General Business Law of the State of New York.

48. The sale of such merchandise is without permission or authority of the plaintiff.

49. This unlawful activity results in irreparable harm and injury to plaintiff in that, among other things, it deprives plaintiff of its absolute right to determine the manner in which the trademarks are presented to the general public through merchandising; deceives the public as to the origin and

sponsorship of such merchandise; the public as to the origin and sponsorship of such merchandise; wrongfully trades upon and cashes in on plaintiff's reputation.

50. Plaintiff seeks injunctive relief enjoining defendant's unlawful conduct described herein in that plaintiff has no adequate remedy of law.

AS AND FOR A EIGHTH CAUSE OF ACTION IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANTS

51. Plaintiff, SEAT SACK, INC., repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "50" of plaintiff's complaint as if fully set forth at length herein.

52. This count arises under 15 U.S.C. Section 1114 with respect to the infringement of plaintiff's federally registered patent and its protected trademark and service mark.

53. By virtue of the plaintiff's aforesaid extensive use, advertising and promotion of its trademark, the trade and public have come to associate use of this trademark with plaintiff and the activities conducted by them, and plaintiff's trademark has acquired secondary meaning in the trademark.

54. Upon information and belief, defendants, with actual and constructive notice of plaintiff's prior use and registration of its mark, have utilized plaintiff's mark and marks confusingly similar thereto to sell its/their

bootleg merchandise.

55. Defendants' unlawful uses of plaintiff's mark and marks confusingly similar thereto are likely to cause confusion, mistake or deception as to the source of origin of defendants' products and to mislead the public into believing that defendants' products originate from, are affiliated with, or are sponsored, authorized or approved by plaintiff.

56. Defendants' aforesaid actions will cause sales of plaintiff's merchandise to be lost and/or diverted to the defendants. Further, the defendants' false designations of origin will irreparable harm and injure plaintiff's goodwill and reputation. Such irreparable harm will continue unless enjoined by this Court.

57. The aforesaid acts of defendants constitute a violation of plaintiff's rights under 15 U.S.C. Section 1114 and Sections 360-l of the General Business Law of the State of New York.

58. Plaintiff will have no adequate remedy at law if defendants' activities are not enjoined and will suffer irreparable harm and injury to plaintiff's image and reputation as a result thereof.

AS AND FOR A NINTH CAUSE OF ACTION IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANTS AS A RESULT OF A VIOLATION OF 15 U.S.C. 1125(a)

59. Plaintiff, SEAT SACK, INC., repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "58" of plaintiff's complaint as if fully set forth at length herein.

60. This count arises under 15 U.S.C. 1125(a) which relates to trademarks, trade names and unfair competition entitled "False Designations of Origin and False Descriptions Forbidden," and involves false description in commerce.

61. The plaintiff's mark has been used widely throughout the United States to identify products and services of SEAT SACK, INC. As a result of same, the plaintiff's mark has developed and now has a secondary and distinctive trademark meaning to purchasers of goods which bear the plaintiff's mark.

62. Defendants, by misappropriating and using the plaintiff's mark and/or a trade name and/or mark so similar to the plaintiffs, have misrepresented and falsely described to the general public the source of origin of the bootleg merchandise so as to create the likelihood of confusing by the ultimate purchaser as to both the source and sponsorship of the bootleg

merchandise.

63. Plaintiff will be damaged by the sale of the bootleg merchandise bearing the plaintiff's mark.

64. The unlawful merchandising activities of defendants, as described above, are without permission or authority of plaintiff and constitute express and implied misrepresentations that the bootleg merchandise was created, authorized or approved by plaintiff.

65. The aforesaid acts of defendants are in violation of 15 U.S.C. 1125(a) in that the defendants will use, in connection with goods and services, a false designation or origin and have caused and will continue to cause said goods the bootleg merchandise to enter into interstate commerce.

66. Plaintiff has no adequate remedy at law and, if defendants' activities are not enjoined, will suffer irreparable harm and injury.

AS AND FOR A TENTH CAUSE OF ACTION IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANTS AS A RESULT OF A VIOLATION OF 15 U.S.C. 1125(a)

67. Plaintiff, SEAT SACK, INC., repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "66" of plaintiff's complaint as if fully set forth at length herein.

68. This count arises under 15 U.S.C. 1125(a) which relates to

trademarks, trade names and unfair competition entitled "False Designations of Origin and False Descriptions Forbidden," and involves false description in commerce.

69. The plaintiff's mark has been used widely throughout the United States to identify plaintiff's respective goods. As a result of same, plaintiff's mark has developed and now has a secondary and distinctive trademark meaning to purchasers of goods which bear the plaintiff's mark.

70. Defendants, by misappropriating and using the plaintiff's mark, have misrepresented and falsely described to the general public the source of origin of the bootleg merchandise so as to create the likelihood of confusion by the ultimate purchaser as to both the source and sponsorship of the bootleg merchandise.

71. The aforesaid acts of the defendants are in violation of 15 U.S.C. 1125(a) in that the defendants will use, in connection with goods and services, a false designation or origin and have caused and will continue to cause said goods the bootleg merchandise to enter into interstate commerce.

72. Plaintiff has no adequate remedy at law and, if defendants' activities are not enjoined, will suffer irreparable harm and injury.

AS AND FOR A ELEVENTH CAUSE OF ACTION IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANTS FOR VIOLATIONS OF SECTION 360-l OF THE GENERAL BUSINESS LAW OF THE STATE OF NEW YORK

73. Plaintiff, SEAT SACK, INC., repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "72" of plaintiff's complaint as if fully set forth at length herein.

74. This count arises under Section 360-l of the General Business Law of the State of New York.

75. Defendants' activities are likely to dilute the distinctive quality of the plaintiff's mark and/or trade name and injure the business reputation of SEAT SACK, INC., in violation of its rights under Section 360-l of the General Business Law of the State of New York.

76. Plaintiff has no adequate remedy at law and, if defendants' activities are not enjoined, will suffer irreparable harm and injury.

AS AND FOR A TWELFTH CAUSE OF ACTION IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANTS FOR VIOLATIONS OF SECTION 360-l OF THE GENERAL BUSINESS LAW OF THE STATE OF NEW YORK

77. Plaintiff, SEAT SACK, INC., repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "76" of plaintiff's

complaint as if fully set forth at length herein.

78. That the defendants have continually induced breaches of contract between the plaintiff and its customers who have, by unfair business practices, believe they were entering into contracts with the plaintiff when in fact the defendants diverted sales to itself/themselves.

79. The defendants were also aware of numerous existing contracts between the plaintiff and plaintiff's market which the defendants induced the breach thereof without just cause and for its/their own profit.

AS AND FOR A THIRTEENTH CAUSE OF ACTION IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANTS FOR UNJUST ENRICHMENT

80. Plaintiff, SEAT SACK, INC., repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "79" of plaintiff's complaint as if fully set forth at length herein.

81. The acts of the defendants complained of herein have unjustly enriched said defendants and said acts were committed without the consent and/or knowledge of the plaintiff and were committed for that purpose.

WHEREFORE, plaintiff demands judgment against the above named defendants as follows:

A. On its first, second, third, fourth, sixth, seventh, eighth, ninth,

tenth, eleventh, twelfth and thirteenth causes of action in the sum of $5,000,000.00 as and for compensatory damages; and $15,000,000.00 as and for punitive, exemplary and treble damages; and

B. On its fifth cause of action in the sum of $5,000,000.00 as and for compensatory damages; and

C. On its sixth cause of action an award of attorney's fees in a sum deemed reasonable and necessary by the Court due to the defendants' breach of a fiduciary duty; and

D. On its seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth causes of action granting plaintiff injunctive relief enjoining the defendants as follows:

1. Granting plaintiff a Temporary Restraining Order and a Preliminary Injunction during the pendency of this action and permanently thereafter restraining, enjoining and prohibiting defendants from manufacturing, distributing or selling any and all merchandise bearing the plaintiff's mark and/or anything confusingly similar thereto and/or any merchandise that suggests or implies any association with the plaintiff's mark and/or protected product.

2. An order of seizure of all merchandise bearing the plaintiff's mark and/or any product or anything confusingly similar thereto and/or any

merchandise that suggests or implies any association with the plaintiff's merchandise, trademark or mark.

3. An Order for a Permanent Injunction prohibiting defendants from manufacturing, distributing and selling merchandise bearing the plaintiff's mark and/or anything confusingly similar thereto and/or any merchandise that suggests or implies any association with the plaintiff's business and/or merchandise; and

4. Enjoining the defendants from any future sale of its "knock off product"; directing that defendants provide an accounting of all sales of both plaintiff's "Seat Sack" product and defendant's "Seat Pocket" made between 1999 up to and including the present; and enjoining defendants from interfering in any manner with plaintiff's business, products, sales, patent, and/or customers and/or market.

5. Granting plaintiff a full and complete accounting and inspection of all of the records of the defendants' sales of its "Seat Pocket" and any records pertaining to the gross sales and net profits obtained thereby.

6. An order directing the defendants to return to plaintiff all assets received from the plaintiff and/or any losses of income and/or profits and/or related damages sustained by plaintiff as a result of defendants' fraud, conversion, breach of contract, unlawful business practices and other violations

of federal and state law.

ALL OF THE FOREGOING, together with interest from November, 1999, and costs and disbursements of this action and for such other and further relief as to the Court may seem just and proper under the circumstances.

Dated: February 6, 2007

EDWARD J. CARROLL, ESQ.
Attorney for Plaintiff
2733 Route 209
Kingston, New York 12401
(845) 338-5977

CHILDCRAFT EDUCATION CORP. EXCLUSIVES
GROWING YEARS CATALOG

EXCLUSIVITY: We are requesting information on the items listed below which are featured in Childcraft Education Corp.'s Growing Years Catalog. Terms of exclusivity include:

CODE A. EXCLUSIVE PRODUCTS UNDER CHILDCRAFT LABEL: Products manufactured for Childcraft by other manufacturers/vendors and labeled with the Childcraft name.

CODE B. EXCLUSIVE PRODUCTS NOT BEARING CHILDCRAFT LABEL but manufactured by a vendor who has given Childcraft the exclusive right to be the "sole source" of the product. This right is typically supported by this signed agreement between the vendor and Childcraft, and may include exclusivity with respect to all or to part of the product, such as its color, size, shape, and/or function.

CODE C. EXCLUSIVE COLLECTIONS: Sets of products whose components may be individually bought on the open market, but selected or assembled by Childcraft into sets that may include, but not be limited to:

a. assortments not elsewhere available as a collection, and/or
b. functional packaging intended for a specific educational purpose (i.e. size and dimensions of the collections as contained in specifically configured containers to fit within or adjacent to another product.)

Please sign this page (or respond in writing if items are not exclusive to Childcraft) and return AS SOON AS POSSIBLE to Liz Scott at the fax number below.

Thank you for your prompt response to this request.

Product Description	Childcraft Item #	Vendor Item #	Exclusivity Code
SEAT SACK	#370631	seatsack3	A

This letter is to confirm exclusivity of the vendor's product(s) listed created for Childcraft Education Corp. If possible, please provide us with this letter of exclusivity on your letterhead.

Vendor: SEAT SACK INC. Date: 4/20/00

Signature(Name & Title) [signature] CEO

Print Name: ANNE McALEAR

FROM:
Liz Scott
Childcraft Education Corp.
2920 Old Tree Drive
Lancaster, PA 17603
FAX (717) 391-4061 PHONE (717) 391-4050

Richard W. Mark
David M. Fine
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, NY 10103
Telephone: (212) 506-5000
Facsimile: (212) 506-5151

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SEAT SACK, INC., Plaintiff, -against- CHILDCRAFT EDUCATION CORP.; US OFFICE PRODUCTS COMPANY; US OFFICE PRODUCTS NORTH ATLANTIC DISTRICT, INC.; and SCHOOL SPECIALTY, INC., Defendants.	CASE NO. 07-CIV-3344 (RJH)(DFE)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND MOTION FOR A MORE DEFINITE STATEMENT

OF COUNSEL:

Nicholas A. Kees
Anthony S. Baish
Mark E. Schmidt
GODFREY & KAHN, S.C.
780 North Water Street
Milwaukee, WI 53202-3590

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

Richard W. Mark
David M. Fine
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, NY 10103
Telephone: (212) 506-5000
Facsimile: (212) 506-5151

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SEAT SACK, INC.,	:	
Plaintiff,	:	
-against-	:	
CHILDCRAFT EDUCATION CORP.; US OFFICE PRODUCTS COMPANY; US OFFICE PRODUCTS NORTH ATLANTIC DISTRICT, INC.; and SCHOOL SPECIALTY, INC.,	:	CASE NO. 07-CIV-3344 (RJH)(DFE)
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND MOTION FOR A MORE DEFINITE STATEMENT

In a thirteen-count Complaint, plaintiff Seat Sack, Inc. levels accusations ranging from fraud to patent infringement against defendants Childcraft Education Corp. ("Childcraft") and School Specialty, Inc. ("School Specialty"). Yet each of Seat Sack, Inc.'s claims are premised on the same basic fact: Childcraft introduced a product – the "Seat Pocket" – to compete with plaintiff's product called the "Seat Sack."[1] While Childcraft and School Specialty (collectively, "Childcraft Defendants") are confident they will prevail on all of Plaintiff's claims, the present motion focuses on those claims that, in a classic case of over-pleading, are wholly superfluous to

[1] In order to avoid confusion between plaintiff Seat Sack, Inc. and the Seat Sack product itself, we hereafter refer to Seat Sack, Inc. as "Plaintiff."

the true dispute. Properly distilled, the lawsuit involves just three basic claims for breach of contract, trademark infringement, and patent infringement. All other causes of action should be dismissed because they fail to state claims as a matter of law.

THE FACTS AS PLEADED IN THE COMPLAINT

Except where noted below, Childcraft Defendants accept the following allegations as true for purposes of this motion only. These facts are derived from the Complaint (cited herein as "Compl."), a true and correct copy of which is attached as Exhibit 1 to the accompanying Declaration of Anthony S. Baish, dated June 26, 2007 (the "Baish Decl.").

Plaintiff is a Florida corporation that manufactures and sells the Seat Sack, a storage product for school supplies that drapes over the back of a student's chair. (Compl. para. 1). Childcraft is a New York corporation that develops, markets and distributes educational products and school supplies. (Id. at paras. 3, 7). Defendant School Specialty is a Wisconsin corporation that is also in the business of developing, marketing and distributing educational products and school supplies. (Compl. para. 7; Answer para. 5).[2]

In late 1999, Plaintiff entered into a contract (the "Distribution Agreement") with Childcraft whereby Childcraft agreed to market and sell the Seat Sack as part of its line of school supply products. (Compl. para. 12; Baish Decl. para. 4, Ex. 2).[3] Although the Complaint alleges that all defendants entered into the Distribution Agreement with Plaintiff (see, e.g., Compl. paras. 12, 14), the Distribution Agreement reflects that only Childcraft did so. (Baish Decl.,

---

[2] Defendants US Office Products Company and US Office Products North Atlantic District, Inc. do not join this motion, as they no longer exist. The successor in interest to those entities is USOP Liquidating LLC, the special purpose entity approved by the United States Bankruptcy Court for the District of Delaware to administer, liquidate and distribute the assets of USOP. (Compl. para. 5; Answer para. 5). USOP Liquidating LLC has not filed an Answer, but did file a Suggestion of Bankruptcy with the Court on May 29, 2007.

[3] Where a Complaint expressly refers to and relies upon a contract that it does not attach, the Court may consider that contract without converting a motion to dismiss into one for summary judgment. See Rothman v. Gregor, 220 F.3d 81, 88-89 (2d Cir. 2000); American High-Income Trust v. AlliedSignal, 329 F. Supp. 2d 534, 540 (S.D.N.Y. 2004); Piccoli A/S v. Calvin Klein Jeanswear Co., 19 F. Supp. 2d 157, 162 n.25 (S.D.N.Y. 1998).

Ex. 2). As alleged in the Complaint, under the Distribution Agreement Childcraft became Plaintiff's "lawful distributor and non-exclusive licensee," while Plaintiff allowed Childcraft to include the Seat Sack in Childcraft's catalog and advertisements, and provided Seat Sacks to Childcraft for sale. (Compl. para. 14). Plaintiff alleges "upon information and belief" that Childcraft Defendants made a number of extrinsic representations during the negotiation of the Distribution Agreement. Specifically, Childcraft Defendants allegedly promised to: (1) act as Plaintiff's fiduciary and in Plaintiff's best interests in distributing the Seat Sack; (2) timely account for and remit all payments from sales of the Seat Sack to Plaintiff; (3) not manufacture or distribute any product that competes with the Seat Sack; and (4) protect Plaintiff's United States Design Patent as well as Plaintiff's state and federal trademark rights. (Compl. para. 13(a)-(d)).

The Complaint states that Childcraft Defendants ultimately created a "knock-off" product, called the Seat Pocket, to unfairly compete with the Seat Sack; artificially increased the price of the Seat Sack in order to promote Seat Pocket sales; and set up an Internet website that transferred customers searching for the Seat Sack to information regarding sales of the Seat Pocket. (Compl. para. 18). The Complaint characterizes these actions as "defaults" under the parties' distribution agreement. (Id. at paras. 18-21, 23-24).

From these basic operative facts, Plaintiff contrives thirteen causes of action. They include: fraud in the inducement and fraud (Counts I-II); conversion (Count III); "deceptive trade, unfair business practices, misappropriation of trade secrets, and unfair competition" (Count IV); breach of contract (Count V); "attorney's fees" (Count VI); patent infringement (Count VII); trademark infringement under federal and state laws (Counts VIII-XII), and unjust enrichment (Count XIII). The present motion addresses six of these causes of action – those for

fraud, conversion, "deceptive trade practices," "attorney's fees," and unjust enrichment. Because they fail as a matter of law, the claims should be dismissed.

STANDARDS

In considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court must accept all well-pleaded allegations in the complaint as true, and draw all reasonable inferences in favor of the nonmoving party. See Gill v. Pidlypchak, 389 F.3d 379, 384 (2d Cir. 2004). Dismissal is proper if it appears beyond doubt that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief. See id. However, "[t]he court need not credit conclusory statements unsupported by assertions of facts or legal conclusions and characterizations presented as factual allegations." In re Livent, Inc. Noteholders Sec. Litig., 151 F. Supp. 2d 371, 404 (S.D.N.Y. 2001) (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)). In addition, "the circumstances constituting fraud . . . shall be stated with particularity." Federal Rule of Civil Procedure 9(b). Plaintiff's claims in Counts I-IV, VI, and XIII fail under these standards.

ARGUMENT

I. THE FRAUD COUNTS SHOULD BE DISMISSED

Counts I and II of the Complaint allege fraud in the inducement and fraud. The alleged "fraud," however, relates solely to Childcraft Defendants' alleged breach of contractual promises. The claims accordingly fail as a matter of law. Moreover, the Complaint fails to satisfy the heightened pleading requirements of Fed. R. Civ. P. 9(b) in that it does not specify the time, place, speaker, or even the precise content of the alleged misrepresentations.

A. The Complaint Merely Alleges Breach Of Contract, Not Fraud

According to the Complaint, "on, about, or immediately proceeding [sic] the making of" the Distribution Agreement, Childcraft Defendants made certain allegedly false statements to Plaintiff. (Compl. para. 13). Although characterized as "representations," the alleged statements

in fact amount to promises of future performance under the contract. Specifically, as noted above, Childcraft Defendants allegedly promised to: (1) act as Plaintiff's fiduciary and in Plaintiff's best interests in distributing the Seat Sack; (2) timely account for and remit all payments from sales of the Seat Sack to Plaintiff; (3) not manufacture or distribute any product that competes with the Seat Sack; and (4) protect Plaintiff's United States Design Patent as well as Plaintiff's state and federal trademark rights. (Compl. para. 13(a)-(d)).

Plaintiff eliminates all doubt as to whether the alleged "fraud" involved promises of performance, as the fraud claims are replete with allegations pertaining solely to contractual performance. See, e.g., Compl. para. 13(a) ("defendants would faithfully adhere and perform all of its/their obligations under the aforesaid agreement"); para. 17 ("defendants have failed to perform its/their obligations under its aforesaid distributorship agreement"); para. 19 ("defendants were and still are in default of its/their contractual obligations"); para. 20 ("plaintiff has allowed defendants numerous opportunities to cure the aforesaid defaults"); para. 22 ("Plaintiff has fully performed all of its duties and obligations under the distributorship agreement"); para. 23 ("plaintiff has fully performed its obligations under the aforesaid agreement but the obligations to be performed by the defendants have not been met"); para. 24 ("Defendants have fail and/or refused to meet its/their obligations and as a result, said defendants have defaulted"); para. 25 ("Plaintiff has demanded in timely and reasonable manner that said defendants fully perform its/their obligations pursuant to its agreement"). In other words, the so-called "fraud" claims are nothing more than claims for breach of contract.

While Childcraft Defendants dispute Plaintiff's description of the terms of the Distribution Agreement, a breach of the agreement – whatever its terms – does not amount to fraud. It is well settled under New York law that a claim of fraud does not lie if the alleged fraud

merely relates to a breach of a contract.[4] See, e.g., Crabtree v. Tristar Automotive Group, Inc., 776 F. Supp. 155, 161 (S.D.N.Y. 1991); MBW Advertising Network, Inc. v. Century Business Credit Corp., 173 A.D. 2d 306, 569 N.Y.S.2d 682 (N.Y. 1991). Similarly, a cause of action for fraud in the inducement cannot be based solely upon a failure to perform contractual promises of future acts. See DS America (East), Inc. v. Chromagrafx Imaging Systems, Inc., 873 F. Supp. 786, 796 (E.D.N.Y. 1995) (citing C.B. Western Financial Corp. v. Computer Consoles, Inc., 122 A.D.2d 10, 504, N.Y.S.2d 179, 182 (N.Y. App. Div. 1986)). An alleged failure to fulfill such promises is a breach of contract and may be remedied only in an action on the contract. See id.; see also L. Fatato, Inc. v. Decrescente Dist. Co., 86 A.D.2d 600, 601, 446 N.Y.S.2d 120, 121 (N.Y. App. Div. 1982) (allegation "that [the] defendant made [an] agreement knowing that it would not abide by it, thereby misrepresenting its intention to [the] plaintiff [.] . . . says nothing which is not legally embraced by [a cause] of action for breach of contract"); Canstar v. Jones, 212 A.D. 452, 453, 622 N.Y.S.2d 730, 731 (N.Y. App. Div. 1995) (decrying "an improper attempt to recast the breach of contract claim in terms of fraud").

Even accepting as true all of Plaintiff's allegations about the terms of the Distribution Agreement, the Complaint merely alleges breach of contract, not fraud or fraud in the inducement. Plaintiff has a remedy for such alleged misconduct – a breach of contract claim, which is set forth in Count V. On this ground alone, the "fraud" claims of Counts I and II should be dismissed.

B. THE COMPLAINT FAILS TO PLEAD FRAUD WITH PARTICULARITY

Another basis for dismissing Plaintiff's fraud claims is that the Complaint fails to allege fraud with the specificity required by Fed. R. Civ. P. 9(b). This rule provides that "[i]n all

[4] For purposes of this motion only, and without waiving any rights with respect to choice of law, Childcraft Defendants will assume New York law applies.

averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." The Second Circuit "has read Rule 9(b) to require that a complaint [alleging fraud] (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." Rombach v. Chang, 355 F.3d 164, 170 (2d Cir. 2004). The pleading must be sufficiently particular to serve the three goals of Rule 9(b), which are to provide a defendant with fair notice of the claims against it, to protect a defendant from harm to its reputation or goodwill by unfounded allegations of fraud, and to reduce the number of strike suits. See DiVittorio v. Equidyne Extractive Indus., Inc., 822 F.2d 1242, 1247 (2d Cir. 1987) (citing Reingold v. Deloitte Haskins & Sells, 599 F. Supp. 1241, 1266 (S.D.N.Y. 1984)); O'Brien v. Price Waterhouse, 740 F. Supp. 276, 279 (S.D.N.Y. 1990), aff'd, 936 F.2d 674 (2d Cir. 1991). The Complaint falls far short of these requirements.

As to the time when the alleged misrepresentations were made, the Complaint offers only a vague reference to a period "on, about, or immediately proceeding [sic] the making of the . . . agreement[.]" (Compl. para. 13). The place where the alleged misrepresentations were made is not identified. Indeed, the Complaint remarkably does not even specify which of the defendants made the alleged misrepresentations, merely referencing "defendants." This defect alone is fatal: where multiple defendants are involved in an alleged fraud, the fraud must be particularized as to each one of them. See Lou v. Belzberg, 728 F. Supp. 1010, 1022 (S.D.N.Y. 1990); see also Oechsner v. Connell Ltd. P'ship, 283 F. Supp. 2d 926 (S.D.N.Y. 2003) (pleading unspecified false statements by corporation's chairman "and others" allegedly made to "various employees"

at "various meetings" did not satisfy time, place, speaker and content requirements necessary for allegations of fraudulent concealment).

Finally, the fraud allegations also are insufficient because they are made "upon information and belief." (Comp. para. 13, 15-16). Accusations of fraud may not rest upon allegations made on information and belief. See Mills v. Polar Molecular Corp., 12 F.3d 1170, 1175 (2d Cir. 1993); Di Vittorio v. Equidyne Extractive Indus., Inc., 822 F.2d 1242, 1247 (2d Cir. 1987).

The Federal Rules are clear: the serious allegation of fraud requires more than vague assertions "upon information and belief" of fraud committed somewhere, at some time, by someone. Rather, Plaintiff must set forth specific facts supporting its claim. The Complaint is woefully lacking in any such facts. As a matter of law, Plaintiff fails to state a claim for fraud, and Counts I and II should be dismissed.

II. THE CONVERSION CLAIM SHOULD BE DISMISSED

Plaintiff's conversion claim – Count III – is nothing more than a duplicative rephrasing of other claims. Childcraft Defendants allegedly converted "monies and the proceeds of sales due plaintiff" by breach of contract, breach of fiduciary duty, "and/or" by selling the Seat Pocket. (Compl. para. 33). The conversion claim, in other words, simply seeks money damages for the same alleged conduct underlying other causes of action in the Complaint. Plaintiff misuses the tort of conversion, and the claim should be dismissed.

A. Money Cannot Be Converted, Except In Exceptional Circumstances Not Present Here

Conversion is a tort that involves the unauthorized taking of specific, identifiable property to which the plaintiff has an immediate right of possession. See Independence Discount Corp. v. Bressner, 47 A.D.2d 756, 757, 365 N.Y.S.2d 44, 46 (N.Y. App. Div. 1975) (citing

cases); Laurent v. Williamsburg Sav. Bank, 28 Misc. 2d 140, 143-44, 137 N.Y.S.2d 750, 754-55 (N.Y. 1954). A right to money damages is not "property" that is subject to conversion. Money cannot be converted unless it is specifically identifiable – for example, a specific $20 bill with a specific serial number – or unless it is placed in a specially segregated or designated account or fund. See id.; Peters Griffin Woodward, Inc. v. WCSC, Inc., 88 A.D.2d 883, 883-84, 452 N.Y.S.2d 599, 600 (N.Y. App. Div. 1982). For this reason, then, a plaintiff cannot sue for conversion "where damages are merely being sought for breach of contract." Id. at 884; see also Laurent, 137 N.Y.S.2d at 754-55 (conversion "cannot be predicated upon an equitable interest or a mere breach of contract obligation") (internal quotations and citations omitted). In other words, a conversion claim is not an appropriate means to seek general money damages compensable through other claims. Yet this is exactly what Plaintiff is attempting to do. The conversion claim fails as a matter of law and should be dismissed.

B. The Economic Loss Doctrine Bars Plaintiff's Tort Action For Conversion

To the extent Plaintiff's conversion claim is premised on a breach of the Distribution Agreement, it also is barred by the economic loss doctrine. The economic loss doctrine is designed to maintain the distinction between contract and tort law. In essence, the doctrine prohibits a plaintiff from suing in tort for breach of a contractual duty.

> It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent on the contract.

Bristol-Myers Squibb, Indus. Div. v. Delta Star, Inc., 206 A.2d 177, 620 N.Y.S.2d 196 (N.Y. App. Div. 1994) (internal quotations and citations omitted). "The economic loss rule reflects the principle that damages arising from the failure of the bargained-for consideration to meet the

expectations of the parties are recoverable in contract, not tort." Id., 206 A.2d at 181; 620 N.Y.S.2d at 198-99. Thus, for claims alleging only economic loss (as opposed to injury to person or property), "the usual means of redress is an action for breach of contract; a tort action for economic loss will not lie." Shred-It USA, Inc. v. Mobile Data Shred, 222 F. Supp. 2d 376, 379 (S.D.N.Y. 2002). Childcraft Defendants' alleged duties to Plaintiff are not imposed by tort law, but rather are imposed by the express terms of the Distribution Agreement, the existence of which is admitted. The conversion claim, therefore, is barred by the economic loss doctrine and should be dismissed.

III. THE FOURTH CAUSE OF ACTION FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

The parameters of Plaintiff's Fourth Cause of Action are hard to discern. Plaintiff alleges "deceptive trade, unfair business practices, misappropriation of trade secrets and unfair competition." Plaintiff apparently has lumped several distinct claims within a single cause of action. Regardless, the allegations are insufficient to support any of the purported claims.

A. The Seat Sack Is Not A Trade Secret

In order to state a claim for misappropriation of trade secrets, the Complaint must identify information that is secret. See Lehman v. Dow, Jones & Co., Inc., 783 F.2d 285, 298 (2d Cir. 1986). Here, the only reasonable reading of the Complaint is that the Seat Sack itself is the alleged "trade secret." (Compl. para. 13(d)). Yet the Complaint also alleges that the Seat Sack is marketed and sold to schools across the country and even "throughout the world." (Compl. para. 12). A product that is marketed to the public cannot be a trade secret, as "secrecy is necessarily lost when the design or product is placed on the market." See Linkco, Inc. v. Fujitsu, Ltd., 230 F. Supp. 2d 492, 498 (S.D.N.Y. 2002). The Complaint therefore fails to state a claim for misappropriation of a trade secret.

B. Section 349 of New York General Business Law Protects The Consuming Public From "Deceptive Trade Practices," Not Parties To Private Contracts

Childcraft Defendants do not know precisely what Plaintiff means by "deceptive trade practices," but any such practices would be governed by New York General Business Law § 349. This statute is expressly oriented to the protection of consumers within the general public and requires the claimant to establish that the alleged deceptive act or practice was directed to the consuming public at large. See Bangkok Crafts Corp. v. Capitol Di San Pietro In Vaticano, 331 F. Supp. 2d 247, 256 (S.D.N.Y. 2004). Accordingly, "[p]rivate contract disputes, unique to the parties [do] not fall within the ambit of the statute." Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 25, 647 N.E.2d 741 (N.Y. 1995). In so limiting the application of the statute, the New York Court of Appeals stated, "We are mindful of the potential for a tidal wave of litigation against businesses that was not intended by the Legislature. . ." Id., 85 N.Y.2d at 26. Accordingly, misrepresentations covered by the statute are "limited to those likely to mislead a reasonable consumer acting reasonably under the circumstances." Id. (emphasis added). Here, so far as Childcraft Defendants are able to tell, the Complaint concerns a private dispute between Plaintiff and Childcraft Defendants. The Complaint fails to state a claim under N.Y. G.B.L. § 349.

C. The "Unfair Competition" Claim Also Fails

The vague and conclusory allegations of "unfair competition" making up the remainder of the Fourth Cause of Action do not set forth any discernible or distinct claim, and therefore should be dismissed.

D. At Minimum, Plaintiff Should Be Compelled to Restate Its Fourth Cause of Action So That Childcraft Defendants Have a Meaningful Opportunity to Respond

At the very least, Plaintiff should be required to re-plead the "unfair competition" allegations in a more definite statement that gives the Childcraft Defendants meaningful notice of Plaintiff's claims. See Bangkok Crafts, 331 F. Supp. 2d at 255 (dismissing unfair competition claim).

An order compelling a more definite statement under Fed. R. Civ. P. 12(e) is appropriate when a complaint pleads a viable legal theory, but is so unclear that the opposing party cannot respond to the complaint. See Pelman v. McDonald's Corp., 396 F. Supp. 2d 439, 443 (S.D.N.Y. 2005). While Childcraft Defendants do not believe Count IV pleads a viable legal theory for the reasons stated above, Childcraft Defendants must confess that they are unsure just what is alleged in Count IV. To the extent the Court concludes Count IV articulates some viable theory of recovery, Childcraft Defendants request an order compelling Plaintiff to elucidate that theory.

IV. THERE IS NO BASIS FOR THE STAND-ALONE "ATTORNEY FEES" CLAIM

Plaintiff's Sixth Cause of Action seeks "an award of attorney's fees and costs in favor of the Plaintiff and against the defendants." (Compl. para. 42). This claim is inappropriate and should also be dismissed. Absent a specific contractual fee-shifting clause or statutory provision, the general rule is that a prevailing party is not entitled to recover attorney fees from the losing party. See Hunt v. Sharp, 85 N.Y.2d 883, 626 N.Y.S.2d 57, 649 N.E.2d 1201 (N.Y. 1995) (prevailing litigant ordinarily cannot collect attorney fees from unsuccessful opponents); see also Feeney v. Licari, 131 A.D.2d 539, 516 N.Y.S.2d 265 (N.Y. App. Div. 1987) (addressing statutory basis for attorney fee award). Plaintiff, however, claims entitlement to attorneys' fees as a result of Childcraft Defendants' alleged breach of fiduciary duties. (Compl. para. 42; see

also Plaintiff's May 23, 2007 correspondence to the Court). The Complaint, however, fails to adequately allege the existence of a fiduciary relationship.

In order to pursue a breach of fiduciary duty claim, there must first be a fiduciary relationship between the parties. See Whitney v. Citibank, N.A., 782 F.2d 1106, 1115 (2d Cir. 1986). No such relationship existed here. A conventional business relationship where the parties deal at arm's length does not create a fiduciary relationship. See In re Mid-Island Hosp., Inc., 276 F.3d 123, 130 (2d Cir. 2002); SNS Bank, N.V. v. Citibank, N.A., 777 N.Y.S.2d 62, 65 (N.Y. App. Div. 2004). Rather, a fiduciary relationship arises in limited circumstances where "a party reposed confidence in another and reasonably relied on the other's superior expertise and knowledge," such as a relationship between attorney and client, executor and heir, or investment manager and investor. See Wiener v. Lazard Freres & Co., 672 N.Y.S.2d 8, 14 (N.Y. App. Div. 1988). Here, Childcraft agreed to offer the Seat Sack for sale through its catalog and on its website (as it does with hundreds of other products.) The Distributor Agreement reflects a quintessential arms' length commercial transaction, not the establishment of the sort of intimate relationship of trust that gives rise to fiduciary duties. Plaintiff's bare and conclusory allegations that Childcraft Defendants acted in a "fiduciary capacity" (Compl. para. 42) do not change that fact. See In re Livent, Inc. Noteholders Sec. Litig., 151 F. Supp. 2d at 404 (On a motion to dismiss, "[t]he court need not credit conclusory statements unsupported by assertions of facts or legal conclusions and characterizations presented as factual allegations."). Plaintiff cannot plead facts showing the existence of a fiduciary relationship, and thus has no basis to demand attorney fees on the basis of such a relationship.

V. THE EXISTENCE OF A CONTRACT BARS THE UNJUST ENRICHMENT CLAIM

Plaintiff's Thirteenth Cause of Action asserts a claim for unjust enrichment. Under New York law, however, an enforceable contract between the parties concerning a particular subject matter precludes recovery in unjust enrichment for claims arising out of that subject matter. See Clark-Fitzpatrick, Inc. v. Long Island R.R. Co., 70 N.Y.2d 382, 388-89 (N.Y. 1987) (noting that quasi-contractual relief is only available "where there has been no agreement or expression of assent, by word or act, on the part of either party involved"); see also Zito v. Fischbein, Badillo, Wagner & Harding, 831 N.Y.S.2d 25, 35 N.Y.S.2d 306, 307 (1st Dep't 2006) (existence of express oral agreement bars unjust enrichment claim). Here, paragraphs 80 and 81 of Plaintiff's Complaint simply reiterate and incorporate by reference the previous allegations of the Complaint. No additional facts are set forth that provide any basis to conclude that Childcraft Defendants was somehow "enriched" through an act of the Plaintiff by any means other than through the Distribution Agreement. Accordingly, the unjust enrichment claim should be dismissed.

CONCLUSION

Based on the foregoing, Childcraft Defendants move the Court to dismiss Counts I, II, III, IV, VI, and XIII. As an alternative to the dismissal of Count IV, Childcraft Defendants request that the Court order Plaintiff to set forth a more definite statement with respect to that claim.

Dated: June 27, 2007

Respectfully submitted,

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: s/Richard W. Mark

Richard W. Mark
David M. Fine
666 Fifth Avenue
New York, NY 10103

Attorneys for Defendants,
Childcraft Education Corp. and
School Specialty, Inc.

OF COUNSEL:

Nicholas A. Kees
Anthony S. Baish
Mark E. Schmidt
GODFREY & KAHN, S.C.
780 North Water Street
Milwaukee, WI 53202-3590

EDWARD J. CARROLL, ESQ.
2733 Route 209
Kingston, New York 12401
Telephone: 845-338-5977
Facsimile: 845-338-5975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

SEAT SACK, INC.,

Plaintiff,

-against-

NOTICE OF CROSS-MOTION

Case No. 07-CV-3344 (RJH)(DFE)

CHILDCRAFT EDUCATION CORP.;
US OFFICE PRODUCTS COMPANY;
US OFFICE PRODUCTS NORTH
ATLANTIC DISTRICT, INC.; and
SCHOOL SPECIALTY, INC.,

Defendants.

----------x

SIRS:

PLEASE TAKE NOTICE, that upon the annexed Affidavit of EDWARD J. CARROLL, ESQ., sworn to on the 24th day of July, 2007, the Affidavit of Ann McAlear, sworn to on the 21st day of March, 2007, the exhibits submitted in support thereof, and the accompanying Memorandum of Law, and upon all the pleadings filed herein, plaintiff, SEAT SACK, INC., will cross-move this Court, before the HONORABLE RICHARD J. HOLWELL, United States District Judge, in the United States Courthouse for the Southern District of New York, 500 Pearl Street, Courtroom

17B, New York, New York 10007-1312, on the 8th day of August, 2007, or any date thereafter convenient to the Court and parties, for an Order, pursuant to Rule 65(a) of the Federal Rules of Civil Procedure granting plaintiff a preliminary injunction, during the pendency of this action, enjoining the defendant(s) from (a) advertising, marketing and/or selling their product known as "Seat Pocket", either on the wholesale, or retail market, and/or (b) continuing their deceptive trade practices of (1) artificially inflating the sale price of plaintiff's "Seat Sack" to induce sales of "Seat Pocket"; and/or (2) operating their website which, when a general consumer searches for "Seat Sack", transfers that consumer to a "Seat Pocket" under conditions which mislead and/or confuse the public; and/or (3) advertising defendants' "Seat Pocket" as a "Seat Sack cc edu"; and/or (4) in any manner competing with plaintiff's product "Seat Sack", together with such other and further relief as to the Court may deem just and proper under the circumstances.

Dated: July 24, 2007

Respectfully submitted,

EDWARD J. CARROLL, ESQ.
Attorney for Plaintiff, SEAT SACK, INC.
2733 Route 209
Kingston, New York 12401
(845) 338-5977

TO: ORRICK, HERRINGTON & SUTCLIFF, LLP
Att: RICHARD W. MARK, ESQ. and DAVID M. FINE, ESQ.
Attorneys for Defendants, CHILDCRAFT EDUCATION CORP.
and SCHOOL SPECIALTY, INC.
666 Fifth Avenue
New York, New York 10103

GODFREY & KAHN, S.C. (OF COUNSEL)
Att: ANTHONY S. BAISH, ESQ., MARK E. SCHMIDT, ESQ. and NICHOLAS A. KEES, ESQ.
Attorneys for Defendants, CHILDCRAFT EDUCATION CORP. and SCHOOL SPECIALTY, INC.
780 North Water Street
Milwaukee, Wisconsin 53202

YOUNG, CONAWAY, STARGATT & TAYLOR, LLP
Att: SEAN M. BEACH, ESQ.
Attorneys for USOP LIQUIDATING LLC (f/k/a US OFFICE PRODUCTS COMPANY and US OFFICE PRODUCTS NORTH ATLANTIC DISTRICT, INC.)
P.O. Box 391
Wilmington, Delaware 19899

EDWARD J. CARROLL, ESQ.
2733 Route 209
Kingston, New York 12401
Telephone: 845-338-5977
Facsimile: 845-338-5975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

SEAT SACK, INC.,

Plaintiff,

-against-

CHILDCRAFT EDUCATION CORP.;
US OFFICE PRODUCTS COMPANY;
US OFFICE PRODUCTS NORTH
ATLANTIC DISTRICT, INC.; and
SCHOOL SPECIALTY, INC.,

Defendants.

----------x

AFFIDAVIT

Case No. 07-CV-3344 (RJH)(DFE)

STATE OF NEW YORK)
COUNTY OF ULSTER) ss.:

EDWARD J. CARROLL, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice before this Court and represent the plaintiff herein. I submit this affidavit and the affidavit of Ann McAlear sworn to on the 12th day of March, 2007, in opposition to a motion to dismiss pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6), brought on by defendants, CHILDCRAFT EDUCATION CORP. (hereinafter referred to as "CHILDCRAFT") and SCHOOL SPECIALTY, INC. (hereinafter referred to as "SCHOOL SPECIALTY"), and in

support of the relief sought in plaintiff's, SEAT SACK's, annexed cross-motion, both of which are returnable before the HONORABLE RICHARD J. HOLWELL, United States District Judge, in the United States Courthouse for the Southern District of New York, 500 Pearl Street, Courtroom 17B, New York, New York 10007-1312, on August 8, 2007, or any date thereafter convenient to the Court and parties.

2. On or about March 5, 2007, plaintiff commenced the instant lawsuit in the Supreme Court of the State of New York, County of New York. Thereafter, following service, "CHILDCRAFT" and "SCHOOL SPECIALTY" moved to remove this case to the United States District Court of the Southern District of New York. Defendants, US OFFICE PRODUCTS COMPANY and US OFFICE PRODUCTS NORTH ATLANTIC DISTRICT, INC., filed for bankruptcy protection and have not appeared. To date, no voluntary disclosure has been made by the defendants pursuant to FRCP Rule 26, nor have the parties been able to agree on a proposed case management plan to allow for the scheduling of discovery and depositions.

3. Notwithstanding the foregoing, defendants' counsel, without any sufficient evidence or testimony, now moves this Court for an order dismissing plaintiff's complaint pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure. The only documentation produced is plaintiff's verified complaint and a one page document entitled "Childcraft Education Corp. Exclusives Growing Years Catalog". In essence, defendants' claim is simply that plaintiff's complaint fails to state a claim upon which relief can be granted.

4. Defendants acknowledge that the Court should accept all of the allegations contained in plaintiff's complaint as "true" for the purposes of this motion. Furthermore, defendants, contrary to their notice of motion, do not seek to dismiss all causes of action contained in plaintiff's complaint. Instead, defendants' counsel are only moving to dismiss those causes of action which allege fraud, conversion, "deceptive trade practices", "attorney's fees" and unjust enrichment upon their claim that they fail as a matter of law and should be dismissed. Nothing can be further from the truth.

5. Defendants' counsel have not allowed plaintiff any discovery, to date, nor has the plaintiff been allowed to depose any of the defendants' officers or principals. Therefore, this motion is premature. Defendants, while denying plaintiff any discovery, are attempting to "gut" plaintiff's complaint before plaintiff has had any opportunity to obtain and provide those particulars. For this reason alone, defendants' motion should be summarily denied at this stage of the litigation. If any relief is granted, plaintiff should be allowed the opportunity to amend its pleadings.

6. Contrary to defendants' claims, it is respectfully submitted that plaintiff's causes of action for fraud, conversion, "deceptive trade practices", "attorney's fees" and unjust enrichment are sufficiently set forth in plaintiff's complaint and are not vague. Although drawn originally for the State Court, and based to some extent upon information and belief, sufficient facts are set forth in plaintiff's complaint. Any additional details of the defendants' participation in the torts for which they now seek

dismissal are totally within those principals' knowledge and discovery should be permitted. Dismissal, without an opportunity for discovery, would be unjust.

7. Plaintiff further alleges that "CHILDCRAFT" is totally owned and controlled by "SCHOOL SPECIALTY" and acts at its direction. This fact is established by the defendants' own correspondence. (See Exhibit "F"). Defense counsel also does not dispute that both defendants are in the business of marketing and distributing educational aides, products and supplies to educational institutions. Defense counsel, likewise, does not dispute that in late 1999, at least one of defendants, "CHILDCRAFT", entered into an agreement whereby it agreed that it would serve as a distributor of "Seat Sack", a product developed by plaintiff, SEAT SACK, INC., for which the plaintiff holds a patent. "Seat Sack" is an organizational device which is secured to the back of a student's chair and contains compartments to organize the student's supplies. Defense counsel also admits, for purposes of this motion, that "CHILDCRAFT" promised to act as plaintiff's fiduciary and in plaintiff's best interest in distributing the "Seat Sack"; to timely account for and remit all payments from the sales of "Seat Sack"; to not manufacture or distribute any product that competes with "Seat Sack"; and to protect plaintiff's United States design patent as well as plaintiff's State and Federal trademark rights. (See page 3 of defendants' memorandum of law). It is by virtue of this fiduciary relationship, breached by the defendant, and its further acts of defrauding the public by substituting its own "knock off product", for the plaintiff's product, that the plaintiff now brings suit against these defendants.

8. Plaintiff's complaint alleges that while defendant, "CHILDCRAFT", was acting under the control of "SCHOOL SPECIALTY", and in a fiduciary capacity, as plaintiff's distributor, with the promise to use due diligence and good faith in selling plaintiff's product, and to refrain from competition and after plaintiff had allowed defendant to include its product in defendant's catalog, with a notice to purchasers that additional orders could be made through the defendant's company, "CHILDCRAFT" secretly manufactured a "knock-off product" known as a "Seat Pocket" and established a web site to defraud the plaintiff. The defendant then utilized plaintiff's trade name and this product to attract customers for the sale of its own "knock-off product" known as a "Seat Pocket", which it sold in direct competition to the plaintiff. When a user searched the internet for the word "Seat Sack", instead of using due diligence to promote plaintiff's product, the defendant established a web site which automatically transferred the customer to its own "knock-off product" known as a "Seat Pocket". The website then presented the customer with a misleading name and description together with an artificially rigged purchase price, whereby plaintiff's product was purportedly being sold at a greater price than defendants' own "knock-off product". As a result of the foregoing, the customer was ultimately misled into believing that he or she was purchasing the plaintiff's product, when, in fact, he or she was purchasing the defendants' "knock-off copy", or, that he or she was purchasing a cheaper, but same product. After the purchase, defendants' "knock-off product" was then supplied, and the profits were retained by the defendants. These actions, carried out without the knowledge and consent of plaintiff, resulted in a breach of a fiduciary

duty owed to plaintiff. These breaches were committed while the defendants were acting as plaintiff's distributing agent and, constituted "self-dealing" in that defendants utilized plaintiff's good will, trade name and patented product to sell its own "knock-off product" in direct competition with plaintiff. The defendants' acts also induced breaches of contract with plaintiff's established customers whereby the defendants realized vast profits at the plaintiff's expense.

9. The defendants would have this Court believe that this is simply an action for a breach of contract, trade mark infringement and patent infringement. Defendants claim that plaintiff's causes of action for fraud, conversion, "deceptive trade practices", "attorney's fees" and unjust enrichment fail as a matter of law and should be dismissed.

10. Plaintiff is not suing, alone, upon a claim for a failure to provide contractual promises, as would be in the case of the defendants in failing solely to use due diligence in the sale of the "Seat Sack". Instead, independently of the contract, defendants have extrinsicly carried out a scheme of "self-dealing" to defraud the plaintiff and numerous other contributing suppliers, together with the general public. These independent tortuous acts were done to fraudulently obtain the good will and value of the trade name of plaintiff's product, while counterfeiting it, and then utilizing misleading and deceptive advertising to sell that counterfeit and to retain those profits. The defendants' independent actions have converted sales and proceeds which should have gone to plaintiff, instead of into the defendants' coffers. Public confusion is clearly set forth in the facts of this case which support plaintiff's causes of action for

unfair competition, fraud, conversion, and unjust enrichment. Control of the plaintiff's product and advertising was provided to the defendants in good faith. This good faith and the plaintiff's rights were violated as a result of the independent illegal acts of the defendants and their ongoing acts of deception in creating a "knock-off product"; establishing a website to mislead and induce customers to purchase defendants' "knock-off product", in direct competition with plaintiff's patented "Seat Sack"; and their retention of those profits, which are independent acts, beyond their contractual obligations for which they may be independently prosecuted.

11. These independent acts were extrinsic to their obligations under the contract cause of action and stand alone. This is not simply a breach of contract where plaintiff is alleging that the defendants failed to diligently sell their product and included in their catalog. The independent acts of the defendants in obtaining an exclusive license to sell plaintiff's product, among others, and then creating a counterfeit "knock-off product" which they sold under a misleading name to the public, as plaintiff's product, and the retention of those profits constitute independent fraudulent acts which, without the contract, stand alone.

12. The affidavit of Ann McAlear sworn to on the 21st day of March, 2007 provides this Court with admissible evidence that the plaintiff has a reasonable chance of success, and that unless a preliminary injunction is granted, the plaintiff will suffer irreparable damage. Furthermore, the defendants have not shown this Court that they will suffer any damage if such relief were to be granted. For those reasons, a

preliminary injunction for the relief sought by plaintiff more particularly described in the annexed notice of cross-motion should be in all respects granted.

13. Plaintiff respectfully submits the accompanying memorandum of law in support of that position.

WHEREFORE, for all the foregoing reasons, it is respectfully requested that the relief sought in the defendants' motion be in all respects denied and that the relief sought in the plaintiff's cross-motion be in all respects granted, together with such other and further relief as to the Court may deem just and proper under the circumstances.

EDWARD J. CARROLL

Sworn to before me this
24th day of July, 2007.

NOTARY PUBLIC

Debra L. Leacock
Notary Public, State of New York
Qualified in Ulster County
Commission Expires January 14, 2011

TO: ORRICK, HERRINGTON & SUTCLIFF, LLP
Att: RICHARD W. MARK, ESQ. and DAVID M. FINE, ESQ.
Attorneys for Defendants, CHILDCRAFT EDUCATION CORP.
and SCHOOL SPECIALTY, INC.
666 Fifth Avenue
New York, New York 10103

GODFREY & KAHN, S.C. (OF COUNSEL)
Att: ANTHONY S. BAISH, ESQ., MARK E. SCHMIDT, ESQ.
and NICHOLAS A. KEES, ESQ.
Attorneys for Defendants, CHILDCRAFT EDUCATION CORP.
and SCHOOL SPECIALTY, INC.
780 North Water Street
Milwaukee, Wisconsin 53202

YOUNG, CONAWAY, STARGATT & TAYLOR, LLP
Att: SEAN M. BEACH, ESQ.
Attorneys for USOP LIQUIDATING LLC (f/k/a US OFFICE
PRODUCTS COMPANY and US OFFICE PRODUCTS NORTH
ATLANTIC DISTRICT, INC.)
P.O. Box 391
Wilmington, Delaware 19899

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

SEAT SACK, INC.,

Plaintiff,

-against-

CHILDCRAFT EDUCATION CORP.; US OFFICE PRODUCTS COMPANY; US OFFICE PRODUCTS NORTH ATLANTIC DISTRICT, INC.; and SCHOOL SPECIALITY, INC.,

Defendants.

----------x

AFFIDAVIT

Index #103040/07
RJI #
Assigned Judge:

STATE OF FLORIDA)
COUNTY OF COLLIER) ss.:

ANN MCALEAR, being duly sworn, deposes and says:

1. That I am the president of plaintiff, Seat Sack, Inc., and have personal knowledge of the facts which form the basis of the above entitled lawsuit. I submit this affidavit in support of the relief sought in the annexed Notice of Motion.

2. For sake of brevity, your deponent repeats and reiterates each and every allegation contained in plaintiff's annexed verified complaint with the same force and effect as if those allegations were more fully set forth at length herein. A copy of plaintiff's complaint is annexed hereto and made a part hereof

as Exhibit "A".

3. That your deponent established, organized and has acted as an officer, member of the board of directors and stockholder of SEAT SACK, INC. since its inception on or about June, 1999.

4. That your deponent is also the holder of an United States Patent bearing number Des. 358,731, dated May 30, 1995. I have always authorized SEAT SACK, INC. to utilize this patent in the manufacture and sale of a certain device known under its protected trademark name as "Seat Sack". This device is used for the storage of school supplies by students and attaches to the back of a student's chair. This device allows the student to organize his or her school supplies in various compartments contained therein. A copy of the foregoing patent is annexed hereto and made a part hereof as Exhibit "B".

5. That SEAT SACK, INC. manufactures and sells this device to private and public school districts throughout the world and this product is its primary source of income.

6. On or about November, 1999, plaintiff, SEAT SACK, INC. entered into a non-exclusive agreement with defendant, CHILDCRAFT EDUCATION CORP. for the distribution of plaintiff's trademarked and patented protected device to private and municipal school districts throughout the State of New

York, the United States of America, and numerous foreign markets.

7. SEAT SACK, INC., by virtue of this agreement, authorized CHILDCRAFT EDUCATION CORP. to act as its distributing agent for this product and to include it in the defendant's catalog for wholesale and retail sales to municipal and private school districts.

8. Upon information and belief, CHILDCRAFT EDUCATION CORP. is a subsidiary of and/or has acted for this purpose in concert with defendants, US OFFICE PRODUCTS COMPANY, US OFFICE PRODUCTS NORTH ATLANTIC DISTRICT, INC. and SCHOOL SPECIALITY, INC.

9. CHILDCRAFT EDUCATION CORP., through its officers, has always represented that it would use its best efforts to protect plaintiff's product from unfair business practices; that it would not compete with plaintiff; and that it would diligently promote sales of "Seat Sack" while acting as plaintiff's distributing agent. Relying upon those representations, plaintiff notified every purchaser of a "Seat Sack" that CHILDCRAFT was acting as its distributor by endorsing a notice on that product informing them that re-orders for "Seat Sack" could be obtained through CHILDCRAFT EDUCATION CORP.

10. However, your deponent has recently become aware that while CHILDCRAFT EDUCATION CORP. was purportedly acting as plaintiff's

distributor, it also began manufacturing a "knock off" of plaintiff's product known as a "Seat Pocket". In 2004, CHILDCRAFT EDUCATION CORP. requested a tariff classification for this product from China and Taiwan (see Exhibit "F"). The defendants, without the permission of the plaintiff, are selling this "knock off" product which is identical to plaintiff's "Seat Sack" in name, form, and function, instead of distributing plaintiff's "Seat Sack". These sales are being accomplished by misleading, unfair business practices and in direct competition with the plaintiff. This is not an isolated practice. Based upon an investigation conducted by your deponent, the defendants are not only violating the rights of plaintiff but also other manufacturers and all of their consumers by distributing "knock off" versions of their products (see Exhibit "C").

11. The duplication of plaintiff's product by "knock off" design and name is confusing to the public and purchasers are being deceived in believing that they are purchasing a "Seat Sack" when they are actually being sold defendants' "Seat Pocket".

12. To accomplish these sales, CHILDCRAFT EDUCATION CORP., while acting in concert with the other defendants, has improperly established a website which transfers any inquiries made by purchasers seeking plaintiff's "Seat Sack" to a website where only CHILDCRAFT's own "knock off" product,

known as a "Seat Pocket" is for sale. This practice is clearly deceptive and in direct competition with plaintiff's product which the defendants should be using good faith to distribute. A copy of defendants' website referred to is annexed hereto and made a part hereof as Exhibit "D".

13. In addition, CHILDCRAFT, while acting as plaintiff's distribution agent has artificially raised the price of plaintiff's "Seat Sack" in the market place while at the same time it is distributing its own "Seat Pocket" at a lower price. This practice unfairly prohibits any competition by "Seat Sack" and allows the defendants to convert all of the profits from those sales for their own purposes.

14. Plaintiff recently became the successful bidder with the New York City Department of Education (see Exhibit "E"). However, sales did not materialize as expected. Your deponent has learned that the defendants are continuing to use plaintiff's trademark "Seat Sack" to gain access to this market and other public municipal school districts by misrepresenting that their "knock off" product known as a "Seat Pocket" is the same as plaintiff's "Seat Sack". By use of this deceptive practice, CHILDCRAFT is gaining eligibility for these sales and is reaping the benefit of plaintiff's advertising campaigns, patented design and good will. Representatives of schools all over the country are

ordering "Seat Sacks" on their computer systems but the name of "Seat Sack" is being manipulated on their school e-catalog searches by the defendants via unfair business practices and in violation of plaintiff's patent and trademark rights. Defendants are claiming that their "knock off" product is the same as plaintiff's "Seat Sack" by advertising their "knock off" product as a "Seat Sack cc edu". Not only is this practice in direct breach of its fiduciary duty owed to plaintiff to use good faith and reasonable efforts to distribute and market plaintiff's product, such deceptive practice is also in direct competition with plaintiff's tradename by confusing the public. This unlawful practice has rendered plaintiff's expenditure of thousands of dollars to protect its product by advertising and marketing worthless.

15. In March 2006, your deponent was informed by the New York City School District that only plaintiff's patented "Seat Sack" was being put on the bidding list. After the bids were opened, your deponent was informed that SEAT SACK, INC. was the lowest bidder. Notwithstanding the foregoing, no sales were generated, contrary to plaintiff's expectations. I then acquired a fax of a computer screen being used by a New York City school teacher (see Exhibit "E"). This teacher had contacted your deponent to ask why plaintiff's prices were different in her computer than the prices we advertised elsewhere. These

types of inquiries and confusion by the public have continued due to the unfair labor practices of the defendants. As you can see from Exhibit "E", the teacher had searched "Seat Sack" and was immediately transferred to a product known as "Seat Sack cc edu". This referral and marketing practice, by defendants, transfers a user looking for "Seat Sack" to a product known as "Seat Sack cc edu" which is actually CHILDCRAFT's "knock off" product known as a "Seat Pocket".

16. Such misrepresentations have caused plaintiff to sustain lost sales in excess of several million dollars and plaintiff and has no adequate remedy at law.

17. "Seat Sack, Inc." is a small family owned business which relies upon the sales of the "Seat Sack" as its total source of income. It is patently improper for the defendants, as large corporations to ignore their fiduciary responsibility to plaintiff by intentionally sabotaging its sales.

18. Without the issuance of a preliminary injunction during the pendency of this action, granting the relief sought in the annexed Notice of Motion, the plaintiff will be forced out of business due to the continuation of illegal "knock off" sales by CHILDCRAFT. If that occurs, this lawsuit will be rendered moot

before any final relief can be obtained. Obviously, defendants' actions are in direct conflict with their duties as distributors for plaintiff's protected product.

19. The preliminary relief sought herein should be granted in order to avoid irreparable harm to the plaintiff during the pendency of this lawsuit.

20. That no prior application for the relief sought herein has been made to any other Court or Judge.

WHEREFORE, for all of the foregoing reasons, it is respectfully requested that the relief sought in the annexed Notice of Motion be in all respects granted.

ANN MCALEAR

Sworn to before me this
21st day of March, 2007.

NOTARY PUBLIC

BARBARA ADONY

BARBARA H. ADONY
Notary Public - State of Florida
My Commission Expires Nov 1, 2010
Commission # DD 611070
Bonded Through National Notary Assn.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

SEAT SACK, INC.,

Plaintiff,

-against-

CHILDCRAFT EDUCATION CORP.; US OFFICE PRODUCTS COMPANY; US OFFICE PRODUCTS NORTH ATLANTIC DISTRICT, INC.; and SCHOOL SPECIALITY, INC.,

Defendants.

SUMMONS
WITH NOTICE

Index # 103040/07
Date Filed: 3/5/2007

----------x

TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney(s) within 20 days after the service of this summons, exclusive of the day of service, (or within 30 days after the 10service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded herein.

Plaintiff designates New York County as the place of trial. The basis of venue is that defendant, CHILDCRAFT EDUCATION CORP., is a domestic corporation organized in the County of New York under and by virtue of the Laws of the State of New York. Defendants, US OFFICE PRODUCTS COMPANY, US OFFICE PRODUCTS NORTH ATLANTIC DISTRICT, INC., and SCHOOL SPECIALITY, INC., are foreign corporations authorized to and/or doing business within the County of New York and State of New York.

Dated: February 6, 2007

Yours, etc.

EDWARD J. CARROLL, ESQ.
Attorney for Plaintiff
2733 Route 209
Kingston, New York 12401
(845) 338-5977

Notice: The object of this action involves breach of contract, fraud, conversion, misappropriation of trade secrets, unfair competition, and unjust enrichment.

The relief sought is monetary damages and injunctive relief.

Upon your failure to appear, judgment will be taken against you for the sum of $5,000,000.00 as and for compensatory damages and $15,000,000.00 as and for tremble, exemplary and punitive damages all with interest from November 1, 1999 and the costs and disbursements of this action.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

SEAT SACK, INC.,

Plaintiff,

-against-

CHILDCRAFT EDUCATION CORP.; US OFFICE PRODUCTS COMPANY; US OFFICE PRODUCTS NORTH ATLANTIC DISTRICT, INC.; and SCHOOL SPECIALITY, INC.,

Defendants.

----------x

VERIFIED COMPLAINT

Index # 103040/07

Date Filed: 3/5/2007

Plaintiff, complaining of the defendants, by its attorney, EDWARD J. CARROLL, ESQ., as and for its verified complaint respectfully sets forth and alleges as follows:

1. Plaintiff, SEAT SACK, INC., was and still is at all times hereinafter mentioned:

A. A foreign corporation organized under and by virtue of the laws of the State of Florida having a principal place of business situated at 5910 Taylor Road, in the City of Naples, State of Florida 34109, and a mailing address of P.O. Box 9732, Naples, Florida 34101; and

B. Established for the purpose of engaging in the business of manufacturing and selling, by wholesale and retail marketing, a certain

product known as a "Seat Sack" which is used by pupils to organize their school supplies by hanging plaintiff's device over the back of their chair(s) and utilizing individual pouches contained therein for storage of school supplies, including but not limited to books, pencils, pens, etc.

2. At all times herein mentioned, plaintiff's aforementioned device was known to the defendants to be protected under and by virtue of State and Federal Law, including but not limited to the United States Patent Number: Des. 358, 731 issued to plaintiff on or about May 30, 1995.

3. Upon information and belief and at all times hereinafter mentioned, defendants, CHILDCRAFT EDUCATION CORP., was and still is a domestic corporation organized under and by virtue of the laws of the State of New York on or about October 24, 1952 in the County of New York, State of New York which maintains a principal place of business situated at 2918 Old Tree Drive, Lancaster, PA 17603.

4. Upon information and belief and at all times hereinafter mentioned, defendant, CHILDCRAFT EDUCATION CORP., did and still does authorize C T Corporation System, 111 8th Avenue, New York, New York 10011 to act as its designated agent for the service of legal process.

5. Upon information and belief and at all times hereinafter mentioned, defendants, US OFFICE PRODUCTS COMPANY and US OFFICE

PRODUCTS NORTH ATLANTIC DISTRICT, INC., are both foreign corporations which were incorporated in the State of Delaware and authorized to do business in the State of New York with a designated agent for service of process at 440 New York Avenue Northwest, Suite 310, Washington, DC 20005. SCHOOL SPECIALITY, INC., is a foreign corporation originally incorporated in the State of New York and thereafter discontinued and then incorporated in the State of Delaware but which is authorized to do business in the State of New York with a designated agent for service of process at C T Corporation System, 111 8th Avenue, New York, New York 10011.

6. That at all times hereinafter mentioned herein, all of the above named defendants have acted in concert with CHILDCRAFT EDUCATION CORP. in committing those acts against plaintiff as are alleged hereinafter herein.

7. Upon information and belief and at all times hereinafter mentioned, each of the defendants have/has held itself/themselves out to the general public, including plaintiff, as a distributor(s) for the wholesale and retail sale of various school products and services, including plaintiff's aforesaid "Seat Sack" organizer, to municipal and private schools, their districts, and/or their authorized agents and/or employees throughout the world, including the United States of America and specifically within the State of New York, for use in their daily educational curriculum.

8. Upon information and belief and at all times herein mentioned, the defendants did transact business within the State of New York and/or did commit a tortious act within that state, and/or did commit a tortious act without that State, all causing injury and damages to the plaintiff and/or did enter into a agreement with plaintiff which is the subject of this litigation within that State and regularly does or solicits business, or does engage in any other persistent course of conduct, and/or derives substantial revenue from goods used or consumed or services rendered in the State of New York, and/or expects or should reasonably expect that its acts will have consequences in the State of New York and/or derives substantial revenue from interstate or international commerce and/or owns, uses or possesses real property situated within the State of New York.

9. Upon information and belief, at all times hereinafter mentioned, defendants have transacted and/or continue to transact business in the County of New York and the State of New York and are subject to the jurisdiction of this Court.

10. This action arises under the Federal Trademark Act, 15 U.S.C. Section 1051, et seq., and other laws adopted by the State of New York, including but not limited to the Uniform Fiduciaries Act; unfair trade practices and unlawful packaging trade; and unfair competition; and Section 360-l of the

General Business Law of the State of New York. Subject matter jurisdiction over this action is also conferred upon this Court by 15 U.S.C. Sections 1121 and 1125, 28 U.S.C. Section 1331 and 28 U.S.C. Section 1338 and jurisdiction pendent thereto.

AS AND FOR A FIRST CAUSE OF ACTION IN BASED IN FRAUD IN THE INDUCEMENT IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENANTS

11. Plaintiff, SEAT SACK, INC., repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "10" of plaintiff's complaint as if those allegations were fully set forth at length herein.

12. On, about or during the month of November, 1999, plaintiff, as a result of fraudulent misrepresentations made by defendants and/or its employees while acting within the scope of their authority and in furtherance of the business interests of said defendants, did enter into an agreement with the defendants, whereby plaintiff agreed to allow the defendants to act as its distributor for present and future sales of plaintiff's aforesaid "Seat Sack", and defendants agreed to so act, in a fiduciary capacity and on behalf of plaintiff, as plaintiff's distributor for this product to municipal and private schools, their districts, and/or their authorized agents and/or employees throughout the world, including the United States of America and specifically within the State of

New York, for use by their pupils in their daily educational curriculum.

13. Upon information and belief, on, about or immediately proceeding the making of the aforesaid agreement, defendants, through its/their agents and/or employees, fraudulently represented to the plaintiff, for the sole purpose of inducing the plaintiff to enter into the aforesaid agreement, and with the intent to deceive, cheat and defraud plaintiff, and with full knowledge that the statements so made by them were not true, that:

A. The defendants would at all times act as plaintiff's fiduciary and distributor and would protect and promote the best interests of plaintiff and its aforesaid product; that defendants would faithfully adhere to and perform all of its/their obligations under the aforesaid agreement; and would distribute plaintiff's product in a good faith and diligent manner, and would promote plaintiff's product in all markets via promotional and catalog sales; and

B. All payments obtained as a result of any sale of plaintiff's aforesaid product would be timely made and accounted for; that defendants would carry out the distribution of plaintiff's product(s) using good business distribution practices; and would protect plaintiff's product as a protected patented device; would protect and promote plaintiff's property right in said device; that all of the plaintiff's existing and future customers would be serviced in the same manner and at the same rates and prices; that new sales

and markets for plaintiff's aforesaid product would be pursued by defendants on behalf of the plaintiff within and without the country; that defendants would not compete in the manufacture and/or distribution of said product or any likeness thereof, nor commit a breach of its fiduciary duty by entering into contracts for said product or any likeness thereof with any existing or future customers desiring plaintiff's product or any facsimile thereof; and that the defendants would at all times protect the integrity and solvency of the plaintiff's product and business; and

C. That the defendants would not act in any manner contrary to its fiduciary capacity as a distributing agent for the plaintiff's product; and

D. That plaintiff's business and/or its product(s) protected by a registered patent and/or trademark and/or its mark would be accurately promoted and protected in the general market for the benefit of the plaintiff.

14. On or about November, 1999, plaintiff herein wholly believing and relying upon the aforesaid statements and representations so made by the defendants and having no opportunity to ascertain the proof of any falsity thereof prior to the commencement of their agreement, did enter into an agreement with defendants whereby plaintiff did hold out the defendants to be its lawful distributor and non-exclusive licensee; and did allow the defendants to include plaintiff's product in their catalog and advertisements and did

thereafter provide "Seat Sacks" to defendants for subsequent sale to the general public, including the aforesaid private and municipal school districts and their agents and/or employees, up to and including August, 2004, and has sporadically continued to do so up to and including the present.

15. Upon information and belief, at the time of the making of the aforesaid agreement, defendants had notice of each and every term and condition and representation so made by its representatives and knew that the plaintiff was relying thereon.

16. Upon information and belief, each and every statement, representation, covenant and promise so made by defendants herein was false and untrue and known by the defendants to be so at the time said statement was made and all of said statements were intentionally and fraudulently made with the intent to cheat and defraud the plaintiff herein.

17. That from the inception of defendants' knowledge and possession of the plaintiff's aforesaid product and contact with plaintiff's customers and market, defendants have failed to perform its/their obligations under its aforesaid distributorship agreement and has/have acted in breach of its/their fiduciary responsibility to plaintiff.

18. That defendants' unlawful acts committed since 1999 were done with gross malice and without the knowledge and consent of plaintiff and

represent a continuing course of conduct against plaintiff and other entities similarly situated. These acts included but were not limited to the following:

A. That defendants did create a "knock off product" in direct competition to plaintiff's "Seat Sack" which was known as a "Seat Pocket" which was identical to plaintiff's "Seat Sack" and did advertise and solicit, for the manufacture and/or distribution and sale of same to, from and within the countries of China and Taiwan and the United States; and

B. That defendants did also establish and create an internet website for the manufacture, sale and distribution of the aforesaid "knock off product" which automatically transferred a customer searching for plaintiff's "Seat Sack" to defendants' site which provided all information necessary to purchase defendants' "Seat Pocket". The foregoing acts were done for the purpose of inducing breaches of contract between plaintiff and its prior, existing and/or future customers and/or for the confusion and deception of the general public which believed that they were purchasing plaintiff's product; and

C. Defendants further did, without just cause, artificially increase the purchase price of plaintiff's product that it was distributing as plaintiff's fiduciary in an amount greater than the purchase price of its own "Seat Pocket" to induce its customers to purchase its product and to deprive the plaintiff of any opportunity to compete in the open market; and

D. That defendants consistently misled and manipulated the plaintiff's customers into believing that they were purchasing plaintiff's product when they were actually purchasing defendants' product; and

E. Defendants withheld knowledge of its foregoing unfair business practices from the plaintiff to preclude plaintiff from competing with sales of defendants' "knock off product", although defendants were still acting as plaintiff's fiduciary and distributor; and

F. That defendants have refused to act in the best interests of plaintiff as its fiduciary and instead, acted in a competitive, unlawful manner for the purpose of stealing plaintiff's protected product, sales and market.

19. That at all times hereinafter mentioned, said defendants were and still are in default of its/their contractual obligations to the plaintiff herein.

20. That the plaintiff has allowed defendants numerous opportunities to cure the aforesaid defaults and/or unlawful conduct and defendants have failed and/or refused to remedy same and/or refrain from such unlawful conduct in the future.

21. As a result of defendants' failure and/or refusal to cease its/their unlawful conduct and remedy its/their default and deceptive practices, plaintiff has sustained lost profits in sales, together with ancillary damages and continues to suffer from same, a diminishing market, together with damage to

its good name, reputation product, and other unwarranted costs and damages.

22. Plaintiff has fully performed all of its duties and obligations under the distributorship agreement, including but not limited to manufacturing a product in a timely fashion; ensuring that said product was fit for the purpose for which it was manufactured; providing defendants with an ample supply of product and in a timely fashion; and advising its customers and market that defendants were acting as its distributor and including for the purpose of reordering merchandise defendants' name, address and contact telephone numbers on its product.

23. As a result of the foregoing, the plaintiff has fully performed its obligations under the aforesaid agreement but the obligations to be performed by the defendants have not been met.

24. Defendants have refused and/or failed to meet its/their obligations and as a result, said defendants have defaulted.

25. Plaintiff has demanded in a timely and reasonable manner that said defendants fully perform its/their obligations pursuant to its agreement and that defendants provide plaintiff with an accounting of all sales of its "Seat Sack" and defendants' "Seat Pocket" from the inception of the distributorship of plaintiff's product, together with all monies obtained from the sale thereof; and that defendants refrain from the unlawful conduct set forth herein, but

defendants have wrongfully failed, refused or neglected to do so as of this date.

26. That due to defendants' unlawful conduct of unfair business practice and deception, plaintiff has sustained the loss of its past, present and/or future customers and market and has otherwise sustained additional compensatory damages.

27. That the aforesaid conduct of the defendants was willful, and/or grossly malicious, and/or reckless and/or was calculated to cause and did cause harm to said plaintiff which has no adequate remedy at law.

28. By reason of the false and fraudulent statements made by the defendants to the plaintiff herein and the deceptions and fraud practiced by the defendants upon the plaintiff, defendants have unlawfully obtained and deprived plaintiff of profits to which it is entitled and rendered plaintiff's investments in its product useless.

29. As a result of the foregoing, plaintiff, SEAT SACK, INC., has sustained damages including but not limited to compensatory damages in the sum of $5,000,000.00 and is entitled to punitive, exemplary and treble damages from the defendants in the sum of $15,000,000.00.

AS AND FOR A SECOND CAUSE OF ACTION FOR FRAUD IN FAVOR OF THE PLAINTIFF AND AGAISNT THE DEFENDANTS

30. Plaintiff, SEAT SACK, INC., repeats, reiterates and realleges each

and every allegation contained in paragraphs "1" through "29" of plaintiff's complaint as if fully set forth at length herein.

31. Due to the acts set forth in plaintiff's complaint, committed by the defendants with gross malice and with the intention of stealing the plaintiff's trade secrets and protected product the plaintiff has been defrauded herein due to the loss of sales and market growth.

AS AND FOR A THIRD CAUSE OF ACTION FOR CONVERSION IN FAVOR OF THE PLAINTIFF AND AGAISNT THE DEFENDANTS

32. Plaintiff, SEAT SACK, INC., repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "31" of plaintiff's complaint as if fully set forth at length herein.

33. That the defendants have converted monies and the proceeds of sales due plaintiff without the knowledge and consent of plaintiff and as a result of those diverted sales and inducements of breaches of contract; breaches of a fiduciary relationship, defendants have taken possession for its/their own use and benefit proceeds from the sale of plaintiff's product and/or by sale of a "knock off product" monies due plaintiff from 1999 up to and including the present.

AS AND FOR A FOURTH CAUSE OF ACTION FOR DECEPTIVE TRADE, UNFAIR BUSINESS PRACTICES, MISAPPROPRIATION OF TRADE SECRETS AND UNFAIR COMPETITION IN FAVOR OF THE PLAINTIFF AND AGAINST DEFENDANTS

34. Plaintiff, SEAT SACK, INC., repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "33" of plaintiff's complaint as if fully set forth at length herein.

35. The acts of defendants complained of herein were done with gross malice and represent an ongoing course of conduct by the defendants against all entities supplying it with protected products, including the plaintiff herein due to the defendants' deceptive trade and practices while acting as plaintiff's distributor and fiduciary, plaintiff has sustained diminution of its product, market and name.

AS AND FOR A FIFTH CAUSE OF ACTION FOR BREACH OF CONTRACT IN FAVOR OF PLAINTIFF AND AGAINST THE DEFENDANTS

36. Plaintiff, SEAT SACK, INC., repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "35" of plaintiff's complaint as if fully set forth at length herein.

37. Upon information and belief, plaintiff has performed all the conditions of the contract so required of it.

38. Upon information and belief, plaintiff repeatedly demanded of the

defendants that it/they undertake and complete all of the covenants and promises agreed to as to heretofore mentioned herein.

39. Upon information and belief, defendants have wholly failed to meet its/their obligations under the contract or to return all of the profits obtained by their unlawful conduct and to refrain from continued violations of law more particularly set forth herein, together with all damages sustained by plaintiff as a result of the defendants' breach of contract.

40. As a result of the foregoing, the defendants have breached its/their contracts entered into with the plaintiff and no reasonable basis exists for the defendants' refusal to fully undertake and complete those covenants agreed to by the defendants as heretofore stated herein.

AS AND FOR A SIXTH CAUSE OF ACTION FOR AN AWARD OF ATTORNEY'S FEES AND COSTS IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANTS

41. Plaintiff, SEAT SACK, INC., repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "40" of plaintiff's complaint as if fully set forth at length herein.

42. As a result of the continued fraudulent actions of the defendants while acting as a fiduciary and in breach of that duty to the plaintiff, plaintiff has sustained legal fees and incurred disbursements in seeking compensatory

damages and injunctive relief. As a result of the foregoing, plaintiff is entitled to an award of attorney's fees and costs of litigation in a sum deemed reasonable by the Court.

AS AND FOR A SEVENTH CAUSE OF ACTION IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANTS FOR UNLAWFUL USE OF PLAINTIFF'S PATENTED PRODUCT

43. Plaintiff, SEAT SACK, INC., repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "42" of plaintiff's complaint as if fully set forth at length herein.

44. Plaintiff, SEAT SACK, INC., is the owner of a lawful patent for its product which is the subject of this litigation, together with a trade name, trademarks and service marks, including the famous trademark "Seat Sack" which has been diligently exploited by defendants.

45. SEAT SACK, INC. has actively used the aforesaid name and mark for many years prior to entering the aforesaid distributor agreement through a wide variety of commercial activities. Such activities have included:

A. The sale of merchandise bearing the name and mark "Seat Sack TM, INC.", has been continuously sold within the United States and up to the execution of the aforesaid distributor agreement, plaintiff has derived and continues to derive substantial royalties therefrom.

46. Upon information and belief, SEAT SACK, INC. has also diligently enforced and protected its trademark through, e.g. vigilant policing of the marketplace and of trademark registers throughout the world, and through the use of clipping services, at great cost and expense. Seat Sack, Inc. has aggressively and successfully protected unauthorized uses of its trademark by third parties.

47. Defendants, including CHILDCRAFT EDUCATION CORP., have been distributing and selling unauthorized merchandise embodying the mark and/or the names, trademarks and/or likenesses of "Seat Sack, Inc." at and around numerous retail and wholesale stores in violation of the rights of plaintiffs under the Lenham Act and in violation of the Federal Trademark Act, 15 U.S.C. Section 1051, et seq., and under related and other laws of the State of New York, including but not limited to Section 360-l of General Business Law of the State of New York.

48. The sale of such merchandise is without permission or authority of the plaintiff.

49. This unlawful activity results in irreparable harm and injury to plaintiff in that, among other things, it deprives plaintiff of its absolute right to determine the manner in which the trademarks are presented to the general public through merchandising; deceives the public as to the origin and

sponsorship of such merchandise; the public as to the origin and sponsorship of such merchandise; wrongfully trades upon and cashes in on plaintiff's reputation.

50. Plaintiff seeks injunctive relief enjoining defendant's unlawful conduct described herein in that plaintiff has no adequate remedy of law.

AS AND FOR A EIGHTH CAUSE OF ACTION IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANTS

51. Plaintiff, SEAT SACK, INC., repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "50" of plaintiff's complaint as if fully set forth at length herein.

52. This count arises under 15 U.S.C. Section 1114 with respect to the infringement of plaintiff's federally registered patent and its protected trademark and service mark.

53. By virtue of the plaintiff's aforesaid extensive use, advertising and promotion of its trademark, the trade and public have come to associate use of this trademark with plaintiff and the activities conducted by them, and plaintiff's trademark has acquired secondary meaning in the trademark.

54. Upon information and belief, defendants, with actual and constructive notice of plaintiff's prior use and registration of its mark, have utilized plaintiff's mark and marks confusingly similar thereto to sell its/their

bootleg merchandise.

55. Defendants' unlawful uses of plaintiff's mark and marks confusingly similar thereto are likely to cause confusion, mistake or deception as to the source of origin of defendants' products and to mislead the public into believing that defendants' products originate from, are affiliated with, or are sponsored, authorized or approved by plaintiff.

56. Defendants' aforesaid actions will cause sales of plaintiff's merchandise to be lost and/or diverted to the defendants. Further, the defendants' false designations of origin will irreparable harm and injure plaintiff's goodwill and reputation. Such irreparable harm will continue unless enjoined by this Court.

57. The aforesaid acts of defendants constitute a violation of plaintiff's rights under 15 U.S.C. Section 1114 and Sections 360-l of the General Business Law of the State of New York.

58. Plaintiff will have no adequate remedy at law if defendants' activities are not enjoined and will suffer irreparable harm and injury to plaintiff's image and reputation as a result thereof.

AS AND FOR A NINTH CAUSE OF ACTION IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANTS AS A RESULT OF A VIOLATION OF 15 U.S.C. 1125(a)

59. Plaintiff, SEAT SACK, INC., repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "58" of plaintiff's complaint as if fully set forth at length herein.

60. This count arises under 15 U.S.C. 1125(a) which relates to trademarks, trade names and unfair competition entitled "False Designations of Origin and False Descriptions Forbidden," and involves false description in commerce.

61. The plaintiff's mark has been used widely throughout the United States to identify products and services of SEAT SACK, INC. As a result of same, the plaintiff's mark has developed and now has a secondary and distinctive trademark meaning to purchasers of goods which bear the plaintiff's mark.

62. Defendants, by misappropriating and using the plaintiff's mark and/or a trade name and/or mark so similar to the plaintiffs, have misrepresented and falsely described to the general public the source of origin of the bootleg merchandise so as to create the likelihood of confusing by the ultimate purchaser as to both the source and sponsorship of the bootleg

merchandise.

63. Plaintiff will be damaged by the sale of the bootleg merchandise bearing the plaintiff's mark.

64. The unlawful merchandising activities of defendants, as described above, are without permission or authority of plaintiff and constitute express and implied misrepresentations that the bootleg merchandise was created, authorized or approved by plaintiff.

65. The aforesaid acts of defendants are in violation of 15 U.S.C. 1125(a) in that the defendants will use, in connection with goods and services, a false designation or origin and have caused and will continue to cause said goods the bootleg merchandise to enter into interstate commerce.

66. Plaintiff has no adequate remedy at law and, if defendants' activities are not enjoined, will suffer irreparable harm and injury.

AS AND FOR A TENTH CAUSE OF ACTION IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANTS AS A RESULT OF A VIOLATION OF 15 U.S.C. 1125(a)

67. Plaintiff, SEAT SACK, INC., repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "66" of plaintiff's complaint as if fully set forth at length herein.

68. This count arises under 15 U.S.C. 1125(a) which relates to

trademarks, trade names and unfair competition entitled "False Designations of Origin and False Descriptions Forbidden," and involves false description in commerce.

69. The plaintiff's mark has been used widely throughout the United States to identify plaintiff's respective goods. As a result of same, plaintiff's mark has developed and now has a secondary and distinctive trademark meaning to purchasers of goods which bear the plaintiff's mark.

70. Defendants, by misappropriating and using the plaintiff's mark, have misrepresented and falsely described to the general public the source of origin of the bootleg merchandise so as to create the likelihood of confusion by the ultimate purchaser as to both the source and sponsorship of the bootleg merchandise.

71. The aforesaid acts of the defendants are in violation of 15 U.S.C. 1125(a) in that the defendants will use, in connection with goods and services, a false designation or origin and have caused and will continue to cause said goods the bootleg merchandise to enter into interstate commerce.

72. Plaintiff has no adequate remedy at law and, if defendants' activities are not enjoined, will suffer irreparable harm and injury.

AS AND FOR A ELEVENTH CAUSE OF ACTION IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANTS FOR VIOLATIONS OF SECTION 360-l OF THE GENERAL BUSINESS LAW OF THE STATE OF NEW YORK

73. Plaintiff, SEAT SACK, INC., repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "72" of plaintiff's complaint as if fully set forth at length herein.

74. This count arises under Section 360-l of the General Business Law of the State of New York.

75. Defendants' activities are likely to dilute the distinctive quality of the plaintiff's mark and/or trade name and injure the business reputation of SEAT SACK, INC., in violation of its rights under Section 360-l of the General Business Law of the State of New York.

76. Plaintiff has no adequate remedy at law and, if defendants' activities are not enjoined, will suffer irreparable harm and injury.

AS AND FOR A TWELFTH CAUSE OF ACTION IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANTS FOR VIOLATIONS OF SECTION 360-l OF THE GENERAL BUSINESS LAW OF THE STATE OF NEW YORK

77. Plaintiff, SEAT SACK, INC., repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "76" of plaintiff's

complaint as if fully set forth at length herein.

78. That the defendants have continually induced breaches of contract between the plaintiff and its customers who have, by unfair business practices, believe they were entering into contracts with the plaintiff when in fact the defendants diverted sales to itself/themselves.

79. The defendants were also aware of numerous existing contracts between the plaintiff and plaintiff's market which the defendants induced the breach thereof without just cause and for its/their own profit.

AS AND FOR A THIRTEENTH CAUSE OF ACTION IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANTS FOR UNJUST ENRICHMENT

80. Plaintiff, SEAT SACK, INC., repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "79" of plaintiff's complaint as if fully set forth at length herein.

81. The acts of the defendants complained of herein have unjustly enriched said defendants and said acts were committed without the consent and/or knowledge of the plaintiff and were committed for that purpose.

WHEREFORE, plaintiff demands judgment against the above named defendants as follows:

A. On its first, second, third, fourth, sixth, seventh, eighth, ninth,

tenth, eleventh, twelfth and thirteenth causes of action in the sum of $5,000,000.00 as and for compensatory damages; and $15,000,000.00 as and for punitive, exemplary and treble damages; and

B. On its fifth cause of action in the sum of $5,000,000.00 as and for compensatory damages; and

C. On its sixth cause of action an award of attorney's fees in a sum deemed reasonable and necessary by the Court due to the defendants' breach of a fiduciary duty; and

D. On its seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth causes of action granting plaintiff injunctive relief enjoining the defendants as follows:

1. Granting plaintiff a Temporary Restraining Order and a Preliminary Injunction during the pendency of this action and permanently thereafter restraining, enjoining and prohibiting defendants from manufacturing, distributing or selling any and all merchandise bearing the plaintiff's mark and/or anything confusingly similar thereto and/or any merchandise that suggests or implies any association with the plaintiff's mark and/or protected product.

2. An order of seizure of all merchandise bearing the plaintiff's mark and/or any product or anything confusingly similar thereto and/or any

merchandise that suggests or implies any association with the plaintiff's merchandise, trademark or mark.

3. An Order for a Permanent Injunction prohibiting defendants from manufacturing, distributing and selling merchandise bearing the plaintiff's mark and/or anything confusingly similar thereto and/or any merchandise that suggests or implies any association with the plaintiff's business and/or merchandise; and

4. Enjoining the defendants from any future sale of its "knock off product"; directing that defendants provide an accounting of all sales of both plaintiff's "Seat Sack" product and defendant's "Seat Pocket" made between 1999 up to and including the present; and enjoining defendants from interfering in any manner with plaintiff's business, products, sales, patent, and/or customers and/or market.

5. Granting plaintiff a full and complete accounting and inspection of all of the records of the defendants' sales of its "Seat Pocket" and any records pertaining to the gross sales and net profits obtained thereby.

6. An order directing the defendants to return to plaintiff all assets received from the plaintiff and/or any losses of income and/or profits and/or related damages sustained by plaintiff as a result of defendants' fraud, conversion, breach of contract, unlawful business practices and other violations

of federal and state law.

ALL OF THE FOREGOING, together with interest from November, 1999, and costs and disbursements of this action and for such other and further relief as to the Court may seem just and proper under the circumstances.

Dated: February 6, 2007

EDWARD J. CARROLL, ESQ.
Attorney for Plaintiff
2733 Route 209
Kingston, New York 12401
(845) 338-5977

The United States of America

The Commissioner of Patents and Trademarks

Has received an application for a new, original, and ornamental design for an article of manufacture. The title and description of the design are enclosed. The requirements of law have been complied with, and it has been determined that a patent on the design shall be granted under the law.

Therefore, this

United States Patent

Grants to the person or persons having title to this patent the right to exclude others from making, using or selling the design throughout the United States of America for the term of fourteen years from the date of this patent.

Bruce Lehman

Commissioner of Patents and Trademarks

Sandra J. Morton

Attest

...States Patent [19]

Patent Number: Des. 358,731

Date of Patent: ** May 30, 1995

...FOR HANGING ON THE BACK OF A ...

...ntor: Anne M. McAlear, 110 Ridge Dr., Naples, Fla. 33963

...Term: 14 Years

...Appl. No.: 10,249

...Filed: Jul. 2, 1993

...U.S. Cl. D6/513

...Field of Search D6/567, 513, 611, 343, D6/502; 297/188, 191, 224

References Cited

U.S. PATENT DOCUMENTS

...309,227	7/1990	Popiolkowski	D6/601
...316,649	5/1991	Swanner	D6/611
...479,085	11/1969	Weinstein	297/219
...232,898	11/1980	Bodrero	297/224 X
...273,380	6/1981	Silvestri	297/191
...302,046	11/1981	Lazazzero	297/191
...977,288	10/1989	Lee	297/229
...169,308	8/1992	Ziman	297/191
...,359,119	10/1994	Nicholas	297/191

...Examiner—Brian N. Vinson
...Agent, or Firm—Merrill N. Johnson

CLAIM

The ornamental design for sack for hanging on the back of a chair, as shown.

DESCRIPTION

FIG. 1 is a perspective view of my sack for hanging on the back of a chair;

FIG. 2 is a front elevational view of my sack for hanging on the back of a chair;

FIG. 3 is a rear elevational view of my sack for hanging on the back of a chair;

FIG. 4 is a plane view, taken from above, of my sack for hanging on the back of a chair;

FIG. 5 is a plane view, taken from below, of my sack for hanging on the back of a chair; and,

FIG. 6 is a side elevational view taken from the left side of the sack for hanging on the back of a chair shown in FIG. 1.

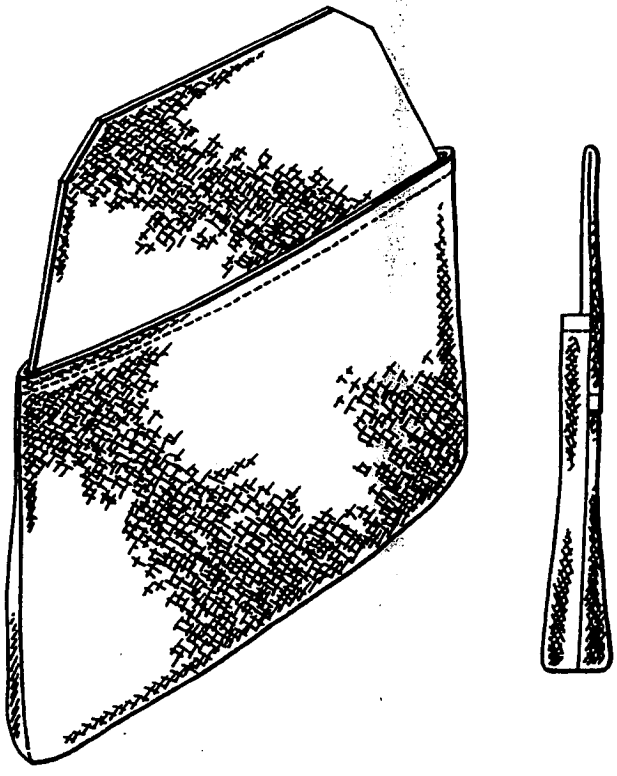


FIG. 1

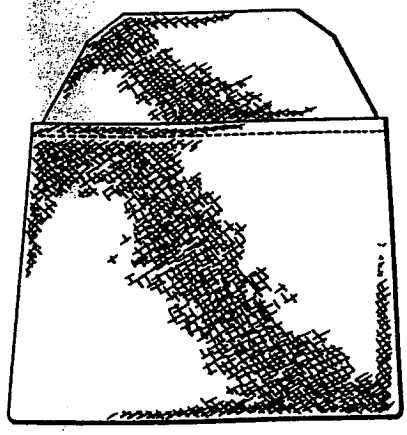


FIG. 2

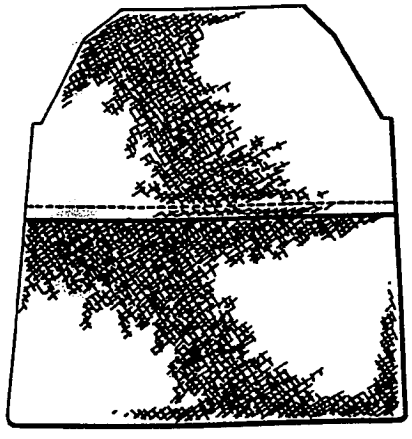


FIG. 3

FIG. 4

FIG. 5

FIG. 6

Tired of Classroom Clutter?

Do your students need help with organization?

Most classrooms have little or no working space.
Seat Sack™ is the answer!
Seat Sack™ is a practical way to develop a neat and organized classroom.
Seat Sack™ is machine washable and best of all the flame retardant fabric is well known to last up to 3 years.

All schools in your District are able to purchase **Seat Sack™** through the issue of a requisition. We are offering a special price of **$5.97**. This offer is good in participating school districts only.

We also accept school purchase orders, credit cards or we can invoice net 10 days.

Seat Sack™ comes in a variety of different sizes to fit your classroom chairs.

SMALL SIZE:	Fits up to a 12" wide chair	Pre-Grade 1
STANDARD:	Fits up to a 14" wide chair	For grades 1-3
MEDIUM SQUARE:	Fits up to a 15" wide for square wooden chair	For grades 1-3
LARGE:	Fits up to a 17" wide chair	For grades 3-5
ADULT:	Fits up to a 19" wide chair	

Participating School District Pricin

$5.97 Each

Orders over 150 receive
Free school logo screen printing

GUARANTEED TO PLEASE OR YOUR MONEY BACK!

Order This Very Practical Answer Today!

SEAT SACK™, INC.

The Practical Answer to Classroom Storage!

P.O. Box 9732 Naples, Florida 34101
Phone: (239) 596-2200 Toll free: (800) 764-1235
Fax: (239) 597-2803
Web site: www.SEATSACK.com

SPECIAL
SCHOOL
DISTRICT
PRICING

SEAT SACK™, INC.

The Practical Answer to Classroom Storage!

P.O. Box 9732 Naples, Florida 34101
Phone: (239) 596-2200 Toll free: (800) 764-1235
Fax: (239) 597-2803
Web site: www.SEATSACK.com

PRSTD STD
US POSTAGE
PAID
PERMIT #18
NAPLES FL

School News & Notes

Teaching Kids Early Organizational Skills

(NAPS)—Understanding the organizational skills used by children has become increasingly complex and important—and organizational differences among students play a large role in determining which children get the most out of their educational experience.

"Many second and third graders have difficulty with organization. It simply doesn't come naturally to them," says Judy McAlear, a special education teacher in Fernandina Beach, Fla.

Many seasoned teachers seem to prefer the use of folders to help teach organizational skills. For example, Nancy Boudon, who teaches first grade at Prospect Elementary School in Elyria, Ohio, has students carry a "Blue Dot Folder" in which they keep important papers and worksheets and a "Take Home Folder" with two pockets.

Another organizational tool used by teachers is Seat Sack™, a bright blue fabric storage bag that fits over the back of a student's classroom chair and holds folders, papers and other items. By adding another storage area to a child's desk area, teachers help eliminate "desk stuffing," a sloppy practice that inevitably leads to confusion and lost time.

It's in the bag. Seat Sack™ helps students learn organizational skills, lightens their backpack loads and conserves valuable classroom teaching time.

Tips For Parents

- Teach your child how to store and transport papers and other items to and from school;
- Consider using "To Do" lists and "Chore Charts";
- Assign your child a specific time to study and do homework each day;
- Create a place for your child to complete homework. Be sure that location is stocked with appropriate supplies; and
- Offer plenty of praise when your child exhibits good organizational skills.

In addition, many teachers also agree that continual communication with parents is vital in teaching these and other skills. Face-to-face conferences, notes sent home with the students and, in Boudon's case, a personal Web site allow parents to keep current with classroom activities.

For the location of the school supply store nearest you, call (800) 764-1235 or go online at www.seatsack.com.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CHILDCRAFT EDUCATION CORP.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 05-461 (GMS)
	)	
ALICE'S HOME, AND WILLIAM WEDD,	)	
	)	
Defendants.	)	

MEMORANDUM

I. INTRODUCTION

Presently before the court in the above-captioned action for breach of contract, misappropriation of trade secrets, and unjust enrichment is the defendants' motion to dismiss. (D.I. 24.) For the reasons below, the court will grant the motion.

II. JURISDICTION

The court has jurisdiction over this matter pursuant to 28 U.S.C.A. § 1332 (Supp. 2005).

III. STANDARD OF REVIEW

"When considering a Rule 12(b)(6) motion, [the court is] required to accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the plaintiff." *Evancho v. Fisher*, 423 F.3d 347, 350 (3d Cir. 2005). "A Rule 12(b)(6) motion should be granted 'if it appears to a certainty that no relief could be granted under any set of facts which could be proved.'" *Id.* at 351 (quoting *D.P. Enter. Inc. v. Bucks County Cmty. Coll.*, 725 F.2d 943, 944 (3d Cir. 1984)). "However, [the] court need not credit either 'bald assertions' or 'legal conclusions' in a complaint when deciding a motion to dismiss." *Evancho*, 423 F.3d at 351.

IV. BACKGROUND

Plaintiff Childcraft Education Corp. ("Childcraft") is a New York corporation with its principal place of business in Lancaster, Pennsylvania. As its name suggests, Childcraft sells educational supplies. Defendant Alice's Home, a sole proprietorship in Columbus, Ohio, also sells educational supplies, including a product known as the Extra Wide Language Easel, Model A116 ("the A116"). Alice's Home is owned entirely by Defendant William Wedd ("William"), who is also a resident of Ohio. Alice Wedd ("Alice") – William's spouse – worked in Ohio as a sales representative for Childcraft from 1995 until May 2003. She, too, is a resident of Ohio. In early 1998, Alice's Home granted Childcraft an exclusive license to sell the A116. The terms of that license were negotiated in Ohio, and the licensing agreement was executed in Ohio. Yet, in spite of the fact that the parties have obvious contacts with Ohio, New York, and Pennsylvania, and in spite of the fact that the parties have no discernable contacts with Delaware, the licensing agreement contains both a choice-of-law provision stating that the laws of Delaware shall apply to the agreement's construction, interpretation, and enforcement, and a forum-selection clause stating that the parties agree to submit to personal jurisdiction in Delaware.

On May 16, 2005, Alice and Alice's Home brought suit in Ohio state court against Childcraft and James Green – Alice's direct supervisor at Childcraft – alleging that Childcraft misappropriated trade secrets and used those secrets to sell products which, although similar to the A116, were the property of Alice's Home and were not covered by the licensing agreement. The amended complaint in the Ohio action also states causes of action for unfair competition, breach of contract, wrongful discharge, interference with contract, slander, and unjust enrichment. By contrast, in the case before this court – which was filed on July 1, 2005 – Childcraft alleges that Alice's Home

violated the parties' agreement by selling the A116 in spite of Childcraft's exclusive license to do so. Childcraft further alleges that William and Alice's Home made unauthorized use of certain trade secrets which Alice had improperly obtained through her employment at Childcraft. In its original complaint, Childcraft named Alice, William, and Alice's Home as defendants. However, the defendants subsequently moved to dismiss Alice for lack of personal jurisdiction, and Childcraft responded by voluntarily dismissing her without prejudice. Childcraft then filed an amended, three-count complaint (breach of contract, misappropriation of trade secrets, and unjust enrichment) naming only William and Alice's Home as defendants. Presently before the court is the defendants' motion to dismiss.

V. DISCUSSION

A. Choice of Law

A fundamental dispute in this case is whether the choice-of-law provision in the licensing agreement should be honored. "A Federal District Court sitting in diversity must apply the choice of law rules of the state in which it sits to determine which state's law governs the controversy before it." Kreider v. F. Schumacher & Co., 816 F. Supp. 957, 960 (D. Del. Mar. 1, 1993). "Delaware courts will generally honor a contractually-designated choice of law provision so long as the jurisdiction selected bears some material relationship to the transaction." *J. S. Alberici Constr. Co. v. Mid-West Conveyor Co.*, 750 A.2d 518, 520 (Del. 2000). The only relationship this case bears to Delaware is in the choice-of-law provision and the forum-selection clause of an agreement executed in another state by non-Delaware residents. That relationship is too attenuated to be deemed material. Therefore, since neither side argues that New York or Pennsylvania law should control, the court holds that Ohio law governs the terms of the licensing agreement.

B. Personal Jurisdiction and Venue

This court's personal jurisdiction is based entirely on the forum-selection clause of the licensing agreement. "Under Ohio law, a forum selection clause is invalid under the following circumstances: (1) it was obtained by fraud, duress, the absence of economic power or other unconscionable means, (2) the designated forum would be closed to the suit or would not handle it effectively or fairly, or (3) the designated forum would be so seriously an inconvenient forum that to require the plaintiff to bring the suit there would be unjust." *Preferred Capital, Inc. v. Sarasota Kennel Club*, No. 04-2063, 2005 U.S. Dist. LEXIS 15238, at *7 (N.D. Ohio July 27, 2005). "In determining whether the selected forum is sufficiently unreasonable, factors to consider include: (1) which law controls the contractual dispute; (2) what residency do the parties maintain; (3) where the contract was executed; (4) where are the witnesses and parties to the litigation located; and (5) whether the forum's designated location is inconvenient to the parties." *Id.* at *10. It requires little discussion for the court to conclude that, under Ohio law, this forum-selection clause is invalid as unreasonable. Accordingly, this court has no personal jurisdiction over the defendants.

VI. CONCLUSION

Because the court lacks jurisdiction, the defendants' motion to dismiss must be granted.

Dated: May 22, 2006

/s/ Gregory M. Sleet
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CHILDCRAFT EDUCATION CORP.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 05-461 (GMS)
	)	
ALICE'S HOME,	)	
AND WILLIAM WEDD,	)	
	)	
Defendants.	)	

ORDER

IT IS HEREBY ORDERED THAT:

1. The defendants' motion to dismiss (D.I. 24) be GRANTED; and

2. The plaintiff's motion to strike the affidavit of William Wedd (D.I. 28) be DENIED as moot.

Dated: May 22, 2006

/s/ Gregory M. Sleet
UNITED STATES DISTRICT JUDGE

Quick Search

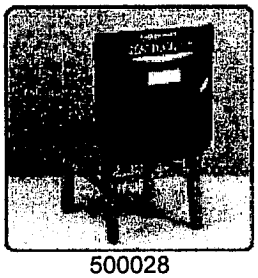
Seat Sack GO

Shop by Category

- Active Play
- Arts & Crafts
- Audio Visual
- Block Play
- Carpets
- Children's Literature
- Classroom Furniture
- Cooking/Health/Nutrition
- Dramatic Play
- Infant/Toddler
- LEGO ®
- Literacy
- Manipulatives
- Math
- Mats & Cots
- Music
- Puzzles
- Records/Cassettes/CDs
- Sand & Water
- Science
- Social Studies
- Tables & Chairs
- Woodworking

Items: 1 - 2 of 2

Page: 1



500028

Premium Seat Pocket -- Small
500028
Regular Price: $9.95
Sale Price: $7.95
More Information

Qty. 1

Buy Now!

Premium Seat Pocket -- Large
500032
Regular Price: $9.95
More Information

Qty. 1

Buy Now!

500032

Search Results Page: 1

See left menu for more products.

Shop by Category

- Active Play
- Arts & Crafts
- Audio Visual
- Block Play
- Carpets
- Children's Literature
- Classroom Furniture
- Cooking/Health/Nutrition
- Dramatic Play
- Infant/Toddler
- LEGO ®
- Literacy
- Manipulatives
- Math
- Mats & Cots
- Music
- Puzzles
- Records/Cassettes/CDs
- Sand & Water
- Science
- Social Studies
- Tables & Chairs
- Woodworking

Product Information

500028

Premium Seat Pocket -- Small
Attractive two-tone canvas organizer in classic colors. Front pockets keep smaller items easily accessible. Fits chairs up to 16"H. Seat Pocket dimensions are 15" X 15 1/2".

Regular Price	Sale Price	In Stock
$9.95	$7.95	Yes

Send item information to a friend

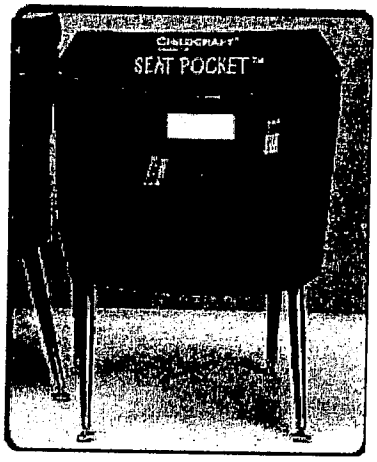
Add 1 Add To My Cart

Continue Shopping

Shop by Category

- Active Play
- Arts & Crafts
- Audio Visual
- Block Play
- Carpets
- Children's Literature
- Classroom Furniture
- Cooking/Health/Nutrition
- Dramatic Play
- Infant/Toddler
- LEGO ®
- Literacy
- Manipulatives
- Math
- Mats & Cots
- Music
- Puzzles
- Records/Cassettes/CDs
- Sand & Water
- Science
- Social Studies
- Tables & Chairs
- Woodworking

Product Information



500032

Premium Seat Pocket -- Large
Attractive two-tone canvas organizer in classic colors. Holds oversize items while front pockets keep smaller items accessible. Fits chairs up to 18"H. Seat Pocket dimensions are 17 1/2" X 15 1/2".

Regular Price	In Stock
$9.95	Yes

Send item information to a friend

Add 1 Add To My Cart

Continue Shopping

SafeKids.Com

CHILDCRAFT

[redacted]

1-800-631-5652

What's New | Classroom Designer | Special Prices | Check Your Shopping Cart

[redacted]

HOME

[redacted]

Shop By Standards Keywords! Click Literacy, Math, Science and Social Studies to view the reference files. Enter the keyword in the field below to shop by standards

Search by item number, Description or Standards Keywords.

Seat sack GO

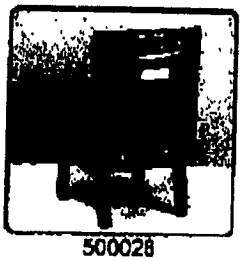
Shop by Category

- Active Play
- Arts & Crafts
- Audio Visual
- Block Play
- Carpets
- Children's Literature
- Classroom Furniture
- Cooking/Health/Nutrition
- Dramatic Play
- Infant/Toddler
- LEGO ®
- Literacy
- Manipulatives
- Math
- Mats & Cots
- Music
- Puzzles
- Records/Cassettes/CDs
- Sand & Water
- Science
- Social Studies
- Tables & Chairs
- Woodworking

product search result

Items: 1 - 8 of 8

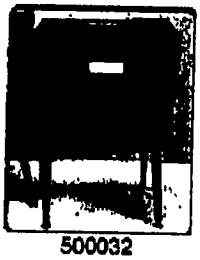
Page: 1 of 1



500028

Premium Seat Pocket -- Small
500028
Regular Price: $8.95
Sale Price: $7.95
More Information
Qty. 1
Buy Now

Premium Seat Pocket -- Large
500032
Regular Price: $8.95
Sale Price: $7.95
More Information
Qty. 1
Buy Now



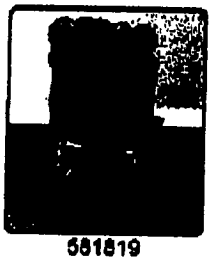
500032

581616

Welcome To Our Class! Seat Pocket
581616
Regular Price: $6.99
More Information
Qty. 1
Buy Now

Lost A Tooth! Seat Pocket
581625
Regular Price: $6.99
More Information
Qty. 1
Buy Now

581625

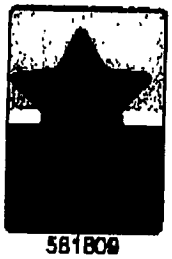


581619

Happy Birthday! Seat Pocket
581619
Regular Price: $6.99
More Information
Qty. 1
Buy Now

Author's Chair Seat Pocket
581622
Regular Price: $6.99
More Information
Qty. 1
Buy Now

581622



581609

Today's Helper Seat Pocket
581609
Regular Price: $6.99
More Information
Qty. 1
Buy Now

CHILDCRAFT Education Corp.

What's New | Classroom Designer | Special Prices | Check Your Shopping Cart | Toys

Order by Item # | Request a Catalog | Exchanges | Customer Service | Security/FAQs | Safety Tested | Expert Library | Q&A

Home

Quick Search

SEAT SACKS GO

Shop by Category

- Active Play
- Arts & Crafts
- Audio Visual
- Block Play
- Carpets
- Children's Literature
- Classroom Furniture
- Cooking/Health/Nutrition
- Dramatic Play
- Infant/Toddler
- LEGO ®
- Literacy
- Manipulatives
- Math
- Mats & Cots
- Music
- Puzzles
- Records/Cassettes/CDs
- Sand & Water
- Science
- Social Studies
- Tables & Chairs
- Woodworking

Items: 1 - 4 of 4

Page: 1 of 1

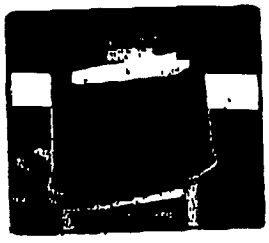
370631

Standard Seat Sack
370631
Regular Price: $9.95
Sale Price: $7.95
More Information

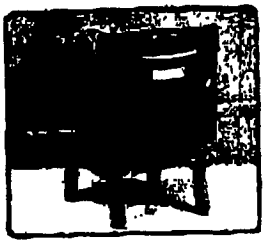
Qty. 1 Buy Now!

Extra Large Seat Sack
390015
Regular Price: $11.95
Sale Price: $8.95
More Information

Qty. 1 Buy Now!



390015



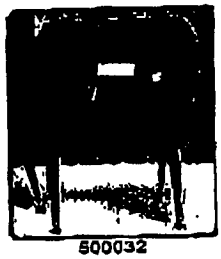
500028

Premium Seat Pocket Small
500028
Regular Price: $8.95
More Information

Qty. 1 Buy Now!

Premium Seat Pocket Large
500032
Regular Price: $9.95
More Information

Qty. 1 Buy Now!



500032

Search Results Page: 1

See left menu for more products.

SafeKids.Com

NYC Department of Education
Joel I. Klein, Chancellor

FAMIS E-Catalog
Version 1.0

FAMIS E-CATALOG

Help Logoff

Welcome rpravat@schools.nyc.gov

Division of Contracts and Purchasing

Search Commodity: All Commodities

Search By: Description

seat sack

Search Clear View All Items

Advanced Search

Proceed to Checkout Clear Cart Print Results Close

2 results found.

Add To Cart	Item #	Description	View	U/M	Net Price
[Add to Cart]	393921360	SEAT SACK CC EDU CORP PRE K-3 2004 PG203		EACH	$ 7.16
[Add to Cart]	393922219	EXTRA LARGE SEAT SACK CC EDU CORP PRE K-3 2004 PG203		EA.	$ 8.06

Proceed to Checkout View Cart Print Results Close

4.22 KEY DATES:

The following table outlines key dates of the bid process and the anticipated timeframe for an award and initial orders placed. Please review this timeline and ensure all dates are understood. Failure to meet a deadline relating to the bid is basis for disqualification. Please note that all dates associated with the award and initial orders resulting from this bid are subject to change at the sole discretion of the New York City Board of Education. Use the dates provided only as a reference to ensure that if awarded, you company can meet the ordering needs of the Board of Education

Key Dates in Bid Process	Date	Time
Issuance of the **Instructional Learning Materials Request for Bid and Attachments** for download off the DCP website and for e-mail to Bidders	**MONDAY JUNE 5, 2006**	**4:00 PM ET**
Bidder's **Pre- Bid Conference** at the Board of Education Division of Contracts and Purchasing, 65 Court Street, Room 1701, Brooklyn, N. Y. 11201. **17TH FLOOR CONFERENCE ROOM,**	**FRIDAY JUNE 23, 2006**	**2:00-3:30 PM ET**
Bidder deadline for submitting inquiries and questions using **RFB Clarifying Questions Form**	**WEDNESDAY JUNE 28, 2006**	**4:00 PM ET**
DCP deadline for issuing **Responses** to the **RFB Clarifying Questions** forms received on the Web Site RFB1C500@nycboe.net and at the Pre-Bid Conference.	**TUESDAY, JULY 11, 2006**	**4:00 PM ET**
Bidder deadline for submitting **Responses** to this **Request for Bid, including Vendex Questionnaire and Insurance Policies**	**TUESDAY AUGUST 1, 2006**	**5:00 PM ET**
Public **Bid Opening** of **RFB 1C500** sealed responses	**WEDNESDAY AUGUST 2, 2006**	**11:00 AM ET**
Notice of Award decisions communicated to Bidders	**FRIDAY SEPTEMBER 15, 2006**	**5:00 PM ET**

4.23 BIDDER CHECKLIST:

In order to facilitate expeditious and accurate completion of all bid responses, please refer to the following checklist to ensure that all activities are completed in a timely manner. Please review the checklist and confirm that you have all the required material and understand all of the bid requirements before submitting your response.

Please ensure that you have received each of the following documents for your response to this Request for Bid due **5:00 PM ET, TUESDAY, AUGUST 1, 2006.** The attachments include:

- RFB Clarifying Questions Form.doc (Section 5-1)
- Minimum Qualifications Form.doc (Section 5-2)
- Manufacturer's Certificate.doc (Section 5-3)
- Bid Blanks.xls (Section 6-1)

Before submitting a bid, please check the Division of Contracts and Purchasing web site (http://www.nycenet.edu/opm) to make certain all amendments have been included.

END OF SPECIFICATION

NY K82680

February 17, 2004

CLA-2-63:RR:NC:N3:351 K82680

CATEGORY: Classification

TARIFF NO.: 6307.90.9889 (EN)

Bettie Jo Shearer
Director- Customs Operations
GeoLogistics Americas Inc.
Majestic Airport Center 1
2500A Sullivan Road
College Park, GA 30337

RE: The tariff classification of a seat pocket from China and Taiwan

Dear Ms. Shearer:

In your letter dated January 26, 2004, you requested a tariff classification ruling. The ruling request is on behalf of Childcraft Education Corporation.

The submitted sample is identified as a "Seat Pocket." It is constructed wholly of 100 percent cotton woven fabric. You indicate that the seat pocket is designed to be slipped over the back of a student's chair. It has one large and two small open pockets on the front panel. The rear panel has a flap-like holder that is slipped over the chair.

You state that you believe this item is classifiable in subheading 4202.92 6091 (EN), Harmonized Tariff Schedule of the United States (HTS). However, this seat pocket is not a bag, container, or case of a kind similar to the named items of Heading 4202.

The applicable subheading for the seat pocket will be 6307.90.9889 (EN), HTS, which provides for other made up textile articles, other. The rate of duty will be 7 percent ad valorem.

The sample will be returned as requested.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Mitchel Bayer at 646-733-3102.

Sincerely,

Robert B. Swierupski

Childcraft Education Corp.
2920 Old Tree Drive
Lancaster, PA 17603

Early Childhood Direct
2918 Old Tree Drive
Lancaster, PA 17603

May 15, 2000

Dear Childcraft and Early Childhood Direct Vendor,

It is time for us to begin work on our 2001 catalogs for Childcraft Education Corp. and Early Childhood Direct. This past year there seemed to be some confusion regarding our various requests for information pertinent to our respective catalogs. We hope the information provided here, along with a chart of your contact for each catalog/company, will define who we are and how we all fit into the School Specialty family of companies.

Early Childhood Direct (ECD) and Childcraft Education Corp. (CEC) are both part of the School Specialty family of companies. Although all School Specialty-owned companies expect the same discounts, allowances, and terms as they relate to vendors' products, we are separate entities in regard to shipping, billing, purchasing, and merchandising. (Please see the enclosed chart for your contacts at ECD and Childcraft.)

Throughout the year, ECD and CEC will both separately order products, pay vendors, request updated information and ask for catalog allowances. This mailing is our annual request for pricing and availability of products for next year's catalogs. Please complete the forms and return them to our Product Information Coordinator by the due date indicated.

Thank you for your continued efforts in helping to make our catalogs so successful. We look forward to continuing our relationship with you in 2001.

Sincerely,

Ginger Murphy
Vice President of Merchandising and Purchasing

Richard W. Mark (RM 6884)
David M. Fine (DF 4479)
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, NY 10103
Telephone: (212) 506-5000
Facsimile: (212) 506-5151

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SEAT SACK, INC., Plaintiff, -against- CHILDCRAFT EDUCATION CORP.; US OFFICE PRODUCTS COMPANY; US OFFICE PRODUCTS NORTH ATLANTIC DISTRICT, INC.; and SCHOOL SPECIALTY, INC., Defendants.	07-CV-3344 (RJH) (DFE) **DEFENDANTS CHILDCRAFT EDUCATION CORP.'S AND SCHOOL SPECIALTY INC.'S ANSWER AND COUNTERCLAIM**

Defendants Childcraft Education Corp. ("Childcraft") and School Specialty, Inc. ("School Specialty") (collectively, "Childcraft Defendants") hereby respond to the Verified Complaint (the "Complaint") of plaintiff Seat Sack, Inc. ("Plaintiff") as follows. Each of the allegations set forth in the Complaint not specifically admitted by Childcraft Defendants is hereby denied.

1. Childcraft Defendants admit, upon information and belief, the allegations of paragraph 1A and lack knowledge and information sufficient to form a belief as to the allegations of paragraph 1B, and therefore deny the allegations.

2. Childcraft Defendants admit that United States Design Patent Number 358,731 was issued by the U.S. Patent and Trademark Office on May 30, 1995. Childcraft Defendants

lack knowledge and information sufficient to form a belief as to the remaining allegations in paragraph 2, and therefore deny the allegations.

3. Childcraft Defendants admit that Childcraft is a New York Corporation, and affirmatively allege that Childcraft's principal place of business is located at 1156 Four Star Drive, Mount Joy, Pennsylvania, 17552.

4. Childcraft Defendants admit the allegations in paragraph 4.

5. Upon information and belief, Childcraft Defendants state that U.S. Office Products Company and U.S. Office Products North Atlantic District, Inc. no longer exist and the successor in interest to those entities is USOP Liquidating LLC. Childcraft Defendants affirmatively allege that Defendant School Specialty, Inc. is a Wisconsin corporation whose principal place of business is located at W6316 Design Drive, Greenville, Wisconsin, 54942. Childcraft Defendants deny all remaining allegations of paragraph 5.

6. Childcraft Defendants deny the allegations in paragraph 6.

7. Childcraft Defendants admit that they engage in the business of marketing and distributing various school products, as alleged in paragraph 7. Childcraft admits that it previously distributed the Seat Sack pursuant to an agreement with Plaintiff. School Specialty denies that it ever held itself out to Plaintiff or to any other person or entity as a distributor of the Seat Sack, and Childcraft Defendants deny all remaining allegations of paragraph 7.

8. Childcraft Defendants admit that they transact business in the State of New York, but deny all remaining allegations of paragraph 8.

9. Childcraft Defendants admit that they have transacted business in the County and State of New York and are subject to the jurisdiction of this Court, and deny all remaining allegations of paragraph 9.

10. Childcraft Defendants admit that Plaintiff's Complaint asserts causes of action as alleged in paragraph 10. Childcraft Defendants deny that they have committed any violations of statutes or other laws or have breached any contracts as alleged in the Complaint. Childcraft Defendants deny that portions of the Complaint state claims upon which relief may be granted. Childcraft Defendants deny all remaining allegations of paragraph 10.

FIRST CAUSE OF ACTION – FRAUD IN THE INDUCEMENT

11. Childcraft Defendants repeat their responses to the allegations set forth in Paragraphs 1 through 10 of the Complaint as though fully set forth herein.

12-29. Childcraft Defendants will move to dismiss Plaintiff's First Cause of Action, and therefore no responsive pleading to the allegations contained in paragraphs 12-29 is required at this time.

SECOND CAUSE OF ACTION - FRAUD

30. Childcraft Defendants repeat their responses to the allegations set forth in Paragraphs 1 through 29 of the Complaint as though fully set forth herein.

31. Childcraft Defendants will move to dismiss Plaintiff's Second Cause of Action, and therefore no responsive pleading to the allegations contained in paragraph 31 is required at this time.

THIRD CAUSE OF ACTION - CONVERSION

32. Childcraft Defendants repeat their responses to the allegations set forth in Paragraphs 1 through 31 of the Complaint as though fully set forth herein.

33. Childcraft Defendants will move to dismiss Plaintiff's Third Cause of Action, and therefore no responsive pleading to the allegations contained in paragraph 33 is required at this time.

FOURTH CAUSE OF ACTION – DECEPTIVE TRADE, UNFAIR BUSINESS PRACTICES, MISAPPROPRIATION OF TRADE SECRETS AND UNFAIR COMPETITION

34. Childcraft Defendants repeat their responses to the allegations set forth in Paragraphs 1 through 33 of the Complaint as though fully set forth herein.

35. Childcraft Defendants will move to dismiss, or, alternatively, for a more definite statement with respect to Plaintiff's Fourth Cause of Action, and therefore no responsive pleading to the allegations contained in paragraph 35 is required at this time.

FIFTH CAUSE OF ACTION – BREACH OF CONTRACT

36. Childcraft Defendants repeat their responses to the allegations set forth in Paragraphs 1 through 35 of the Complaint as though fully set forth herein.

37. Childcraft Defendants deny the allegations of paragraph 37.

38. Childcraft Defendants deny the allegations of paragraph 38. School Specialty further denies that it had any contractual or other relationship with Plaintiff.

39. Childcraft Defendants deny the allegations of paragraph 39. School Specialty further denies that it had any contractual or other relationship with Plaintiff.

40. Childcraft Defendants deny the allegations of paragraph 40. School Specialty further denies that it had any contractual or other relationship with Plaintiff.

SIXTH CAUSE OF ACTION – ATTORNEY'S FEES

41. Childcraft Defendants repeat their responses to the allegations set forth in Paragraphs 1 through 40 of the Complaint as though fully set forth herein.

42. Childcraft Defendants will move to dismiss Plaintiff's Sixth Cause of Action, and therefore no responsive pleading to the allegations contained in paragraph 42 is required at this time.

SEVENTH CAUSE OF ACTION – UNLAWFUL USE OF PLAINTIFF'S PATENTED PRODUCT

43. Childcraft Defendants repeat their responses to the allegations set forth in Paragraphs 1 through 42 of the Complaint as though fully set forth herein.

44. Childcraft Defendants admit that United States Design Patent No. 358,731 was issued by the U.S. Patent and Trademark Office for the Seat Sack, and deny all remaining allegations of paragraph 44.

45. Childcraft Defendants lack knowledge and information sufficient to form a belief as to the allegations of paragraph 45 and therefore deny the allegations.

46. Childcraft Defendants lack knowledge and information sufficient to form a belief as to the allegations of paragraph 46 and therefore deny the allegations.

47. Childcraft Defendants deny the allegations of paragraph 47.

48. Childcraft Defendants deny the allegations of paragraph 48.

49. Childcraft Defendants deny the allegations of paragraph 49.

50. Childcraft Defendants admit that Plaintiff seeks certain injunctive relief, but deny Plaintiff's entitlement to any such relief.

EIGHTH CAUSE OF ACTION – TRADEMARK INFRINGEMENT

51. Childcraft Defendants repeat their responses to the allegations set forth in Paragraphs 1 through 50 of the Complaint as though fully set forth herein.

52. Childcraft Defendants admit that Plaintiff seeks relief for alleged infringement of its alleged patents and trademarks, but deny Plaintiff's entitlement to any such relief. Childcraft Defendants deny all remaining allegations of paragraph 52.

53. Childcraft Defendants deny the allegations of paragraph 53.

54. Childcraft Defendants deny the allegations of paragraph 54.

55. Childcraft Defendants deny the allegations of paragraph 55.

56. Childcraft Defendants deny the allegations of paragraph 56.

57. Childcraft Defendants deny the allegations of paragraph 57.

58. Childcraft Defendants deny the allegations of paragraph 58.

NINTH CAUSE OF ACTION – 15 U.S.C. § 1125(a)

59. Childcraft Defendants repeat their responses to the allegations set forth in Paragraphs 1 through 58 of the Complaint as though fully set forth herein.

60. Childcraft Defendants admit that Plaintiff seeks relief for alleged infringement of its alleged trademarks, but deny Plaintiff's entitlement to any such relief. Childcraft Defendants deny all remaining allegations of paragraph 60.

61. Childcraft Defendants deny the allegations of paragraph 61.

62. Childcraft Defendants deny the allegations of paragraph 62.

63. Childcraft Defendants deny the allegations of paragraph 63.

64. Childcraft Defendants deny the allegations of paragraph 64.

65. Childcraft Defendants deny the allegations of paragraph 65.

66. Childcraft Defendants deny the allegations of paragraph 66.

TENTH CAUSE OF ACTION – 15 U.S.C. § 1125(a)

67. Childcraft Defendants repeat their responses to the allegations set forth in Paragraphs 1 through 66 of the Complaint as though fully set forth herein.

68. Childcraft Defendants admit that Plaintiff seeks relief for alleged infringement of its alleged trademarks, but deny Plaintiff's entitlement to any such relief. Childcraft Defendants deny all remaining allegations of paragraph 68.

69. Childcraft Defendants deny the allegations of paragraph 69.

70. Childcraft Defendants deny the allegations of paragraph 70.

71. Childcraft Defendants deny the allegations of paragraph 71.

72. Childcraft Defendants deny the allegations of paragraph 72.

ELEVENTH CAUSE OF ACTION – VIOLATIONS OF § 360-l OF THE GENERAL BUSINESS LAW OF NEW YORK STATE

73. Childcraft Defendants repeat their responses to the allegations set forth in Paragraphs 1 through 72 of the Complaint as though fully set forth herein.

74. Childcraft Defendants admit that Plaintiff seeks relief for alleged violations of Section 360-1 of the General Business Law of the State of New York, but deny Plaintiff's entitlement to any such relief. Childcraft Defendants deny all remaining allegations of paragraph 74.

75. Childcraft Defendants deny the allegations of paragraph 75.

76. Childcraft Defendants deny the allegations of paragraph 76.

TWELFTH CAUSE OF ACTION – VIOLATIONS OF § 360-l OF THE GENERAL BUSINESS LAW OF NEW YORK STATE

77. Childcraft Defendants repeat their responses to the allegations set forth in Paragraphs 1 through 76 of the Complaint as though fully set forth herein.

78. Childcraft Defendants deny the allegations of paragraph 78.

79. Childcraft Defendants deny the allegations of paragraph 79.

THIRTEENTH CAUSE OF ACTION – UNJUST ENRICHMENT

80. Childcraft Defendants repeat their responses to the allegations set forth in Paragraphs 1 through 79 of the Complaint as though fully set forth herein.

81. Childcraft Defendants will move to dismiss Plaintiff's Thirteenth Cause of Action, and therefore no responsive pleading to the allegations of paragraph 81 is required at this

time.

DEFENSES AND AFFIRMATIVE DEFENSES

1. Plaintiff fails to state claims upon which relief may be granted.

2. School Specialty never entered into any contractual or other relationship with Plaintiff and therefore was improperly joined as a Defendant in this matter.

3. There is no federally registered trademark applicable to the Seat Sack.

4. Plaintiff's design patent for the Seat Sack is invalid because the Seat Sack design is obvious.

5. Plaintiff's tort claims are barred by the economic loss doctrine.

6. Plaintiff's contract claims are barred due to Plaintiff's breach of the contract.

7. Plaintiff's contract claims are barred by a failure of consideration.

8. Plaintiff's claims are barred in their entirety by Plaintiff's unclean hands.

9. Plaintiff's claims are barred in their entirety by the doctrines of laches, waiver and/or estoppel.

COUNTERCLAIM

For their Counterclaim against Plaintiff, Childcraft Defendants hereby allege as follows:

1. Counterclaimant Childcraft Education Corp. is a New York corporation with its principal place of business located at 1156 Four Star Drive, Mount Joy, Pennsylvania, 17552.

2. Counterclaimant School Specialty, Inc. is a Wisconsin corporation with its principal place of business located at W6316 Design Drive, Greenville, Wisconsin, 54942.

3. Upon information and belief, Plaintiff is a Florida corporation with its principal place of business located at 5910 Taylor Road, Naples, Florida, 34109.

4. Plaintiff has accused Childcraft Defendants of infringing Seat Sack's United

States Design Patent No. 358,731 by selling allegedly "knock-off" products that attach to the back of school students' chairs.

5. This is an action for declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202. This Court has jurisdiction over the Counterclaims pursuant to 28 U.S.C. §§ 1331 and 1338(a).

FIRST CAUSE OF ACTION – DECLARATORY JUDGMENT OF INVALIDITY OF U.S. DESIGN PATENT NO. 358,731

6. Childcraft Defendants incorporate by reference and re-allege as if fully set forth herein the allegations of paragraphs 1 through 5 of the Counterclaim.

7. Upon information and belief, Plaintiff is the owner of United States Design Patent No. 358,731 (the "Design Patent").

8. As evidenced by the Complaint and the Defendants' Answer thereto, and by Plaintiff's accusations of infringement, there exists a real and actual controversy concerning the validity and alleged infringement of the Design Patent.

9. Childcraft Defendants are entitled to a declaratory judgment that the Design Patent is invalid under 35 U.S.C. § 101, *et seq.*, in that it fails to meet the patentability standards under 35 U.S.C. §§ 102 and 103, because it is anticipated by, or obvious in view of, the prior art.

SECOND CAUSE OF ACTION – DECLARATORY JUDGMENT OF NON-INFRINGEMENT OF U.S. DESIGN PATENT NO. 358,731

10. Childcraft Defendants incorporate by reference and re-allege as if fully set forth herein the allegations of paragraphs 1 through 9 of the Counterclaim.

11. Childcraft Defendants are entitled to a declaratory judgment that they have not infringed and are not infringing the Design Patent.

WHEREFORE, Childcraft Defendants demand judgment in their favor and against Plaintiff as follows:

1. Dismissing Plaintiff's Complaint with prejudice;

2. Declaring that the Patent is invalid;

3. Declaring that the Childcraft Defendants have not infringed the Patent;

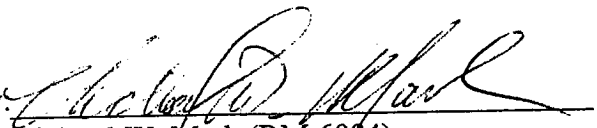
4. Awarding Childcraft Defendants all recoverable costs, fees, and interest; and

5. For all such other relief as the Court deems just and equitable.

Dated: New York, New York
May 3, 2007

Respectfully submitted,

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: 

Richard W. Mark (RM 6884)
David M. Fine (DF 4479)
666 Fifth Avenue
New York, NY 10103

Attorneys for Defendants,
Childcraft Education Corp. and
School Specialty, Inc.

OF COUNSEL:

Nicholas A. Kees
Anthony S. Baish
Mark E. Schmidt
GODFREY & KAHN, S.C.
780 North Water Street
Milwaukee, WI 53202-3590

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

SEAT SACK, INC.,

Plaintiff,

-against-

CHILDCRAFT EDUATION CORP.; US OFFICE PRODUCTS COMPANY; US OFFICE PRODUCTS NORTH ATLANTIC DISTRICT, INC.; and SCHOOL SPECIALTY, INC.,

Defendants.

----------x

REPLY

07-CV-3344
(RJH)(DFE)

Plaintiff, Seat Sack Inc., by its attorney, Edward J. Carroll, Esq. in reply to the counterclaims set forth in defendants', Childcraft Education Corp., ("Childcraft") and School Specialty, Inc., ("School Specialty") Answer and Counterclaims, respectfully sets forth and alleges as follows:

1. Denies each and every allegation contained in paragraphs 9, 10 and 11, of defendants' Answer and Counterclaims.

2. Denies knowledge and information contained in paragraphs 2, of defendants Answer and Counterclaims.

WHEREFORE, plaintiff demands judgment against defendants, Childcraft Education Corp., ("Childcraft") and School Specialty, Inc., ("School Specialty") dismissing defendants' Answer and Counterclaims in favor of plaintiff and against

defendants as set forth in its Verified Complaint, together with such

relief as to the Court may seem just and proper under the circumstances.

Dated: May 21, 2007

EDWARD J. CARROLL, ESQ. (ec6937)
Attorney for Plaintiff
2733 Route 209
Kingston, New York 12401
(845) 338-5977

TO: ORRICK, HERRINGTON & SUTCLIFFE, LLP
Attorneys for Defendants - Childcraft Education Corp., and School Specialty, Inc.
Att: Richard W. Mark, Esq., (RM6884)
666 Fifth Avenue
New York, New York 10103

YOUNG, CONAWAY, STARGATT & TAYLOR, LLP
Attorneys for Defendants - US Office Products Company and US Office Products North Atlantic District, Inc.
Att: Sean M. Beach, Esq.
P.O. Box 391
Wilmington, Delaware 19899-0391

Richard W. Mark
David M. Fine
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, NY 10103
Telephone: (212) 506-5000
Facsimile: (212) 506-5151

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SEAT SACK, INC.,	:	
Plaintiff,	:	
-against-	:	
CHILDCRAFT EDUCATION CORP.; US OFFICE PRODUCTS COMPANY; US OFFICE PRODUCTS NORTH ATLANTIC DISTRICT, INC.; and SCHOOL SPECIALTY, INC.,	:	CASE NO. 07-CIV-3344 (RJH)(DFE)
Defendants.	:	

CHILDCRAFT DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

OF COUNSEL:

Nicholas A. Kees
Anthony S. Baish
Mark E. Schmidt
GODFREY & KAHN, S.C.
780 North Water Street
Milwaukee, WI 53202-3590

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

STATE CASES

Page

FEDERAL STATUTES

STATE STATUTES

OTHER

Richard W. Mark (RM 6884)
David M. Fine (DF 4479)
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, NY 10103
Telephone: (212) 506-5000
Facsimile: (212) 506-5151

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SEAT SACK, INC., Plaintiff, -against- CHILDCRAFT EDUCATION CORP.; US OFFICE PRODUCTS COMPANY; US OFFICE PRODUCTS NORTH ATLANTIC DISTRICT, INC.; and SCHOOL SPECIALTY, INC., Defendants.	:	CASE NO. 07-CIV-3344 (RJH)(DFE)

CHILDCRAFT DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Having filed a Complaint containing six counts that fail to state a claim as a matter of law, plaintiff Seat Sack, Inc. ("Seat Sack") remarkably asks the Court to allow it discovery so that it can attempt to find support for its allegations. Seat Sack needed to have that support before it filed this lawsuit. Defendants Childcraft Education Corp. ("Childcraft") and School Specialty, Inc. ("School Specialty"; collectively, "Childcraft Defendants") should not be put to further expense and inconvenience in defending claims that have no legal merit. Substantial portions of Seat Sack's Complaint should be dismissed.

ARGUMENT

I. PLAINTIFF HAS FAILED TO STATE A CLAIM AS A MATTER OF LAW, AND IS NOT ENTITLED TO DISCOVERY TO CURE THIS DEFICIENCY

Seat Sack first argues that the Childcraft Defendants' motion to dismiss is premature, because Seat Sack has not yet obtained discovery and therefore has had no "opportunity to obtain and provide further particulars." (Pl. Br. at 3.) Seat Sack apparently confuses the Childcraft Defendants' motion to dismiss under Rule 9(b) (for failure to plead fraud with particularity) and Rule 12(b)(6) (for failure to state a claim upon which relief can be granted) with a motion for summary judgment under Rule 56. Rules 9(b) and 12(b)(6) concern the sufficiency of Seat Sack's pleadings, not its evidence. See ATSI Communications, Inc. v. Shaar Fund, Ltd., --- F.3d ----, 2007 WL 1989336, at *6 (2d Cir. July 11, 2007) (describing Rule 9(b) as a "pleading constraint"); Shmueli v. City of New York, 424 F.3d 231, 236 (2d Cir. 2005) (ruling on motion under Rule 12(b)(6) "constituted a ruling as to the legal sufficiency of the amended [complaint]"). Seat Sack may not obtain discovery in pursuit of a legally deficient claim in the hope of unearthing some facts by which it might cobble together a cause of action. Indeed, Seat Sack's request for discovery to allow it to "obtain . . . further particulars" is a tacit concession that its current Complaint lacks the "particulars" necessary to sustain the claims in question.

II. SEAT SACK'S AFFIDAVITS ARE IRRELEVANT TO RESOLUTION OF THE MOTION TO DISMISS

Seat Sack presents two affidavits in opposition to the motion to dismiss. The affidavits, which have no place in a response to motions brought under Rules 9(b) or 12(b), are both deficient as a matter of law and wholly irrelevant to the present motion. One of the affiants is Seat Sack's attorney, Edward J. Carroll. The first two paragraphs and the last paragraph of his thirteen-paragraph affidavit contain introductory language and a brief description of the

procedural history of the case, none of which is pertinent to the resolution of the Childcraft Defendants' motion. The remainder of the affidavit is nothing more than counsel's argument, corresponding virtually word-for-word with entire sections of Seat Sack's opposing brief.[1] None of this "testimony" is proper. An affidavit must set forth facts – not argument – about which the affiant has personal knowledge and which would be admissible at trial. See Fed. R. Civ. P. 56(e).

The affidavit of Ann McAlear, Seat Sack's president, fares no better. Setting aside background information (in paragraphs one, two, three, and twenty) and averments about irreparable harm directed solely toward Seat Sack's motion for preliminary injunction (in paragraphs sixteen through nineteen), the substance of McAlear's affidavit is either directed to the claims for alleged infringement of the design patent, trademark infringement or breach of contract, none of which is the subject of this motion. (McAlear Aff., paras. 4-5, 6-8, 11, 12-15.) McAlear also attempts to bolster Seat Sack's allegations of fraud (id., para. 9), but as discussed below, the fraud claims fail whether or not the affidavit is considered. The affidavits offered by Seat Sack should be disregarded.

III. SEAT SACK'S FRAUD CLAIMS SHOULD BE DISMISSED

The Childcraft Defendants identified two fatal defects in Seat Sack's fraud claims (Counts I and II of Seat Sack's Complaint). First, the fraud claims are indistinguishable from Seat Sack's breach of contract claims. Second, Seat Sack fails to plead fraud with particularity, instead alleging "upon information and belief" only generalized statements supposedly made by

---

[1] Compare Carroll Aff. paras. 3-4 with Pl. Br. at 2; Carroll Aff. para. 5 with Pl. Br. at 3; Carroll Aff. para. 6 with Pl. Br. at 4; Carroll Aff. para. 7 with Pl. Br. at 6-7; Carroll Aff. para. 8 with Pl. Br. at 7-8; Carroll Aff. para. 9 with Pl. Br. at 8; Carroll Aff. para. 10 with Pl. Br. at 8-9; and Carroll Aff. para. 11 with Pl. Br. at 9-10. Although paragraph 12 of Carroll's Affidavit has no counterpart in Seat Sack's opposition brief, it merely contains argument regarding the effect of Seat Sack's second affidavit on its motion for a preliminary injunction. See Carroll Aff. para. 12.

"the Defendants" at some unspecified time. Seat Sack's opposition does not adequately address either of these defects.

A. Seat Sack's "Fraud" Claims Are Actionable Only In Contract

A claim for failure to fulfill a promise is a claim for breach of contract, not for fraud. See DS America (East), Inc. v. Chromagrafx Imaging Systems, Inc., 873 F. Supp. 786, 796 (E.D.N.Y. 1995) (citing C.B. Western Financial Corp. v. Computer Consoles, Inc., 122 A.D.2d 10, 504, N.Y.S.2d 179, 182 (N.Y. App. Div. 1986)); Crabtree v. Tristar Automotive Group, Inc., 776 F. Supp. 155, 161 (S.D.N.Y. 1991); MBW Advertising Network, Inc. v. Century Business Credit Corp., 173 A.D. 2d 306, 569 N.Y.S.2d 682 (N.Y. 1991); Canstar v. Jones, 212 A.D. 452, 453, 622 N.Y.S.2d 730, 731 (N.Y. App. Div. 1995); L. Fatato, Inc. v. Decrescente Dist. Co., 86 A.D.2d 600, 601, 446 N.Y.S.2d 120, 121 (N.Y. App. Div. 1982) (allegation "that [the] defendant made [an] agreement knowing that it would not abide by it, thereby misrepresenting its intention to [the] plaintiff [.] . . . says nothing which is not legally embraced by [a cause] of action for breach of contract"). As the Childcraft Defendants pointed out in their opening brief, Seat Sack's own Complaint repeatedly and consistently characterizes the allegedly "fraudulent" acts as breaches of contract. See Def. Br. at 5 and citations contained therein.

In response, Seat Sack asserts that the Childcraft Defendants' supposed misdeeds are "extrinsic" to or "independent" of the parties' contract. (Pl. Br. at 9-10.) Saying it does not make it so, however. Seat Sack offers no authority to support the proposition that the Court should treat its fraud claims for failure to perform the alleged contract as "extrinsic" to its contract with the Childcraft Defendants. Seat Sack's self-serving and unsupported statements are insufficient to defeat a motion to dismiss. See, e.g., Port Washington Teachers' Ass'n v. Bd. of Educ., 478 F.3d 494, 499 (2d Cir. 2007) (upholding dismissal for lack of standing in part

because "plaintiffs offer little more than conclusory statements to support their assertion" of harm).

B. Seat Sack Has Not Alleged Fraud with Particularity, as Required by the Rules

Fed. R. Civ. P. 9(b) requires Seat Sack to allege the Childcraft Defendants' purported misrepresentations with particularity. See Fed. R. Civ. P. 9(b). Seat Sack may not rest allegations of fraud on "information and belief." See Mills v. Polar Molecular Corp., 12 F.3d 1170, 1175 (2d Cir. 1993); Di Vittorio v. Equidyne Extractive Indus., Inc., 822 F.2d 1242, 1247 (2d Cir. 1987). Seat Sack must specifically allege not only the content of the statements, but also who made the statements, the time they were made, and the place they were made. See, e.g., Rombach v. Chang, 355 F.3d 164, 170 (2d Cir. 2004); Oechsner v. Connell Ltd. P'ship, 283 F. Supp. 2d 926, 933 (S.D.N.Y. 2003). As discussed in the Childcraft Defendants' opening brief, Seat Sack's Complaint falls woefully short of these requirements. See Def. Br. at 7-8.

The entirety of Seat Sack's opposition contains no identification of who made the alleged misrepresentations, when they were made, where they were made, or what – specifically – was said. Although Seat Sack's brief promises that the McAlear Affidavit provides "further particularization" of Seat Sack's claims (Pl. Br. at 6), the affidavit – even assuming it could supplant the Complaint itself – still does not support a fraud claim. With respect to who made the alleged misrepresentations, McAlear's affidavit vaguely tells us that "Childcraft Education Corp." did so "through its officers." (McAlear Aff. para. 9.) While marginally more specific than the Complaint[2] (and, it should be noted, exculpatory of School Specialty), McAlear's affidavit still does not adequately identify the maker of the alleged misrepresentations. See, e.g., Oechsner, 283 F. Supp. 2d at 933 (alleging false statement by corporation's chairman "and

---

[2] The Complaint alleged that "defendants, through its/their agents and/or employees" made the misrepresentations. (Compl. para. 13.)

others" did not satisfy speaker requirements of Rule 9). When were the alleged misrepresentations made? "Always," says McAlear. (McAlear Aff. para. 9.) It is difficult to conceive of an allegation less particularized than this. And McAlear's affidavit, like the remainder of Seat Sack's opposition, is silent on where the alleged misrepresentations took place and what exactly was said. Put simply, Seat Sack's Complaint, even if read together with McAlear's affidavit, constitutes precisely the sort of broadside accusation Rule 9(b) is intended to prevent. The fraud claims should be dismissed.

IV. SEAT SACK'S THIRD CAUSE OF ACTION, FOR CONVERSION, SHOULD BE DISMISSED

The Childcraft Defendants move to dismiss Seat Sack's conversion claim on the ground that the Complaint seeks nothing more than general money damages, as opposed to the recovery of specifically identifiable personal property. Only the latter is the proper subject of a conversion claim; money, generally speaking, may not be converted. See Peters Griffin Woodward, Inc. v. WCSC, Inc., 88 A.D.2d 883, 883-84, 452 N.Y.S.2d 599, 600 (N.Y. App. Div. 1982); Independence Discount Corp. v. Bressner, 47 A.D.2d 756, 757, 365 N.Y.S.2d 44, 46 (N.Y. App. Div. 1975) (citing cases); Laurent v. Williamsburg Sav. Bank, 28 Misc. 2d 140, 143-44, 137 N.Y.S.2d 750, 754-55 (N.Y. 1954). Money may be subject to a conversion claim only if the plaintiff seeks recovery of specific money – i.e., a specific dollar bill – or money placed into a specific, segregated fund. See Independence Discount Corp., 47 A.D.2d at 757; Laurent, 28 Misc. 2d at 144.

The two cases cited by Seat Sack (Pl. Br. at 10) do not hold otherwise. In Heffernan v. Marine Midland Bank, N.A., 283 A.D.2d 337, 727 N.Y.S.2d 60 (N.Y. 2001)(slip op.), there is nothing to suggest that the defendants argued, or the court considered, whether the money at issue could be the subject of a conversion claim. If the court had considered the issue, however,

it likely would have concluded that the money could be the subject of such a claim, since the money apparently was taken for deposit into a specific trust account. See id. at 338 (discussing bank employee's practice of converting "funds entrusted to him by plaintiffs in response to [his] solicitations of investments in a fictitious 'Trust B' account"). If Heffernan tells us anything about the conversion of money, therefore, it merely reaffirms that only specific money, or money designated for a specific account, may be converted. The other case cited by Seat Sack, Barash v. Estate of Sperlin, 271 A.D.2d 558 (N.Y. 2000), does not discuss conversion at all.

The only question, then, is whether Seat Sack alleges the conversion of specific money rather than a generalized right to money. It does not. (Compl. paras. 32-33.)

V. SEAT SACK'S CLAIM FOR MISAPPROPRIATION OF TRADE SECRETS AND/OR "DECEPTIVE TRADE PRACTICES" SHOULD BE DISMISSED

Seat Sack insists the Childcraft Defendants have misappropriated its "trade secrets," a claim asserted (albeit obliquely) in Seat Sack's Fourth Cause of Action. The claim cannot stand. As noted in the Childcraft Defendants opening brief, the only potential "trade secret" alleged in the Complaint is the Seat Sack product itself (or, perhaps, its design). Seat Sack confirms that among the so-called "trade secrets" it seeks to protect is "the product that was transferred to the defendants[.]" (Pl. Br. at 11.) But Seat Sack may not maintain an action for misappropriation of information that is available to the public at large; the information must be secret. See Lehman v. Dow, Jones & Co., Inc., 783 F.2d 285, 297-98 (2d Cir. 1986); Sylmark Holdings Ltd. v. Silicone Zones Int'l, Ltd., 5 Misc. 3d 285, 297-98, 783 N.Y.S.2d 758, 770-71 (N.Y. Sup. 2004) (slip op.) (citing authorities). According to the Complaint, the Seat Sack design is disclosed in a publicly available patent. (Compl. para. 44; McAlear Aff. para, 4.) The public availability of the information destroys its secrecy. "After a patent has issued, the information contained within it is ordinarily regarded as public and not subject to protection as a trade secret." On-Line Tech. v.

Bodenseewerk Perkin-Elmer, 386 F.3d 1133, 1141 (Fed. Cir. 2004). See also Henry Hope X-Ray Prods., Inc. v. Marron Carrel, Inc., 674 F.2d 1336, 1342 (9th Cir. 1982) ("Matters disclosed in a patent publication destroy any trade secret contained therein"); Restatement (Third) Unfair Competition § 39, cmt. f (1995) ("Information that is generally known or readily ascertainable through proper means . . . is not protectible as a trade secret. Thus, information that is disclosed in a patent or contained in published materials reasonably accessible to competitors does not qualify for protection"). Seat Sack also asserts that it provided the Childcraft Defendants "with the accounts of its customers and the prices which were totally non-public in nature." (Pl. Br. at 11.) However, such allegations are nowhere to be found in the Complaint.

Nor can any specific reference to New York General Business Law § 349 be found in the Complaint, although a claim under this statute is presumably also subsumed in the Fourth Cause of Action (which is vaguely styled as a count for "deceptive trade, unfair business practices, misappropriation of trade secrets and unfair competition"). Plaintiff concedes, as it must, that "the primary focus of this statute is consumer protection," but argues that it may nonetheless bring a claim against a competitor under Section 349 where "some harm to the public at large is at issue." (Pl. Br. at 11-12.) The sole case plaintiff cites in this regard allowed a plaintiff health plan to proceed with a Section 349 claim against its competitor because it adequately pleaded such public harm. See Excellus Health Plan, Inc. v. Tran, 287 F. Supp. 2d 167, 179-80 (W.D.N.Y. 2003) (complaint contains specific allegations that conduct "threatens the general public" by limiting the number of health care providers available to the community). Trying to fit a square peg in a round hole, plaintiff argues here that the Childcraft Defendants sold a "counterfeit of lesser value and purpose," thereby harming consumers. (Pl. Br. at 12.) Yet the Complaint contains no allegations that consumers were harmed by the Childcraft Defendants'

product. To the contrary, plaintiff alleges that the product sold by the Childcraft Defendants was "identical to plaintiff's 'Seat Sack,'" not inferior to it. (Compl. para. 18-A.) While plaintiff makes numerous allegations that the Childcraft Defendants deprived it of profits (which is the subject of other counts of the Complaint), nowhere does it claim that consumers were in any way harmed by the Childcraft Defendants' alleged conduct. In short, Seat Sack has not adequately pleaded a claim for "deceptive trade, unfair business practices, misappropriation of trade secrets and unfair competition." Any such claim should be dismissed.

VI. ATTORNEYS' FEES

Seat Sack asserts a "stand-alone" claim for attorneys' fees. It seeks to support this claim by arguing that Section 349 of New York's General Business Law specifically provides for an award of fees. (Pl. Br. at 12.) Even assuming that Section 349 has some application here, an award of fees is only a specific remedy under that law. There is no need to include a claim for fees as a separate cause of action in the Complaint.

Seat Sack also argues that New York law permits recovery of attorneys' fees for breach of fiduciary duties, and cites a host of cases so holding. Seat Sack wrongly assumes, however, that the Childcraft Defendants acted as Seat Sack's fiduciary. For all the reasons set forth in their opening brief, the Childcraft Defendants were not, as a matter of law, Seat Sack's fiduciaries. (See Def. Br. at 13.) Seat Sack does not counter these arguments and authorities in any way.[3] (See Pl. Br. at 12-13.) Accordingly, Seat Sack has waived any claim that the Childcraft Defendants acted as its fiduciaries. See, e.g., McCarthy v. Securities and Exchange

---

[3] Seat Sack does state the Childcraft Defendants agreed to act as its fiduciaries, but does so only in a conclusory fashion. (See, e.g., Compl. para. 42; Pl. Br. at 12.) The Court need not credit these conclusory statements. See In re Livent, Inc. Noteholders Sec. Litig., 151 F. Supp. 2d 371, 404 (S.D.N.Y. 2001). Remarkably, Seat Sack also proclaims that the Childcraft Defendants have conceded for purposes of this motion that they acted as Seat Sack's fiduciaries. (Pl. Br. at 6.) Not so. The Childcraft Defendants summarized the "fiduciary" allegations of Seat Sack's Complaint (Def. Br. at 3), but plainly challenged the truth and legal sufficiency of those allegations. (Id. at 13.) Seat Sack does not address the Childcraft Defendants' challenge.

Commission, 406 F.3d 179, 186 (2d Cir. 2005) (failure to raise argument in brief constitutes waiver). There is no point in including a stand-alone claim for attorneys' fees, which – at most – is a remedy available to Seat Sack under other claims.

VII. UNJUST ENRICHMENT

The existence of a contract between Childcraft and Seat Sack precludes Seat Sack from pursuing an unjust enrichment claim. See Clark-Fitzpatrick, Inc. v. Long Island R.R. Co., 70 N.Y.2d 382, 388-89 (N.Y. 1987). Seat Sack insists, however, that it may pursue an unjust enrichment claim "not by virtue of contract, but based on the independent, unlawful extrinsic tortuous [sic] acts of the defendants which have deprived plaintiff of the profits from the sale or thwarted sales of its products." (Pl. Br. at 13.) This hollow platitude, offered without citation to authority, sheds no light on why Seat Sack's claim should be allowed to proceed. Unjust enrichment is not a universal, "catch-all" claim against a defendant who allegedly has done something "wrong." It is a quasi-contractual claim designed to compensate a plaintiff who performed a service for the benefit of the defendant, who in turn received the service (whether or not he actually benefited) but did not pay for it. See, e.g., Farash v. Sykes Datatronic, Inc., 59 N.Y.2d 500, 505-06 (N.Y. 1983). Seat Sack's complaint does not identify any such performance or service beyond those required by the alleged contract itself. The contract between the parties, pleaded by Seat Sack, precludes any unjust enrichment claim. The claim should be dismissed.

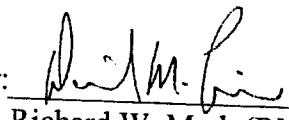
CONCLUSION

For the foregoing reasons, the Childcraft Defendants' Motion to Dismiss Counts I, II, III, IV, VI, and XIII should be granted.

Dated: August 8, 2007

Respectfully submitted,

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: 

Richard W. Mark (RM 6884)
David M. Fine (DF 4479)
666 Fifth Avenue
New York, NY 10103

Attorneys for Defendants,
Childcraft Education Corp. and
School Specialty, Inc.

OF COUNSEL:

Nicholas A. Kees
Anthony S. Baish
Mark E. Schmidt
GODFREY & KAHN, S.C.
780 North Water Street
Milwaukee, WI 53202-3590

Richard W. Mark
David M. Fine
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, NY 10103
Telephone: (212) 506-5000
Facsimile: (212) 506-5151

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SEAT SACK, INC., Plaintiff, -against- CHILDCRAFT EDUCATION CORP.; US OFFICE PRODUCTS COMPANY; US OFFICE PRODUCTS NORTH ATLANTIC DISTRICT, INC.; and SCHOOL SPECIALITY, INC., Defendants.	:	07-CV-3344 (RJH) (DFE) **DECLARATION OF SERVICE**

David M. Fine, an attorney duly admitted to practice law in the State of New York, declares as follows:

1. I am over the age of 18 years, am not a party to this action, and am associated with the law firm of Orrick, Herrington & Sutcliffe LLP, 666 Fifth Avenue, New York, New York 10103.

2. On the 8th day of August, 2007, I served true copies of the annexed **Childcraft Defendants' Reply Memorandum of Law in Support of Motion to Dismiss** upon:

Edward J. Carroll, Esq.
Attorney for Plaintiff
2733 Route 209
Kingston, NY 12401

Sean M. Beach, Esq.
Young Conaway Stargatt & Taylor, LLP
Attorneys for USOP Liquidating LLC
(f/k/a US Office Products Company
and US Office Products North Atlantic District, Inc.)
P.O. Box 391
Wilmington, DE 19899-0391

by first class mail, by depositing true copies thereof in a postage prepaid wrapper in an official depository under the exclusive care and custody of the U.S. Postal Service within the State of New York, addressed to the address designated by them for service.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
August 8, 2007

David M. Fine

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

SEAT SACK, INC.,

Plaintiff,

-against-

Case No. 07-CV-3344 (RJH)(DFE)

CHILDCRAFT EDUCATION CORP,;
US OFFICE PRODUCTS COMPANY;
US OFFICE PRODUCTS NORTH
ATLANTIC DISTRICT, INC.; and
SCHOOL SPECIALTY, INC.,

Defendants.

----------x

REPLY MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFF'S CROSS MOTION FOR A PRELIMINARY INJUNCTION

Respectfully submitted,

EDWARD J. CARROLL, ESQ.
Attorney for Plaintiff, SEAT SACK, INC.
2733 Route 209
Kingston, New York 12401
Telephone: 845-338-5977
Facsimile: 845-338-5975

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

Page

CASES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

SEAT SACK, INC.,

Plaintiff,

-against-

Case No. 07-CV-3344 (RJH)(DFE)

CHILDCRAFT EDUCATION CORP.;;
US OFFICE PRODUCTS COMPANY;
US OFFICE PRODUCTS NORTH
ATLANTIC DISTRICT, INC.; and
SCHOOL SPECIALTY, INC.,

Defendants.

----------x

REPLY MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFF'S CROSS MOTION FOR A PRELIMINARY INJUNCTION

For the Court's convenience, this reply memorandum shall address, where possible, defendants' arguments in the same order as defendants have raised them in their reply memorandum, dated August 8, 2007.

ARGUMENT

Defendants, lacking any meritorious factual defense, are instead moving, as a matter of law, to dismiss plaintiff's lawsuit at its inception, before the plaintiff has had any opportunity to present its merits.

Defendants' counsel, by virtue of their motion, are attempting to prematurely acquire all of plaintiff's evidentiary proof which should be more properly presented during discovery or at trial. To accomplish these goals, rather than denying plaintiff's factual allegations,

defense counsel instead argue that plaintiff's complaint fails to plead fraud with particularity; that the fraud claims are indistinguishable from the plaintiff's breach of contract claims; and that plaintiff's actions for conversion, misappropriation of trade secrets and/or deceptive trade practices, unjust enrichment, and for the recovery of attorney's fees must be dismissed.

Defense counsel further attempt to convince this Court that the defendants have done nothing improper; that they did not act as plaintiff's fiduciary; that no consumers were harmed; and that a cause of action for breach of contract precludes additional causes of action, even if such claims are based upon independent and extrinsic acts.

Contrary to defendants' arguments, the only issue to be decided in the instant motion is whether plaintiff's complaint meets the minimum factual standards required by law.

Defense counsel argue that plaintiff's complaint, in order to meet those minimum standards, must contain voluminous and detailed acts of the defendants establishing fraud, and, at best, such conduct, if committed, only constitutes a breach of contract.

What defense counsel overlook, however, is that plaintiff's complaint presently alleges facts which establish a conspiracy to defraud and criminal conduct. Such acts establish fraud, as a matter of law. Plaintiff's complaint additionally seeks to recover for more than just a breach of contract. As a result of the foregoing, plaintiff's complaint includes several additional, independent and unrelated causes of action which establish fraud; conversion; deceptive trade; unfair business practices; misappropriation of trade secrets; unfair competition; award of attorney's fees; unlawful use of plaintiff's patented product, trademark and service mark; violations of 15 U.S.C. 1125(a); violations of General Business Law and unjust enrichment.

Much of this tortuous conduct was committed in violation of the defendants' fiduciary duty to plaintiff.

This conduct occurred outside of any contractual relationship between the plaintiff and defendants and independently establishes causes of action for fraud; conversion; deceptive trade; unfair business practices; misappropriation of trade secrets; unfair competition; award of attorney's fees; unlawful use of plaintiff's patented product, trademark and service mark; violations of 15 U.S.C. 1125(a); violations of General Business Law and unjust enrichment.

BRIEF SUMMARY OF THE FACTUAL ALLEGATIONS OF PLAINTIFF'S COMPLAINT

Plaintiff's complaint alleges that the defendants first entered into a contract with plaintiff and agreed to act, on behalf of the plaintiff, in a fiduciary capacity, as the distributing agent of plaintiff's patented product, sold under the trademark of "Seat Sack". However, instead of diligently acting as plaintiff's fiduciary and pursuing sales on behalf of the plaintiff, the defendants instead conspired to commit criminal acts against the plaintiff which included counterfeiting plaintiff's products, conducting unfair business practices, engaging in unfair competition, and misappropriating trade secrets. These independent and extrinsic acts were committed outside of any contractual relationship, and, on many occasions, rose to the level of criminal conduct.

For example, after acquiring rights to sell plaintiff's product and obtaining plaintiff's confidential trade secrets as to the method, manner, location of markets and customers' identities, which were provided to the defendants to assist them in their contractual obligations as an agent, the defendants, instead, misappropriated this information and created their own inferior "knock-off" products, which they sold in direct competition with plaintiff,

under same or similar names to plaintiff's trademark, i.e. "Seat Sack cc edu" and "Seat Pocket(s)".

The defendants then created a website using plaintiff's trade name, "Seat Sack" as an index for customers seeking plaintiffs' product. Once a customer found that index, they were transferred, without their knowledge, to a web page which sold defendants' counterfeits, "Seat Sack cc edu" and "Seat Pocket" instead of plaintiff's "Seat Sack".

In markets requiring bid specifications that mandated the purchase of plaintiff's product, the defendants further mislead the general public, and specifically the plaintiff's customers and plaintiff, by utilizing the plaintiff's trade name, "Seat Sack", when selling defendants' counterfeit products under the same name, i.e. "Seat Sack cc edu". One of these markets included New York City School Districts (See affidavit of Anne McAlear at paragraph 15, Exhibit "E").

These non-contractual acts confused and mislead the general public, including those internet customers who were attempting to locate plaintiff's product by use of its trade name. Even in the absence of a contract, the defendants' conduct, standing alone, constituted civil and criminal wrongdoings. Many of the defendants' actions also rose to the level of felonies, including *Trademark Counterfeiting in the First Degree*, and *Trademark Counterfeiting in the Second Degree,* Class C and E felonies contrary to sections 165.72 and 165.73 of the *Penal Law of the State of New York* and *Trademark Counterfeiting in the Third Degree*, a misdemeanor contrary to 165.71 of the *Penal Law of the State of New York* (See allegations of Plaintiff's complaint at page 8, paragraph 18 for specific acts alleged).

Defense counsels' claims that these independent acts, which are clearly set forth in plaintiff's complaint, do not state fraud with particularity are ridiculous. These acts are

especially horrendous since they are alleged to have been committed while the defendants were acting contrary to their responsibilities as plaintiff's fiduciary.

Defense counsels' final argument that these acts of self-dealing must be considered only as a cause of action for breach of contract by this Court is tantamount to a "contractually employed" bank teller claiming that he or she cannot be additionally and independently prosecuted by that bank for a larceny.

The present form of plaintiff's complaint contains allegations which sufficiently establish a cause of action for fraud, which exists independently and apart from a cause of action for breach of contract.

As such, plaintiff's complaint has met the minimum standards required by law.

PLAINTIFF'S COMPLAINT WAS PREPARED FOR LITIGATION IN THE SUPREME COURT OF THE STATE OF NEW YORK

I. Seat Sack's Fraud Claims Should Not Be Dismissed

Plaintiff's action was originally commenced in the Supreme Court of the State of New York, County of New York. After service of plaintiff's complaint, defense counsel moved to transfer plaintiff's action to the United States District Court for the Southern District of New York.

Defense counsel now complain that the form of plaintiff's complaint in the "state action" does not meet minimum "federal" legal standards. Specifically, the defendants argue that plaintiff's complaint is defective in that certain paragraphs are made "upon information and belief" and that the fraud claims are indistinguishable from Seat Sack's breach of contract claims.

Nothing could be further from the truth.

It is patently unfair for the defendants to complain that plaintiff's complaint does not meet the requirements of Fed. Rule 9(b) and Rule 12(b)(6). Even assuming that complaint was valid, it was the defendants, themselves, who created that alleged deficiency by causing plaintiff's pleading, prepared in accordance with state procedures, to be transferred to a federal court. While the plaintiff submits that the present form of its complaint is sufficient, if any deficiency is found by this Court, the plaintiff requests leave to amend before the drastic remedy of dismissal is imposed.

It is respectfully submitted that plaintiff's complaint does allege fraud, with particularity, in accordance with Fed. R. Civ. P. 9(b). A scheme to defraud, involving criminal conduct by the defendants, is alleged independently of the contract. There is no requirement that plaintiff must meet a minimum number of factual allegations purportedly committed by the defendant to state such a cause of action.

It is also respectfully submitted that, if even one factual allegation purportedly committed by the defendants constitute fraud, the complaint is legally sufficient. In the instant action, plaintiff has alleged that the defendants have carried out a scheme to defraud, involving numerous acts, many of which constitute crimes.

Under these circumstances, plaintiff's complaint has met the minimum standards required in that a cause of action for fraud has been sufficiently established.

II. Discovery

Defense counsel claim that plaintiff should not be entitled to any discovery required to obtain particulars of defendants' claims, even though such information is, at present, totally within their knowledge and possession.

Plaintiff does not concede that the present form of its complaint lacks such particulars, or that it is otherwise deficient. However, the defendants now possess the affidavit of Ann McAlear, president of "Seat Sack", which was submitted in opposition to defendants' instant motion. This affidavit provides further particulars of the events previously set forth in plaintiff's complaint. Her affidavit is made on personal knowledge and provides further details of the factual allegations of plaintiff's complaint and it is also submitted in support of plaintiff's cross motion for a preliminary injunction.

While discovery can always be helpful in providing further particulars for the benefit of defense counsel, the complaint, in its present form, contains sufficient factual allegations of the defendants' fraudulent acts. These allegations are not simply conclusions. Any additional details, which plaintiff alleges constitute fraud, are presently within the defendants' sole knowledge. Therefore, mutual discovery proceedings are the proper method to seek that information *Niagara Mohawk Power Corp. v. Freed,* 265 AD2d 938 (Fourth Dept., 1999); *Commerce and Indus. Insurance Co. v. Globe Office Supply Co.,* 266 AD2d 165 (First Dept., 1999).

It must be remembered that defendants' motion seeks to dismiss plaintiff's complaint upon the grounds that it fails to state a cause of action. This is not a motion for summary judgment where a party must lay bare all of its evidentiary material in order to preserve its rights to proceed to trial. Defense counsel has already been provided with the statements and acts of the defendants complained of. No demands for discovery have as yet been made which would require further disclosure as to the date, time and place where those statements were made, and by whom, nor were further details of those acts demanded. The defendants may proceed through discovery to obtain further details by depositional testimony or

otherwise. At this juncture, plaintiff's complaint amply provides notice of the actions of the defendants upon which the plaintiff has based its lawsuit.

Therefore, the content of plaintiff's complaint, in its present form, is sufficient.

III. Plaintiff's Third Cause of Action for Conversion Should Not Be Dismissed

Defense counsel claim that plaintiff's cause of action for conversion should be dismissed under the belief that plaintiff seeks nothing more than general money damages.

Defendants' belief is not supported by a reading of plaintiff's complaint.

Plaintiff's complaint, including, but not limited to: page 13, paragraph 33, and page 25, paragraph D(2), seeks relief which includes:

a. Specific accounting and inventory of the sales, by defendant, of plaintiff's product, and the seizure and recovery of all unsold plaintiff's products and if sold, the specific proceeds which were illegally converted by the defendants.

b. Specific accounting and inventory of the sales, by defendant, of its counterfeit products, and the seizure and recovery of all such unsold counterfeit products, pursuant to *NY Penal Law Section 165.74*, or, if sold, the specific proceeds which were illegally converted by the defendants.

The complaint also seeks a temporary restraining order and a preliminary injunction during the pendency of this action and permanently thereafter restraining, enjoining, and prohibiting the defendants from counterfeiting plaintiff's product; seizing all of that specific counterfeit merchandise; prohibiting defendants from future manufacturing of same; directing defendants to provide an accounting of all sales, and an inspection of all the defendants' books and records; directing defendants to return the specific assets received from

plaintiff and the specific losses sustained by plaintiff as a result of defendants' conduct (See plaintiff's complaint at pages 25, 26, and 27).

Under the circumstances, since plaintiff seeks the recovery of specific money and/or property, plaintiff's third cause of action for conversion should not be dismissed.

IV. Seat Sack's Claim for Misappropriation of Trade Secrets and/or "Deceptive Trade Practices" Should Not Be Dismissed

Contrary to defense assertions, plaintiff's complaint alleges that the defendants misappropriated and/or misused private property or information, including, but not limited to "trade secrets". Plaintiff's cause of action is adequately stated in paragraphs 1 through 35 in plaintiff's complaint and, specifically, in plaintiff's fourth cause of action entitled "Deceptive Trade, Unfair Business Practice, Misappropriation of Trade Secret and Unfair Competition".

In addition, the plaintiff's complaint alleges that, after acquiring rights to sell plaintiff's product and obtaining plaintiff's confidential trade secrets as to the method, manner, location of markets and customers' identities, which was provided to the defendants to assist them in their contractual obligations, the defendant's, instead misappropriated that information and created "knock-off" products in direct competition to plaintiff which defendants sold as "Seat Pocket(s)" and "Seat Sack cc edu".

Due to the foregoing, plaintiff's complaint seeks injunctive relief enjoining further use of those misappropriated trade secrets and the return of other property which was misappropriated and/or misused, together with an injunction enjoining the defendants' from committing such deceptive trade practices in the future.

a. Defense counsels' claim that plaintiff's complaint does not specifically identify section 349 of the New York General Business Law is without merit.

There is no requirement that section 349 of the New York General Business Law be cited within the factual paragraphs of plaintiff's cause of action for "deceptive trade", "unfair business practices", "misappropriation of trade secrets" and "unfair competition".

The defendants also claim that this cause of action is defective for an alleged failure to state that defendants' counterfeits are inferior and that they harm consumers.

Plaintiff's complaint does allege that defendants' counterfeit products are inferior to "Seat Sack" and that defendants are selling these inferior products to school districts throughout the country and, ultimately, to the children that attend those districts. These counterfeits, which appear identical to plaintiff's "Seat Sack", but which are of a lesser quality of construction, are being manufactured by the defendants in the countries of China and Taiwan (See plaintiff's complaint at page 9, paragraph 18 A, and the affidavit of Ann McAlear at paragraph 10, exhibit "F"). Plaintiff's complaint clearly alleges damages are being sustained by plaintiff, other manufacturers, and all of their consumers, including the general public (See paragraph 10 of plaintiff's complaint).

Certainly, allegations of plaintiff's complaint, made expressly and/or by inference, that manufacturers, including plaintiff, and consumers, including public school district boards, their teachers and officers, students others, are being harmed, is sufficient to sustain an action "threatening the general public" pursuant to New York General Business Law section 349.

Therefore, Seat Sack's cause of action for "misappropriation of trade secrets" and/or "deceptive trade practices" should not be dismissed.

V. Attorney's Fees

Section 349 of the New York General Business Law, by statute, expressly provides for an award of attorney's fees. Likewise, New York State Courts have consistently held, by case

law, that where an agent breaches its fiduciary duty to its principal, and the principal sustains damages, the principal is entitled to an award of reasonable attorney's fees in any litigation seeking to recover for those damages.

Defense counsel's claim that the defendants were not acting as "Seat Sack"'s distributing agent, and therefore were not acting in a fiduciary capacity, is at best, an attempt, without evidence, to create a material issue of fact.

However, since the allegations of plaintiff's complaint must be deemed true for purposes of this motion, it is undisputed that a fiduciary relationship existed between plaintiff, as principal, and the defendants, as agents, which the defendants breached, causing the plaintiff to sustain damages for which the plaintiff seeks an award of reasonable attorney's fees.

Any argument to the contrary is totally inapplicable to this motion.

For the reasons previously set forth in plaintiff's memorandum of law, dated July 24, 2007, at *pages 12* and *13,* plaintiff's complaint, seeking an award of reasonable attorney's fees should be upheld.

VI. Unjust Enrichment

Defense counsel claim that the existence of a contract between "Childcraft" and "Seat Sack" precludes "Seat Sack" from pursuing any "unjust enrichment" claim.

Again, for reasons previously set forth herein, defendants' independent, additional, unlawful extrinsic tortuous conduct has lined defendants' pockets with profits and at the expense of plaintiff.

These activities were carried out and/or committed in breach of a fiduciary duty owed plaintiff.

Under these circumstances, the plaintiff should be compensated for damages sustained which have unjustly enriched the defendants.

Plaintiff's complaint for unjust enrichment sufficiently states a cause of action.

VII. Plaintiff's Motion for a Preliminary Injunction

It is respectfully submitted that a preliminary injunction should be granted in that the plaintiff has shown (1) the likelihood of irreparable injury, and (2) either: (a) likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly in plaintiff's favor. See *Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 967 (2d Cir. 1995).

(a) The likelihood of irreparable injury

There is no question that the defendants are multi-million dollar corporations which operate for profit throughout the world. The effect of an issuance of a preliminary injunction, during the pendency of this action, enjoining defendants from continuing to sell their counterfeit products, which they developed and marketed while they were in breach of their duties, as plaintiff's distributing agent, would be minimal.

In stark contrast to the financial stability of the corporate defendants, the plaintiff is a small, family-owned corporation which is struggling to meet its daily obligations as a result of the devastating effect of the defendants' continuing acts of "self-dealing".

If a preliminary injunction is not granted, the plaintiff will not be able to continue the operation of its business until a trial can be held and the Court has the opportunity to hear the merits of plaintiff's action.

Under these circumstances, a preliminary injunction should be granted.

(b) Likelihood of success on the merits

Defendants' counterfeit products exhibit the same aspects of plaintiff's patented design and name. Defendants copied the novel idea of hanging a sack from the back of a student's chair for the purpose of organizing and storing a student's supplies.

The defendants then copied and sold their counterfeit under the name "Seat Pocket" and "Seat Sack cc edu", which is substantially the same name and design as that of plaintiff's trademarked and patented "Seat Sack".

The similarity creating confusion for consumers is apparent upon a cursory comparison. (Compare the statistics and pictures both shown as Exhibits "B" and "D" which are attached to the affidavit of Ann McAlear). A plain reading of Exhibit "B", when compared to Exhibit "D", reveals that the similarities of the counterfeit will deceive a purchaser, inducing him or her to purchase one supposing it to be the other.

One point of novelty which allowed plaintiff to obtain a patent is the fact that plaintiff's organizer hangs from the back of each student's chair, and, for the first time, allows school districts to use valuable organizational space.

Clearly, the defendants knew of plaintiff's established rights to manufacture and sell "Seat Sack" prior to developing and introducing their counterfeits. Plaintiff's complaint factually alleges that plaintiff obtained a patent for and has used "Seat Sack"'s design, trade name and trademark since May 30, 1995 (See affidavit of Ann McAlear, Exhibit "B").

Defendants do not dispute that they have acted as plaintiff's distributing agent since January 8, 2000, and therefore knew of plaintiff's novelty in design and trade name prior to producing their counterfeit. Since January 8, 2000, plaintiff labeled its product with

instructions that further orders for the product should be placed with the defendants. Clearly, the plaintiff relied upon the responsibility of defendants as a fiduciary.

However, defendants admit that, in July, 2003, after several years of acting as plaintiff's distributing agent, defendants elected, without plaintiff's knowledge and consent, to develop and market their own counterfeit "Seat Pocket" in competition with plaintiff (See declaration of Virginia Murphy).

Obviously, defendants were aware of "Seat Sack"'s established rights in the marketplace, before they began to take advantage of its trade name and product's "secondary meaning".

Defendants do not dispute that they knew that plaintiff's product and trade name were protected under both Federal and State Law.

Instead, defense counsel complain that numerous affidavits were not submitted in support of plaintiff's application for a preliminary injunction. They further conclude that plaintiff has failed to show or demonstrate a likelihood of consumer confusion.

However, a cursory comparison of pictures of both plaintiff's product and the counterfeit (Exhibits "B" and "C", both attached to the affidavit of plaintiff's president, Ann McAlear), reveals that confusion between plaintiff's product and the counterfeit is apparent on the face of these documents, alone.

The defendants knew of the good will and name recognition of plaintiff's "Seat Sack" and the similarity of the counterfeit to plaintiff's product. The defendants, therefore, designed a website where they knew that every consumer seeking plaintiff's product would be confronted with such a comparison. The website contained a "quick search" index with plaintiff's trade name, "Seat Sack", insuring that every person initially seeking plaintiff's

product would be transferred to defendants' website where their counterfeits were being sold under the same or similar name, "Seat Sack cc edu" and "Seat Pockets".

With that comparison, and considering defendants' website, any further discussion on whether plaintiff has failed to show or demonstrate a likelihood of consumer confusion, would be an insult to the intelligence of this Court.

(c) Sufficiently serious questions going to the merits and a balance of hardships tip decidedly in plaintiff's favor

Plaintiff does not simply seek compensation through monetary damages and will sustain irreparable harm if a preliminary injunction is not granted. In fact, plaintiff seeks various types of temporary and permanent injunctive relief.

Without such relief, plaintiff's business will be forced to cease operation before the merits of this case can be reached at trial.

It is therefore not unreasonable for plaintiff to seek a preliminary injunction in that defendants do not deny the development of their counterfeit. Their fraudulent conduct is tantamount to the commission of crimes, including, but not limited to *Trademark Counterfeiting in the First Degree*, and *Trademark Counterfeiting in the Second Degree*, Class C and E felonies contrary to sections 165.72 and 165.73 of the *Penal Law of the State of New York* and *Trademark Counterfeiting in the Third Degree*, a misdemeanor contrary to 165.71 of the *Penal Law of the State of New York.*

Such acts, committed by the defendants, in violation of their fiduciary duties owed plaintiff, meet the criteria in *Avia Group Int'l, Inc. v. L.A. Gear California, Inc.*, 853 F.2d 1557, 1565 (Fed. Cir. 1988); *Tough Traveler, Ltd. v. Outbound Prods.*

A BOND

The plaintiff seeks a preliminary injunction, but does not oppose the fixing of a reasonable bond.

However, the defendants have provided this Court with no evidence that they will sustain any damages if a preliminary injunction is granted.

Therefore, plaintiff respectfully requests that the amount of the bond, if any, be minimal.

CONCLUSION

Wherefore, due to the foregoing, plaintiff respectfully requests that the defendants' motion to dismiss be, in all respects, denied and that the relief sought in plaintiff's cross motion be, in all respects, granted together with such other and further relief as to this Court may deem just and proper under the circumstances.

Dated: August 30, 2007

Respectfully submitted,

EDWARD J. CARROLL, ESQ.
Attorney for Plaintiff, SEAT SACK, INC.
2733 Route 209
Kingston, New York 12401
(845) 338-5977

TO: ORRICK, HERRINGTON 7 STUCLIFF, LLP
Att: RICHARD W. MARK, ESQ. and DAVID M. FINE, ESQ.
Attorneys for Defendants, CHILDCRAFT EDUCATION CORP.
and SCHOOL SPECIALTY, INC.
666 Fifth Avenue
New York, New York 10103

GODFREY & KAHN, S.C. (OF COUNSEL)
Att: RICHARD S. BAISH, ESQ., MARK E. SCHMIDT, ESQ.
and NICHOLAS A. KEES, ESQ.
Attorneys for Defendants, CHILDCRAFT EDUCATION CORP.
and SCHOOL SPECIALTY, INC.
780 North Water Street
Milwaukee, Wisconsin 53202

YOUNG, CONAWAY, STARGATT & TAYLOR, LLP
Att: SEAN M. BEACH, ESQ.
Attorneys for USOP LIQUIDATING LLC (f/k/a US OFFICE
PRODUCTS COMPANY and US OFFICE PRODUCTS NORTH
ATLANTIC DISTRICT, INC.)
P.O. Box 391
Wilmington, Delaware 19899

Richard W. Mark
David M. Fine
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, NY 10103
Telephone: (212) 506-5000
Facsimile: (212) 506-5151

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SEAT SACK, INC., Plaintiff, -against- CHILDCRAFT EDUCATION CORP.; US OFFICE PRODUCTS COMPANY; US OFFICE PRODUCTS NORTH ATLANTIC DISTRICT, INC.; and SCHOOL SPECIALTY, INC., Defendants.	CASE NO. 07-CIV-3344 (RJH)(DFE)

CHILDCRAFT DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

OF COUNSEL:

Nicholas A. Kees
Anthony S. Baish
Mark E. Schmidt
GODFREY & KAHN, S.C.
780 North Water Street
Milwaukee, WI 53202-3590

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

MISCELLANEOUS

Richard W. Mark (RM 6884)
David M. Fine (DF 4479)
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, NY 10103
Telephone: (212) 506-5000
Facsimile: (212) 506-5151

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SEAT SACK, INC.,	:	
Plaintiff,	:	
-against-	:	
CHILDCRAFT EDUCATION CORP.; US OFFICE PRODUCTS COMPANY; US OFFICE PRODUCTS NORTH ATLANTIC DISTRICT, INC.; and SCHOOL SPECIALTY, INC.,	:	CASE NO. 07-CIV-3344 (RJH)(DFE)
Defendants.	:	

CHILDCRAFT DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

In order to obtain a preliminary injunction, plaintiff Seat Sack, Inc. ("Plaintiff") bears the burden of establishing a likelihood of success on the merits and of irreparable harm. Yet its motion and supporting papers are notably lacking a key ingredient: evidence. Stripped of incendiary hyperbole – "fraud," "fiduciary duties," "knock-off products," bootleg products," etc. – Plaintiff's claims rest on nothing more than unsupported and self-serving proclamations that fall far short of establishing its entitlement to the extraordinary remedy of a preliminary injunction.

The reality of the case is this: defendant Childcraft Education Corp. ("Childcraft") occasionally bought Plaintiff's Seat Sack product for resale, nothing more. Once Childcraft paid for the products – and it always did – its obligations to Plaintiff came to an end. Now that Childcraft has stopped buying the Seat Sack, Plaintiff is unhappy. Plaintiff is even more annoyed that Childcraft has introduced a competitive product, as it is fully entitled to do. And so Plaintiff has sued Childcraft, and, for good measure, Childcraft's parent, defendant School Specialty, Inc. ("School Specialty"; collectively with Childcraft, the "Childcraft Defendants").

Plaintiff may not eliminate Childcraft as a competitor just because it does not like the competition, and this Court should not assist it in its attempt to do so. Plaintiff cannot prevail on its claims, and cannot show irreparable harm. Its motion should be denied.

BACKGROUND FACTS

On January 28, 2000, Plaintiff executed an agreement with Childcraft entitled "Childcraft Education Corp. Exclusives – Growing Years Catalog" (the "Agreement"). (Murphy Decl. para. 3, Ex. A.) By its express terms, the Agreement gives Childcraft the exclusive right to sell Plaintiff's product with a Childcraft label affixed to the product. (Id. para. 4, Ex. A.) Over the course of several years under this arrangement, Childcraft purchased thousands of Seat Sacks from Plaintiff. (Id. para. 5.) The purchased Seat Sacks became part of Childcraft's inventory and were later sold, bearing the Childcraft label, through Childcraft's website and catalog. (Id. para. 6.) Childcraft paid Plaintiff all amounts due whenever it purchased Seat Sacks. (Id. para. 7.) Other than the purchase price paid by Childcraft, Plaintiff was not entitled to receive any additional money – such as a royalty – from Childcraft's resale of the Seat Sack. (Id. para. 8.) The Agreement did not require Childcraft to purchase or sell any minimum number of Seat Sacks, and did not restrict Childcraft's right to offer competing products. (Id. para. 9, Ex.

A.) Other than the Agreement and periodic purchases of Seat Sacks, Childcraft did not enter into any other agreements with Plaintiff. (Id. para. 10.)

Childcraft and Plaintiff operated under this arrangement for several years. (Id. para. 11.) In approximately 2003, however, Childcraft discovered that Plaintiff was offering to sell the Seat Sack to Childcraft's competitors at a price lower than the price at which it sold to Childcraft. (Id. para. 11.) Childcraft also learned that Plaintiff was offering the Seat Sack for sale directly to teachers, who are a primary market for Childcraft's products, at a price lower than offered in the Childcraft catalog. (Id. para. 12.) Because it did not want to further subsidize a competitor, Childcraft elected to end its relationship with Plaintiff. (Id. para. 13.) In July 2003, Childcraft independently began developing its own Seat Pocket product. (Id. para. 14.) The Seat Pocket is different from Plaintiff's Seat Sack in terms of its pocket configuration (it contains two additional storage pockets), appearance, and color. (Id. para. 15, Ex. B.) Childcraft began offering the Seat Pocket for sale through its catalog in January, 2004. (Id. para. 16.) Childcraft continued to offer both products for sale in its catalog through 2005. (Id.) Seat Sack apparently did not complain about the development and sale of the Seat Pocket prior to the filing of this lawsuit. (Id. para. 17.) Childcraft's last purchase of Childcraft-branded Seat Sacks occurred on or about September, 2005. (Id. para. 18.)

Until recently, if a visitor to Childcraft's website entered the search term "Seat Sack," the website would produce information about both the Seat Sack (some of which remained in Childcraft's inventory) and the Seat Pocket. (Murphy Decl. para. 19; Klinger Decl. para. 3.) Virginia Murphy, Childcraft's Vice President of Early Childhood Merchandising and Product Development, first learned of this situation during the course of this lawsuit and investigated the matter through Childcraft's website technology personnel. (Murphy Decl. paras. 1, 19-20.) The

results of searches conducted on Childcraft's website are determined by automated protocols set forth in the website's software. (Klinger Decl. para. 4.) As with all other searches on Childcraft's website, the results of a search under the term "Seat Sack" were produced in accordance with these automated protocols. (Id.) Childcraft did not change or manipulate the search protocols of its website to influence the results of searches containing the terms "seat," "Seat Sack," or "Seat Pocket." (Id. para. 5.) Although Childcraft is entitled to sell the Seat Pocket and its remaining inventory of Seat Sacks without restriction, out of an abundance of caution in light of Plaintiff's Complaint, Murphy instructed Childcraft's website technology personnel to reconfigure Childcraft's website so that a search for "Seat Sack" does not yield results that include information about the Seat Pocket. (Id. para. 6; Murphy Decl. para. 21.)

According to the Affidavit of Ann McAlear, Plaintiff's president, a computer search of the term "seat sack," allegedly conducted by a New York School District teacher on what purports to be a "NYC Department of Education" website, resulted in information about what appears to be a Childcraft product named "Seat Sack." (McAlear Aff. paras. 14-15, Ex. E.) Childcraft does not operate, administer, or control the content or search protocols of the "NYC Department of Education" website or the websites of any other school district or education department. (Murphy Decl. para. 22.)

Plaintiff sues Childcraft and its parent, School Specialty, for fraud in the inducement, fraud, conversion, breach of contract, "unfair competition," "attorneys' fees," patent infringement, several species of violations of both the Lanham Act and New York General Business Law section 360-l, and unjust enrichment. (See Compl.) In response to a motion to dismiss many of these claims, Plaintiff asserted the present cross-motion for a preliminary injunction. Plaintiff seeks to enjoin Childcraft and School Specialty from advertising or selling

the Seat Pocket, from otherwise competing with Plaintiff, from "artificially inflating" the price of the Seat Sack, and from operating its website. (Pl. Notice of Cross-Motion at 2.)

Because it cannot meet any of the prerequisites to a preliminary injunction, Plaintiff's motion should be denied.

STANDARDS ON MOTION FOR PRELIMINARY INJUNCTION

The decision whether to grant or deny injunctive relief rests within the equitable discretion of the district court. See Ebay Inc. v. Mercexchange, ___ U.S. ___, 126 S. Ct. 1837, 1839 (2006). In order to obtain a preliminary injunction, the moving party must show (1) the likelihood of irreparable injury, and (2) either: (a) likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly in movant's favor. See Tough Traveler, Ltd. v. Outbound Prods., 60 F.3d 964, 967 (2d Cir. 1995). "[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Sussman v. Crawford, 488 F.3d 136, 139-40 (2d Cir. 2007) (citing Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (emphasis in original)). Here, Plaintiff fails to its burden with respect to any of the requisite elements.

ARGUMENT

I. PLAINTIFF IS NOT LIKELY TO SUCCEED ON THE MERITS

Plaintiff does not – indeed, cannot – meet its burden of showing a likelihood of success on the merits of any of its claims. Many of Plaintiff's claims suffer from fatal legal deficiencies, as addressed in Childcraft Defendants' motion to dismiss portions of the Complaint. Plaintiff's breach of contract claim is premised on contractual duties that plainly do not exist between the parties. Plaintiff simply assumes Childcraft's infringement of its design patent without argument

or analysis, when in fact the design of Childcraft's Seat Pocket is substantially different from that of the Seat Sack. Plaintiff's various trademark claims under both the Lanham Act and New York law fail, because Plaintiff has not demonstrated ownership of a protectible mark or a likelihood of consumer confusion. And Plaintiff does not even attempt to demonstrate why School Specialty, Childcraft's parent, should even be a party to this lawsuit.

In short, nothing that Plaintiff has submitted to the Court supports any inference of a likelihood of success on the merits.

A. Several of Plaintiff's Claims Are Legally Deficient

Childcraft Defendants have moved to dismiss Plaintiff's claims for fraud, conversion, "deceptive trade practices," "attorney's fees," and unjust enrichment. Because these claims are legally deficient, as set forth in Childcraft Defendants' memorandum of law in support of their motion to dismiss (arguments we will not repeat here), Plaintiff cannot demonstrate a reasonable likelihood of success on the merits with respect to those claims. Accordingly, injunctive relief should not be granted on the basis of those causes of action.

B. No Breach of Contract Occurred

Plaintiff repeatedly claims that Childcraft owed multiple contractual duties to Plaintiff, including "fiduciary" duties, a duty to use its best efforts in promoting plaintiff's product, and various duties related to protecting Plaintiff's alleged intellectual property rights. (See, e.g., McAlear Aff. paras. 9, 14.) Aside from bare allegations, however, Plaintiff has not identified any specific contract that places such obligations on Childcraft. The reality of Childcraft's relationship with Plaintiff is far removed from Plaintiff's unsupported assertions.

Aside from Childcraft's periodic purchases of Seat Sacks for resale, the parties executed only one agreement. On its face, the Agreement places no obligations on Childcraft at all. See

Murphy Decl. para. 3, Ex. A.) The contract merely says that Childcraft has the exclusive right to Seat Sacks bearing the Childcraft label. The contract does not require Childcraft to purchase any products from Plaintiff or to distribute any products on Plaintiff's behalf. The contract does not prohibit Childcraft from selling products in competition with Plaintiff, including Childcraft's own products. Plaintiff also is free to compete with Childcraft by supplying its products to anyone else it desires, so long as the products do not bear Childcraft's label. And the Agreement says nothing that would give rise to undefined "fiduciary duties" owed to Plaintiff.

Under the Agreement, Childcraft occasionally purchased from Plaintiff Seat Sacks bearing the Childcraft label. Childcraft purchased the products outright, and thereby became the owner of them. Childcraft could, and did, resell the Seat Sacks at a profit, but Plaintiff was not entitled to any portion of that profit. Had Childcraft chosen not to sell the Seat Sacks – but rather to let them sit in a warehouse, or to put them on the backs of chairs in Childcraft's own offices, or to give them away to charity, or to use them as fuel for the company bonfire, etc. – it would be of no consequence to Plaintiff. Once Childcraft bought the Seat Sacks, Plaintiff received the full benefit of its bargain.

Plaintiff does not claim Childcraft did not pay it for the Seat Sacks it purchased, nor can it. That being the case, Childcraft has breached no contract with Plaintiff. Plaintiff has no reasonable likelihood of success on its contract claim.

C. There is No Basis to Conclude that Plaintiff's Design Patent has been Infringed

Plaintiff has moved for injunctive relief based on infringement of its design patent without providing any explanation of how Childcraft's Seat Pocket infringes on the Seat Sack or any depiction of the allegedly infringing product. In failing to do so, Plaintiff provides the Court with no basis to conclude that it will prevail on the merits.

Plaintiff (or, more accurately, its president) owns a design patent on the Seat Sack. (McAlear Aff. paras. 1, 4, Ex. B.) Infringement of that patent must be shown clearly and convincingly before a preliminary injunction against Childcraft may be granted. See Bose Corp. v. Linear Design Labs, Inc., 467 F.2d 304, 307 (2d Cir. 1972). Unlike a utility patent, Plaintiff's design patent only protects the novel, ornamental features of the patented design. See OddzOn Prods., Inc. v. Just Toys, Inc., 122 F.3d 1396 (Fed. Cir. 1997). To prove infringement of a design patent, Plaintiff must establish two elements: (1) that in the eye of an ordinary observer giving such attention as a purchaser usually gives, the two designs are substantially the same and the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other; and (2) that the accused infringing design appropriates the point of novelty in the patented design that distinguishes the design from the prior art. See Avia Group Int'l, Inc. v. L.A. Gear California, Inc., 853 F.2d 1557, 1565 (Fed. Cir. 1988).

Here, Plaintiff has made no effort to identify the "point of novelty" or ornamental aspects of the Seat Sack that are allegedly infringed by the Seat Pocket. Rather, Plaintiff merely proclaims that Childcraft is "selling this 'knock off' product which is identical to Plaintiff's 'Seat Sack' in name, form and function." (McAlear Aff. para. 10.)

A simple comparison of Plaintiff's Seat Sack with Childcraft's Seat Pocket reveals that the two products bear vastly different ornamentation. (Murphy Decl. para. 15, Ex. B.) Indeed, as the product descriptions from Childcraft's catalog make clear, the allegedly infringing product has different ornamental aspects including two pockets, a different color scheme, and a different name. (Id.) The products' only physical similarities relate to their function – their purpose is to drape the back of a chair and hold supplies – not their ornamentation. Accordingly, the Seat Pocket does not infringe Plaintiff's design patent. See Bonito Boats, Inc. v. Thunder Craft Boats,

Inc., 489 U.S. 141, 148 (1989) (design or shape that is entirely functional, without ornamental or decorative aspect, does not meet the criteria of a design patent); see also Lee v. Dayton-Hudson Corp., 838 F.2d 1186 (Fed. Cir. 1988) (noting a device that copies utilitarian or functional features of a patented design is not an infringement unless the ornamental aspects are also copied).

Plaintiff provides this Court with no evidence, argument, or authority upon which to conclude that Plaintiff has a reasonable likelihood of proving that Childcraft has infringed the design patent.

D. Plaintiff Fails to Show a Reasonable Likelihood of Success on the Merits of Its Lanham Act Claims

Plaintiff advances three claims under the Lanham Act, the first under 15 U.S.C. § 1114, which prohibits imitation of a registered mark, and the latter two under 15 U.S.C. § 1125(a), which prohibits a wide variety of conduct from common-law trademark infringement to false advertising. (Compl. paras. 52, 60, 68.) Plaintiff cannot prevail under either statute.

1. Plaintiff Has No Federally-Registered Trademark, and Therefore Cannot Prevail Under 15 U.S.C. § 1114

Section 32 of the Lanham Act, 15 U.S.C. § 1114, protects a "registered mark" against infringement. Registration of the mark is a prerequisite to an action under Section 32. See Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 209, 146 L. Ed. 2d 182 (2000) ("Registration of a mark under § 2 of the Lanham Act, 15 U.S.C. § 1052, enables the owner to sue an infringer under § 32"); Globalaw Ltd. v. Carmon & Carmon Law Office, 452 F. Supp. 2d 1, 25 (D.D.C. 2006) (same); Duggal v. Krishna, 554 F. Supp. 1043, 1044 n.4 (D.D.C. 1983) (same). Protection of unregistered marks is left to Section 43(a) of the Lanham Act, 15 U.S.C.

§ 1125(a). See, e.g., Forschner Group, Inc. v. Arrow Trading Co., Inc., 124 F.3d 402, 407 (2d Cir. 1997); Genesee Brewing Co. v. Stroh Brewing, Co., 124 F.3d 137, 142 (2d Cir. 1997).

Plaintiff does not have a registered trademark in connection with the Seat Sack. (Schmidt Decl. para. 2, Ex. A.) Plaintiff therefore cannot prevail on a claim under Section 32.

2. Plaintiff Also Cannot Prevail Under 15 U.S.C. § 1125(a)

Section 43(a)(1) of the Lanham Act prohibits the "use in commerce [of] any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin" which is "likely to cause confusion . . . as to the affiliation, connection, or association" of the user with another person, "or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person[.]" 15 U.S.C. § 1125(a)(1). Section 43(a)(2) of the Lanham Act similarly prohibits the misrepresentation of the "characteristics, qualities, or geographic origin" of the user's goods. 15 U.S.C. § 1125(a)(2). Together, these provisions encompass a wide range of activities that include common law trademark infringement (i.e., infringement of unregistered marks), trade dress infringement, "passing off" one's own product as that of another, false advertising, disparagement of a competitor's product, and so on.

Which of these theories Plaintiff intends to pursue is somewhat in doubt. The Plaintiff's Ninth Cause of Action seems to allege common law trademark infringement under Section 43(a)(1) through use of a mark confusingly similar to Plaintiff's mark. (Compl. para. 61-62.) However, Plaintiff also repeatedly proclaims that Childcraft has distributed a "knock off" product, the Seat Pocket. (See, e.g., Compl. paras. 10-11.) Although it is not entirely clear just what Plaintiff means by the term "knock off," it presumably asserts a claim for trade dress infringement. The Tenth Cause of Action apparently accuses Childcraft of violating 43(a)(2) by using a false designation of the "source of the origin of the bootleg merchandise." (Compl.

para. 70.) Whatever the theory, Plaintiff cannot establish a likelihood of success on the merits of any of these claims.

a. Trademark and Trade Dress Infringement

To prevail on a common-law claim for infringement of Plaintiff's mark, Plaintiff "must show, first, that its mark merits protection[.]" Brennan's, Inc. v. Brennan's Restaurant, L.L.C., 360 F.3d 125, 129 (2d Cir. 2004.) To do so, Plaintiff must demonstrate either that the mark is inherently distinctive or that it has acquired secondary meaning such that the public associates the mark with the Plaintiff's product. See Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 767 (1992).

Plaintiff concedes its mark is not inherently distinctive, instead alleging the mark has acquired secondary meaning. (Compl. paras. 61, 69.) To establish secondary meaning, a plaintiff typically must offer direct evidence of the public's association of the mark with the Seat Sack, as through a consumer survey, or must present circumstantial evidence of secondary meaning, such as evidence of the plaintiff's marketing efforts, size, sales volumes, etc. (See generally 2 MCCARTHY ON TRADEMARKS § 15.30, at 15-46 to 15-49 (West 2007)). Plaintiff opts for neither avenue, offering literally no evidence of secondary meaning. Indeed, Plaintiff does not even specifically identify the "mark" it claims was infringed.

Plaintiff's evidence of trade dress infringement (if that really is what Plaintiff is claiming) is similarly deficient. To prevail on a trade dress infringement claim under the Lanham Act, Plaintiff must first show that the trade dress is inherently distinctive or has become distinctive because it has acquired secondary meaning. See J.G. Stickley v. Canal Dover Furn. Co., Inc., 79 F.3d 258, 262 (2d Cir. 1996). Again, Plaintiff makes no attempt to satisfy the first requirement by explaining what elements of the Seat Sack "trade dress" are at issue, or how they are

distinctive either inherently or through the acquisition of secondary meaning. Absent such evidence, and notwithstanding Plaintiff's self-serving proclamations about "counterfeit" and "knock-off" products, its trade dress claim cannot succeed. See id. at 262 ("[t]he imitation or even complete duplication of another's product or packaging will not create a risk of confusion unless some aspect of the duplicated appearance is identified with a particular source") (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 16 cmt. a (1995)).

Setting aside Plaintiff's failure to demonstrate ownership of a protectible trademark or trade dress, Plaintiff's claims fail for another reason. For both trademark and trade dress infringement claims, Plaintiff must prove a likelihood of consumer confusion. See Brennan's, Inc., 360 F.3d at 129; J.G. Stickley, 79 F.3d at 262. Likelihood of confusion usually is determined according to the eight-factor Polaroid test. See Polaroid Corp. v. Polarad Elecs. Corp., 287 F.2d 492, 495 (2d Cir. 1961).[1] Plaintiff has not bothered to address these factors, or any others for that matter. Instead, Plaintiff's evidence of alleged consumer confusion is limited to the unremarkable assertion that visitors to Childcraft's website who search for the "Seat Sack" retrieve information related to the "Seat Pocket." (McAlear Aff. para. 12.)

There is nothing nefarious here. Searches on Childcraft's website are conducted according to automated software protocols, and Childcraft is free to sell – or not sell – the Seat Sack as it sees fit. But Plaintiff's evidence fails for a more basic reason: it is not sufficient evidence of confusion with respect to Plaintiff's mark. Plaintiff has offered no evidence showing the number of visitors to the website that actually searched for "Seat Sack," who those visitors were, how knowledgeable were they about the parties' respective products, or whether any of

[1] The non-exclusive factors are: (1) the strength of the marks, (2) the degree of similarity between the two marks, (3) the competitive proximity of the products, (4) actual confusion, (5) the likelihood the plaintiff will bridge the gap, (6) the defendant's good faith in adopting the mark, (7) the quality of the defendant's products, and (8) the sophistication of purchasers. See Polaroid, 287 F.2d at 495.

them (assuming there were any other than Plaintiff) were actually confused. Plaintiff has avoided these and other highly relevant questions, and instead would simply have this Court assume consumer confusion. But just because a visitor to Childcraft's website might have seen information about both the Seat Sack and the Seat Pocket in response to such a search says nothing about whether the visitor was confused, or about whether any potential visitor was likely to be confused, as to the source of the two products.

Plaintiff fails to offer any evidence of a protectible interest in a mark or in trade dress, and similarly fails to demonstrate a likelihood of consumer confusion. Accordingly, Plaintiff has not shown a probability of success on the merits.

b. False Designation of Origin

As discussed above, Section 43(a)(2) of the Lanham Act prohibits the misrepresentation of the "characteristics, qualities, or geographic origin" of one's goods or services in "commercial advertising or promotion." 15 U.S.C. § 1125(a)(2). Childcraft, according to Plaintiff, violated this provision when it "misrepresented and falsely described to the general public the source of origin of the bootleg merchandise," i.e., the Seat Pocket. (Compl. para. 70.)

As evidence of Childcraft's so-called misrepresentation of the origin of the Seat Pocket, Plaintiff cites a single alleged incident in which one unidentified teacher searched the New York City Department of Education website for "seat sack" and retrieved results about "seat sack cc edu corp," apparently a reference to a Childcraft product. (McAlear Aff. para. 14, Ex. E.) From this, Plaintiff leaps to the assertion that Childcraft is "misrepresenting that their 'knock off' product known as 'Seat Pocket' is the same as Plaintiff's 'Seat Sack'." (Id. para. 14.) Even if one accepts McAlear's hearsay evidence (not even attributed to an identifiable source) as true, it is not a basis for finding that Childcraft did anything wrong. Plaintiff's presentation provides no

basis to infer, for example, that the "seat sack" referenced in the computer search is in fact a Seat Pocket, as opposed to a Seat Sack, which Childcraft sold with Plaintiff's blessing. Indeed, since the search apparently was conducted in March 2006 (McAlear Aff. para. 15), when Childcraft still had Seat Sacks in its inventory (Murphy Decl. para. 19), one would expect a search for "Seat Sack" to reflect Childcraft's product.

In any event, whether the computer search references a Seat Sack or a Seat Pocket is irrelevant, because Childcraft bears no responsibility for the results of a computer search done on a website it does not control or administer. If Plaintiff is concerned about the New York City Department of Education's website, it should address the matter with the Department.

Plaintiff fails to present evidence that Childcraft falsely represented the origin of the Seat Pocket to the public.

E. Plaintiff Fails to Show a Reasonable Likelihood of Success on the Merits of Its Claims Under Section 360-l of the New York General Business Laws

Plaintiff asserts two purported claims under N.Y. G.B.L § 360-l. The first (its Eleventh Cause of Action) is premised on the notion that Childcraft's activities will dilute the distinctive quality of its mark or trade name. A prerequisite to a claim under this statute, however, is "ownership of an 'extremely strong mark' that is either 'distinctive' or has acquired secondary meaning." Scholastic, Inc. v. Stouffer, 221 F. Supp. 2d 425, 437 (S.D.N.Y. 2002) (quoting Sally Gee, Inc. v. Myra Hogan, Inc., 699 F.2d 621, 625 (2d Cir. 1983); Allied Maint. v. Allied Mech. Trades, 42 N.Y.2d 538, 542-46, 369 N.E.2d 1162 (1977). For all the reasons discussed above, Plaintiff has failed to present any evidence of a mark – "extremely strong" or otherwise – that has acquired secondary meaning. Plaintiff has no likelihood of success on this claim.