

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

OLDCASTLE ARCHITECTURAL, INC.)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION FILE
)	
BROCK USA, LLC, d/b/a BROCK)	NO. _____
INTERNATIONAL LLC)	
)	JURY TRIAL DEMANDED
Defendant.)	
)	
)	

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff Oldcastle Architectural, Inc. (“Plaintiff” or “Oldcastle”) files this Complaint and Jury Demand against Defendant Brock USA, LLC, doing business as Brock International LLC (“Brock”), and states as follows:

NATURE OF ACTION AND PARTIES

1. This is an action for damages and equitable relief arising from Brock’s acts of infringement of U.S. Patent No. 7,244,076 (the “’076 Patent”) and an action for a declaratory judgment of non-infringement concerning U.S. Patent No. 8,662,787 (the “’787 Patent”) against Brock. A true and correct copy of the ‘076 Patent is attached hereto as Exhibit A. This action arose by reason of Brock’s

unauthorized infringement of the '076 Patent and Brock's false allegation that Oldcastle has infringed Brock's '787 Patent. Oldcastle seeks injunctive relief, damages, an accounting of Brock's profits, enhanced damages and reasonable costs and attorney fees.

THE PARTIES

2. Plaintiff Oldcastle Architectural, Inc. is a corporation organized and existing under the laws of Delaware with its principal place of business at 900 Ashford Parkway, Suite 600, Atlanta, Georgia 30338. Oldcastle is in the business of selling paver systems and components, including underlayment products for paver systems.

3. Oldcastle is the current assignee and owner of the '076 Patent and is entitled to enforce all rights arising therefrom, including the right to prevent infringement of the '076 Patent and obtain damages for any infringements thereof.

4. Defendant Brock USA LLC is a limited liability corporation organized and existing under the laws of the State of Colorado, with its principal place of business at 2840 Wilderness Place, Unit C, Boulder, CO 80301, and may be served through its registered agent, Dan Sawyer, 2840 Wilderness Place, Unit C, Boulder, CO 80301. Defendant Brock USA LLC also does business as "Brock International LLC."

5. Brock is in the business of manufacturing and/or selling paver underlayment products, including the Brock PaverBase underlayment product for paving systems. Brock sells its Brock PaverBase product by and through at least the Lowe's home improvement centers, including Lowe's home improvement centers located in this District.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1338(a), because this is a case arising under the patent laws of the United States (35 U.S.C. § 1, *et seq.*, and particularly 35 U.S.C. § 271) and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202 and also pursuant to 28 U.S.C. § 1331, because this matter involves federal questions under the Patent Act.

7. This Court has personal jurisdiction over Brock because it resides within this judicial district and because it has, either directly or through agents located in this judicial district, made, used, sold, offered for sale, marketed, distributed, or imported into the United States products that infringe, either directly or indirectly, the '076 Patent. Additionally, Brock has engaged in enforcement actions and related meetings in this judicial district concerning the '787 Patent, as well as sold products within this district that Brock has claimed practice the '787 Patent.

8. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391 and § 1400(b) because Brock resides in this judicial district within the meaning of such provisions and because it has transacted business and a substantial part of the events giving rise to the claims occurred in this district.

FACTUAL BACKGROUND

9. Oldcastle, either directly or indirectly through its wholly-owned subsidiaries, manufactures and sells building products throughout North America. As such, Oldcastle is one of the leading manufacturers and sellers of paving systems.

10. Pavers can be used in walkway, patio or driveway installations to improve the visual appeal of those areas. Oldcastle's pavers are designed to be strong, durable and environmentally friendly. They offer many advantages over traditional concrete or wood decking systems.

11. One aspect of pavers and paving systems, however, is that they typically require a supporting substructure before being installed. As the '076 Patent explains, conventional paver installation requires that, after removal of roughly five inches of soil or sod, a grade must be established. Thereafter, a compacted subbase comprised of roughly five inches of heavy crushed stone is created over the excavated area. The subbase acts as an underlying supporting

structure. After this subbase is established, sand is typically spread over the subbase and then pavers are installed in a desired pattern over the sand. Additional sand is then spread over the pavers and swept or otherwise driven into the joints between the pavers to lock the pavers together and fill voids.

12. Installation of pavers can thus be relatively labor-intensive, tedious and time-consuming. Some expertise is required and professionals often perform the installation.

OLDCASTLE'S '076 PATENT

13. On July 17, 2007, the United States Patent and Trademark Office duly and legally issued the '076 Patent, entitled "Method for Installing Paving Blocks" and naming Robert L. Whitson as inventor. The inventors initially assigned the '076 Patent to Bend Industries, Inc., which was acquired by Oldcastle's affiliate, Northfield Block Company. Oldcastle APG Midwest, Inc. merged with Northfield Block Company and, thereafter, Oldcastle APG South, Inc. merged with Oldcastle APG Midwest, Inc. As a result, by operation of law, Oldcastle APG South, Inc. became the sole owner of the '076 Patent. Pursuant to an assignment from Oldcastle APG South, Inc., Oldcastle Architectural, Inc. now holds all ownership interests in the '076 Patent.

14. The invention in the '076 Patent recognizes the need to simplify methods of installing paving blocks. The '076 Patent thus created a method and associated product of significant value in a variety of paving systems markets, including the "do it yourself" market.

15. The method of the '076 Patent involves grading an area to be paved and placing a preformed, load-bearing sheet of material on the prepared area, after which the pavers may be placed in a desired pattern on the sheet of material.

Claim 1 of the '076 Patent describes the method as follows:

In a method of installing paving blocks comprising the steps of preparing an area to be paved to a desired grade;
the improvement comprising the steps of:

providing a sheet of preformed, load-bearing, board-type, foam material having sufficient load-bearing strength for supporting said paving blocks in addition to human and vehicular traffic traversing said paving blocks;

placing said preformed sheet of foam material directly upon the prepared area and without need of an underlying supporting substructure;
laying paving blocks in a desired pattern directly upon the preformed sheet of foamed material;

depositing a joint filling, water-activated, polymeric sand in spaces existing between said paving blocks, and thereafter water spraying the sand to provide long-term stability to the finished paved surface; and

wherein the sheet of foam material includes a grid marked on its exposed surface, said grid being arranged for positioning of said paving blocks.

16. To implement the '076 Patent, Oldcastle's research and development team created a series of prototype sheets formed from various types of materials so

as to select the appropriate material for forming the foamed material. After substantial research and development, Oldcastle launched the Sakrete EZ Base Patio stone and paver base (“EZ Base”) product in December 2013 through its customer, Home Depot. The EZ Base product is marked with the ‘076 Patent number and, in use, practices the method of the ‘076 Patent.

BROCK’S ‘787 PATENT

17. Almost three years after the ‘076 Patent issued, Brock filed on July 7, 2010 U.S. Patent Application No. 12/830,902, which application ultimately led to the ‘787 Patent.

18. Shortly after filing the application leading to the ‘787 Patent, on July 21, 2010, Brock filed an “information disclosure statement” identifying as relevant prior art Oldcastle’s ‘076 Patent. During prosecution, the Patent Office rejected the application for the ‘787 Patent in view of Oldcastle’s prior art ‘076 Patent. For example, in a January 30, 2012, office action, the Patent Office contended that the ‘076 Patent combined with another referenced rendered obvious various claims Brock had sought to patent.

19. Brock repeatedly amended its claims in light of this and other rejections, but the Patent Office continued to reject the claims Brock sought. A principal reason for rejection was the existence of Oldcastle’s ‘076 Patent, which

the Patent Office referred to as “Whitson,” after the named inventor. For example, in a June 26, 2013 rejection, the Patent Office rejected multiple claims Brock sought to patent because “it would have been obvious to one of ordinary skill in the art at the time the invention was made to make the underlayment support layer of Whitson from polyethylene foam beads, as taught by Devine et al. in order to reduce vibrations and shock from damaging the pavement supported by said support panels.” Similarly, the Patent Office contended it would be obvious “to make the underlayment panels of Whitson in view of Devine et al., to include water drainage channels, as taught by Prevost in order to prevent ground water from accumulating beneath the paving elements.” In the same action, the Patent Office made other rejections of Brock’s proposed claims in view of the ‘076 Patent.

20. To overcome those repeated rejections, Brock submitted sworn testimony from two witnesses. One was Mr. Richard Runkles, who is a named co-inventor of the ‘787 Patent and also the President of Brock USA, LLC. Mr. Runkles’ declaration was signed on November 27, 2013, and submitted to the Patent Office in December, 2013. A true and correct copy of Mr. Runkles’ November 27, 2013 declaration is attached as Exhibit B.

21. As reflected in Exhibit C, at paragraph 15, Mr. Runkles claimed that Brock had achieved commercial success in the market, and asserted that two competitors had surfaced. Mr. Runkles claimed “that one of these competitors is actively planning to enter the market with a copycat product in 2014.” (Ex. B, ¶ 15). However, Mr. Runkles did not identify that competitor in his November 27, 2013, declaration.

22. Brock’s representatives thereafter met with the Patent Office examiner to discuss the declarations submitted. The Patent Office indicated in a December 24, 2013 interview summary of that meeting that Brock needed to provide “supporting revenue/advertising/cost ratios of current competitors . . . to demonstrate market share and support date of reduction-to-practice of the claimed invention and that of current competitors.”

23. Thereafter, Mr. Runkles submitted a second declaration, a true and correct copy of which is attached as Exhibit C. Mr. Runkles testified therein that he had met with various Oldcastle representatives in Atlanta several times and presented the Brock PaverBase product in an effort to persuade Oldcastle to distribute the Brock PaverBase underlayment product, including through “trial installations in the Atlanta area.” (Ex. C., ¶ 5). Mr. Runkles also alleged “that Old Castle had copied the Brock PaverBase underlayment product, and had made a

deal for the product to be distributed in Home Depot stores.” (Ex. C, ¶ 6). Mr. Runkles further alleged that “it did not appear in my dealings with them that Old Castle had thought of the idea that foam board as characterized and claimed in our pending patent application could be used as an underlayment layer for a paver system until Brock disclosed its product to Old Castle.” (*Id.*)

24. Brock does not sell its Brock PaverBase underlayment product to or through Home Depot. Nonetheless, in January 2014, Oldcastle learned from its customer, Home Depot, that Brock had contacted Home Depot. Brock claimed to Home Depot that Oldcastle’s EZ Base product would infringe on Brock’s soon to issue ‘787 Patent. Oldcastle likewise received correspondence from Brock asserting that Oldcastle’s EZ Base product would infringe upon Brock’s ‘787 Patent.

25. Oldcastle’s EZ Base product was independently developed and practices its own ‘076 Patent and/or other prior art, all of which predates the ‘787 Patent. Furthermore, Oldcastle’s research and development team had considered using various materials for the foam board that Oldcastle uses to practice Oldcastle’s ‘076 Patent before any disclosure of the Brock PaverBase product and, in fact, other Oldcastle employees had suggested such materials to Brock itself before Brock developed its product or patent application.

26. Mr. Runkles, in his November, 2013, declaration testified that he was “aware of and ha[d] read U.S. Patent No. 7,244,076 to Whitson, one of the primary prior art references associated with the patent prosecution of the” ‘787 Patent. (Ex. B, ¶ 17.) Brock, by and through Mr. Runkles, was accordingly aware that Oldcastle’s EZ Base product practiced the ‘076 Patent, which is admittedly prior art to the ‘787 Patent.

27. Despite Mr. Runkles’ and Brock’s admitted knowledge of Oldcastle’s ‘076 Patent, Brock has nonetheless directly and indirectly infringed upon the ‘076 Patent by and through the sale, promotion, manufacture and use of the Brock PaverBase underlayment product. Brock’s infringement is willful and, unless permanently enjoined will cause Oldcastle irreparable harm.

COUNT I

DIRECT INFRINGEMENT OF U.S. PATENT NO. 7,244,076

28. Oldcastle realleges and incorporates by reference the foregoing paragraphs of this Complaint as if fully set forth herein.

29. Brock has infringed and continues to infringe the ‘076 Patent, either literally or under the doctrine of equivalents, by making, using, offering for sale, or selling paver underlayment systems, including its Brock PaverBase product, use of which practices or embodies each element of claim 1 of the ‘076 Patent.

30. Brock's past and continuing infringement of the '076 Patent has damaged Oldcastle in an amount to be determined at trial.

31. Brock's past and continuing infringement of the '076 Patent has irreparably harmed, and continues irreparably to harm, Oldcastle. Brock's infringing activities will continue unless enjoined by this Court pursuant to 35 U.S.C. § 283.

32. Brock's infringement has been and continues to be willful, intentional, and with knowledge of the existence of the '076 Patent. Oldcastle is thus entitled to enhanced damages pursuant to 35 U.S.C. § 284, and attorneys' fees and other expenses of litigation pursuant to 35 U.S.C. § 285.

COUNT II

INDUCEMENT OF INFRINGEMENT OF U.S. PATENT NO. 7,244,076

33. Oldcastle realleges and incorporates by reference the foregoing paragraphs of this Complaint as if fully set forth herein.

34. Brock has knowingly and intentionally induced, and continues knowingly and intentionally to induce, others in this judicial district and throughout the United States to create, use, sell, offer for sale, and/or import paver underlayment systems and installation methods that Brock knows to infringe the '076 Patent, including by explicitly promoting the Brock PaverBase product, and

instructing customer use of such products in a manner that practices or embodies each element of claim 1 of the '076 Patent.

35. Brock's past and continuing inducement of infringement of the '076 Patent has damaged Oldcastle in an amount to be determined at trial.

36. Brock's past and continuing inducement of infringement of the '076 Patent has irreparably harmed Oldcastle, and Brock's inducement of infringement will continue unless enjoined by this Court pursuant to 35 U.S.C. § 283.

37. Brock's inducement of infringement has been and continues to be deliberate, willful, intentional, and with knowledge of the existence of the '076 Patent, such that Oldcastle is entitled to recover enhanced damages under 35 U.S.C. § 284, as well as its attorneys' fees and other expenses of litigation pursuant to 35 U.S.C. § 285.

COUNT III

CONTRIBUTORY INFRINGEMENT OF U.S. PATENT NO. 7,244,076

38. Oldcastle realleges and incorporates by reference the foregoing paragraphs of this Complaint as if fully set forth herein.

39. Brock has contributed to the infringement of the '076 Patent and continues to do so by making, using, offering for sale, or selling paver underlayment systems and installation methods that Brock knows to infringe the

'076 Patent, including by explicitly promoting the Brock PaverBase product, and instructing customer use of such products in a manner that practices or embodies each element of claim 1 of the '076 Patent.

40. Brock's past and continuing contributory infringement of the '076 Patent has damaged Oldcastle in an amount to be determined at trial.

41. Brock's past and continuing contributory infringement of the Patent has irreparably harmed and continues irreparably to harm Oldcastle, and Brock's infringing activities will continue unless enjoined by this Court pursuant to 35 U.S.C. § 283.

42. Brock's contributory infringement has been and continues to be deliberate, willful, intentional, and with knowledge of the existence of '076 Patent, such that Oldcastle is entitled to recover enhanced damages under 35 U.S.C. § 284, as well as its attorneys' fees and other expenses of litigation pursuant to 35 U.S.C. § 285.

COUNT IV

DECLARATORY JUDGMENT OF NON-INFRINGEMENT OF U.S. PATENT NO.

8,662,787

43. Oldcastle realleges and incorporates by reference the foregoing paragraphs of this Complaint as if fully set forth herein.

44. Brock has asserted that Oldcastle infringes the '787 Patent by making, using, selling, importing, offering for sale or using Oldcastle's EZ Base product.

45. Oldcastle does not infringe Brock's '787 Patent.

46. Based on Brock's communications to Oldcastle and its customer, an actual case or controversy exists as to whether Oldcastle infringes the '787 Patent. Oldcastle accordingly seeks a declaration that it does not infringe the '787 Patent.

REQUEST FOR JURY TRIAL

Oldcastle hereby requests a trial by jury on all claims.

PRAYER FOR RELIEF

WHEREFORE, Oldcastle respectfully requests that the Court:

A. Declare that Brock has directly infringed, induced others to infringe, and/or contributed to the infringement of the '076 Patent, and that Brock has willfully infringed Oldcastle's patent rights, as asserted herein;

B. Enjoin Brock from directly infringing, inducing others to infringe, or contributing to the infringement of the '076 Patent, pursuant to 35 U.S.C. § 283, including by specifically prohibiting Brock from marketing, using, manufacturing, offering for sale, or selling paver underlayment systems, including the Brock Paver Base product and enjoin Brock to destroy its entire inventory of infringing products;

C. Award Oldcastle damages in an amount to be proved at trial to compensate Oldcastle for damages caused by Brock's direct and indirect infringement of the '076 Patent;

D. Treble the damages awarded to Oldcastle, as provided by 35 U.S.C. § 284;

E. Award Oldcastle a judgment that Oldcastle does not infringe the '787 Patent;

F. Award Oldcastle its reasonable attorneys' fees and litigation expenses, as provided by 35 U.S.C. §285;

G. Award Oldcastle prejudgment interest and costs pursuant to 35 U.S.C. § 284; and

H. Award Oldcastle such other and further relief as the Court may deem appropriate.

Respectfully submitted, this 4th day of March, 2014.

OF COUNSEL:

David Lewis
Georgia Bar No. 450098
OLDCASTLE, INC.

/s/ Mitchell G. Stockwell
Mitchell G. Stockwell
Georgia Bar No. 682912
KILPATRICK TOWNSEND &
STOCKTON LLP
Suite 2800
1100 Peachtree Street
Atlanta, Georgia 30309-4530
Phone: (404) 815-6500
Fax: (404) 815-6555

ATTORNEYS FOR PLAINTIFFS