

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

Mitchell Ellis Products, Inc.

Plaintiff

v.

Bouldin & Lawson, LLC

Defendant

CIVIL ACTION NO. 1:14-CV-
00194-WS-N

PLAINTIFF'S FIRST AMENDED COMPLAINT

Plaintiff, Mitchell Ellis Products, Inc., by and through its undersigned counsel, alleges as follows against Defendant Bouldin & Lawson, LLC (“Bouldin”):

JURISDICTION AND VENUE

1. This is a civil action seeking damages and injunctive relief for patent infringement under the Patent Law of the United States (35 U.S.C. § 1 *et seq.*), including 35 U.S.C. §§ 271, 281, 283, 284 and 285. This is also an action seeking damages for false patent marking under 35 U.S.C. § 292, as amended by the Leahy-Smith America Invents Act, Publ. L. 112-29, H.R. 1249 (enacted Sept. 16, 2011). As set forth in greater detail below, this action involves the unauthorized production, use, offer to sell, and sale of Plaintiff’s patented invention without a license or permission from Plaintiff, the patent holder.

2. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1338(a) (any Act of Congress relating to patents or trademarks).

3. Defendant is subject to personal jurisdiction in the district by virtue of, among other things, without consent or permission of Plaintiff as exclusive rights holder, using, offering to sell, and selling the infringing product at issue in this State, including in this judicial district, through agents and representatives and/or otherwise having substantial

contacts with this State and this judicial district. The Defendant has committed and continue to commit acts of infringement in violation of 35 U.S.C. § 271 and place infringing products into the stream of commerce with the knowledge or understanding that such products are sold in the State of Alabama, including in this District. These acts cause injury to Plaintiff in this District. Defendant derives substantial revenue from the sale of infringing products within this District, expect their actions to have consequences in this District, and derive substantial revenue from interstate commerce.

4. Furthermore, this Court has personal jurisdiction over Defendant under the Alabama long-arm statute, AL ST RCP 4.2, because Defendant transacted business in this State, contracted to supply services or goods in this State, caused tortious injury or damage by an act or omission in this State, caused tortious injury or damage in this State by an act or omission outside this State and regularly do and/or solicit business and/or engage in a persistent course of conduct and/or derive substantial revenue from goods used or consumed or services rendered in this State.

5. Venue is proper in this District under 28 U.S.C. § 1391(b) and (c) because Bouldin transacts business within this District and offers for sale in this District products that infringe Plaintiff's patent. Moreover, Bouldin is subject to personal jurisdiction in this District and committed unlawful acts of infringement in this District.

THE PARTIES

6. Plaintiff is an Alabama corporation having its principal place of business at 9110 Church Street, Semmes, Alabama 36575.

7. Plaintiff is a longstanding leader in the horticulture industry and has provided machinery specially developed for the nursery and greenhouse market since 1977.

8. Upon information and belief, Defendant Bouldin & Lawson, LLC is a Tennessee limited liability company with its principal place of business at 70 Easy Street, McMinnville, Tennessee 37110.

BACKGROUND

9. Plaintiff incorporates each of the foregoing paragraphs, as though fully set forth herein.

10. Plaintiff, a longstanding leader in the horticulture industry, has developed several innovative and revolutionary potting apparatuses.

11. Plaintiff has consistently sought to protect its intellectual property rights and filed a utility patent application for a potting apparatus with the United States Patent and Trademark Office on May 31, 2012.

12. On November 26, 2013, United States Letters Patent No. 8,590,583 (the “‘583 patent”), titled “Potting apparatus,” was issued to the Plaintiff. A true and correct copy of the ‘583 patent is attached hereto as Exhibit A.

13. The Plaintiff owned the patent throughout the period of Defendant’s infringing acts and still owns the patent.

14. Plaintiff markets and sells an embodiment of the patented invention as the “EZ Potter Potting Machine.” A photo of Plaintiff’s EZ Potter Potting Machine is attached hereto as Exhibit B.

15. Rather than innovate and develop its own technology, Bouldin chose to copy Plaintiff’s technology and innovative style in its own potting machines.

16. Defendant has infringed and are still infringing Plaintiff’s patent by making, selling, and using potting machines that embody the patented invention, and the Defendant

will continue to do so unless enjoined by this Court.

17. Defendant has falsely marked in the operator's manual of the EP 2200 and EP 2200 EX, that, "this machine is protected by U.S. patents and other patents pending, foreign, and domestic." A true and correct copy of the 'EP 2200 Operator's Manual, page 15, is attached hereto as Exhibit D. A true and correct copy of the 'EP 2200 EX Operator's Manual, page 15, is attached hereto as Exhibit E.

18. At the minimum, the products marketed by Defendant as the "EP 2200 Potting Machine," the "EP 2200EX Potting Machine," and the M131 Pro with Drill Head infringe the '583 patent.

19. Photos of Defendant's products are attached hereto as Exhibit C.

20. Bouldin's infringement of the '583 patent provides Bouldin with unique functionality for its products that is the result of Plaintiff's hard work and innovation, not Bouldin's.

21. Bouldin has not obtained permission from Plaintiff to use the '583 patent.

COUNT 1
INFRINGEMENT OF THE '583 PATENT
(Against Defendant)

22. Plaintiff incorporates each of the foregoing paragraphs, as though fully set forth herein.

23. Plaintiff has complied with the statutory requirement of placing a notice of the Letters Patent on all potting machines it manufactures and sells and has given the Defendant written notice of the infringement. Specifically, Plaintiff notified Defendant on December 31, 2012 that Plaintiff was the owner of a pending U.S. patent application for a potting apparatus (U.S. Patent Publication No. 2012/0285580). Subsequently, on November 26,

2013, Plaintiff notified Defendant that claims in the application had been allowed.

24. On information and belief, and in violation of 35 U.S.C. § 271(a), Defendant has, literally and under the doctrine of equivalents, infringed the '583 patent and still are, literally and under the doctrine of equivalents, infringing the '583 patent, by, among other things, making, using, offering for sale, and/or selling a potting machine with a conveyor belt and drill operating in an indexing manner such that the conveyor temporarily stops at a location directly below the drill, including but not limited to its EP 2200 Potting Machine, EP 2200EX Potting Machine, and M131 Pro with Drill head and will continue to do so unless such infringing activities are enjoined by this Court.

25. On information and belief, and in violation of 35 U.S.C. § 271(b), Defendant has actively induced others to infringe one or more claims of the '583 patent in this District and elsewhere in the United States. Defendant knowingly induced infringement and possessed specific intent to encourage another's infringement which led to direct infringement by a third party by soliciting buyers, distributors and/or retailers to offer for sale and/or sell the infringing products, and by soliciting end users to purchase and use the infringing products, in this District and elsewhere in the United States.

26. Bouldin had knowledge of the '583 patent through direct and indirect communication with Plaintiff and/or as a result of its participation in the horticulture industry.

27. Bouldin's infringement of the '583 patent is and has been intentional, deliberate, and willful based upon its knowledge that it infringed the '583 patent.

28. Plaintiff has sustained damages as a direct and proximate result of Bouldin's infringement of the '583 patent.

29. Plaintiff is suffering and will continue to suffer irreparable harm from Bouldin's infringement of the '583 patent. Plaintiff has no adequate remedy at law and is entitled to an injunction against Bouldin's continuing infringement of the '583 patent. Unless enjoined, Bouldin will continue its infringing conduct.

30. The actions and conduct of Defendant as described above infringe upon Plaintiff's exclusive rights granted under the patent law of the United States to make, use, and sell the patented invention.

31. As a result of Defendant's infringement of Plaintiff's exclusive rights, Plaintiff is entitled to relief pursuant to 35 U.S.C. §§ 281-297 and to its attorney's fees and costs pursuant to 35 U.S.C. § 285.

COUNT 2
FALSE PATENT MARKING

32. Plaintiff realleges and incorporates by reference the allegations of paragraphs 1-32 herein.

33. This is a claim for false marking under 35 U.S.C. § 292.

34. Bouldin makes, uses, offers for sale, sells, supplies, causes to be supplied, in the State of Alabama and/or elsewhere in the United States, the EP2200, EP2200 EX, and M131 Pro with Drill head potting machines. Bouldin has in the past marked, or caused to be marked, and, upon information and belief, presently marks, or causes to be marked EP 2200, EP 2200 EX and M131 Pro with Drill head potting machines, advertisements and marketing for said potting machines, and correspondence with language that said machines are protected by patents and/or pending patents.

35. The EP 2200, EP 2200 EX, and M131 Pro with Drill head operator's manual states: "this machine is protected by U.S. patents and other patents pending, foreign, and

domestic.”

36. Upon information and belief, Bouldin is a sophisticated company and has experience applying for, obtaining, and maintaining patents, and therefore knows that patents provide a scope of patent protection that is governed by the claims of the patent.

37. Upon information and belief, Bouldin employs outside intellectual property counsel.

38. Further underscoring its legal sophistication as to patent matters, Bouldin is listed as the assignee for approximately 15 U.S. patents and/or patent applications.

39. Upon information and belief, Bouldin performed analysis of its patent portfolio to determine if it had in fact received a granted U.S. patent covering the EP 2200, EP 2200 EX, and M131 Pro with Drill head.

40. On information and belief, Bouldin, with knowledge that the EP 2200, EP 2200 EX, and M131 Pro with Drill head were not covered by any patents, marked and, upon information and belief, continues to mark the EP 2200, EP 2200 EX, and M131 Pro with Drill operator’s manual with language stating that the machine is protected by U.S. patents and other patents pending, foreign, and domestic with the intent of deceiving the public.

41. Bouldin knows, or reasonably should know (itself or by its representatives) that marking the EP 2200, EP 2200 EX, and M131 Pro with Drill operator’s manual with language stating that the machine is protected by U.S. patents and other patents pending, foreign, and domestic will deceive the public.

42. Bouldin knows, or reasonably should know (itself or by its representatives) that marking the EP 2200, EP 2200 EX, and M131 Pro with Drill operator’s manual with language stating that the machine is protected by U.S. patents and other patents pending,

foreign, and domestic is a violation of 35 U.S.C. § 292.

43. The mismarked patent language on the EP 2200, EP 2200 EX, and M131 Pro with Drill operator's manual is likely to, or at least has the potential to, discourage or deter others from commercializing a competing product, thereby deterring innovation and stifling competition in the marketplace generally and between Bouldin and Mitchell Ellis Products specifically.

44. Bouldin has wrongfully and illegally advertised patent monopolies which it does not possess, and, as a result, upon information and belief, has likely benefitted in at least maintaining its market share with respect to the EP 2200, EP 2200 EX, and M131 Pro with Drill products in the marketplace.

45. For at least the reasons provided herein, and/or for other reasons that will be later evidenced, each mismarked advertisement, document, or product likely, or at least potentially, deceives the public and contributes to the public harm.

46. For at least the reasons provided herein, and/or for other reasons that will be later evidenced, each mismarked advertisement, document, or product has stifled Mitchell Ellis Products' competition with Bouldin and has caused Mitchell Ellis Products competitive injury.

47. Bouldin knew or reasonably should have known that each mismarked advertisement, document, or product it has marked and sold or caused to be sold is not covered by any of Bouldin's issued patents. Thus, each time Bouldin has intentionally marked an EP 2200, EP 2200 EX, and/or M131 Pro with Drill manual, advertisement, or machine with a patent marking that does not cover the article such as described above, Bouldin has committed at least one "offense" as defined in 25 U.S.C. § 292 (a), and has

caused Mitchell Ellis Products a “competitive injury” as defined in 35 U.S.C. § 292 (b), as amended. Mitchell Ellis Products is entitled to recover damages adequate to compensate for this injury.

48. For at least the reasons set forth herein, and/or for other reasons which will later be evidenced, Bouldin has falsely marked and, upon information and belief, continues to falsely mark its products, manuals, and/or advertising as patented, with the intent to deceive the public and the effect of causing competitive injury to Mitchell Ellis Products, in violation of 35 U.S.C. § 292.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendant and for relief as follows:

1. A judgment that the ‘583 patent is valid and enforceable;
2. A judgment that Bouldin has infringed and/or induced infringement of one or more claims of the ‘583 patent;
3. A judgment that Bouldin has falsely marked the EP 2200, EP 2200 EX, and/or M131 Pro with Drill machines, manuals, and/or advertisements in violation of 35 U.S.C. § 292.
4. An order and judgment preliminarily and permanently enjoining Bouldin and its officers, directors, agents, servants, employees, affiliates, attorneys, and all others acting in privity or in concert with them, and their parents, subsidiaries, divisions, successors, and assigns from further acts of infringement of the ‘583 patent;
5. A judgment awarding Plaintiff all damages adequate to compensate for Bouldin’s infringement of the ‘583 patent, and in no event less than a reasonable royalty for Bouldin’s

acts of infringement, including all pre-judgment and post-judgment interest at the maximum rate permitted by law;

6. A judgment awarding Plaintiff all damages, including treble damages, based on any infringement found to be willful, pursuant to 35 U.S.C. § 284, together with prejudgment interest;

7. Actual damages suffered by Plaintiff as a result of Bouldin's unlawful conduct, in an amount to be proven at trial, as well as prejudgment interest as authorized by law;

8. A judgment that this is an exceptional case and an award to Plaintiff of its costs and reasonable attorneys' fees incurred in this action as provided by 35 U.S.C. § 285; and

9. Such other relief as this Court deems just and proper.

JURY DEMAND

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff demands a trial by jury on all issues raised by the Complaint.

Dated: January 5, 2015

Respectfully submitted,

ADAMSIP, LLC

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing PLAINTIFF'S FIRST AMENDED COMPLAINT has been filed with the Clerk of the Court through the CM/ECF system which will automatically send electronic mail notification of such filing to the CM/ECF registered participants as identified on the Electronic Mail Notice List.



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