

UNITED STATE DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
TYLER DIVISION

KITCHEN EQUIPMENT FABRICATING	)	
COMPANY D/B/A COUNTERCRAFT,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 6:14-cv-00677-KNM
v.	)	
	)	
COMMERCIAL KITCHENS, INC. D/B/A	)	
MOD-U-SERVE,	)	
	)	
Defendant.	)	

**FIRST AMENDED COMPLAINT**

Plaintiff Kitchen Equipment Fabricating Company d/b/a CounterCraft (“Plaintiff”), for its Complaint against Defendant Commercial Kitchens, Inc. d/b/a Mod-U-Serve (“Defendant”), states as follows:

**Parties**

1. Plaintiff is a corporation organized and existing under the laws of the State of Texas and has a principal place of business at 7007 Stearns St., Houston, Texas 77021.

2. On information and belief, Defendant is a corporation organized and existing under the laws of the State of Texas and has a principal place of business at 2320 Peyton Road, Houston, Texas 77032.

**Jurisdiction and Venue**

3. This is an action for patent infringement under 35 U.S.C. § 271. This Court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1338(a).

4. This Court has personal jurisdiction over Defendant because Defendant resides in Texas and, upon information and belief, has committed acts of infringement in this judicial district.

5. Venue is proper in this Judicial District under 28 U.S.C. §§ 1391(b) and (c) and 1400(b) because Defendant is subject to personal jurisdiction here and, upon information and belief, has committed acts of infringement here.

**Patents-In-Suit**

6. On April 22, 2014, the United States Patent and Trademark Office duly and legally issued U.S. Patent No. 8,701,554 (“the ‘554 patent”), entitled “Temperature Controlled Food Tray System.” A copy of the ‘554 patent is attached as Exhibit A.

7. On April 7, 2015, the United States Patent and Trademark Office duly and legally issued U.S. Patent No. 8,997,640 (“the ‘640 patent”), entitled “Temperature Controlled Food Display System.” A copy of the ‘640 patent is attached as Exhibit B.

8. Plaintiff owns the ‘554 patent and the ‘640 patent and holds all right to sue for past, present, and future infringement of the ‘554 patent and the ‘640 patent.

9. Plaintiff has marked its products in compliance with the notice requirement of 35 U.S.C. § 287. In addition, Plaintiff put Defendant on actual notice of the ‘554 patent and of Defendant’s infringement of the ‘554 patent in a letter to counsel for Defendant dated June 6, 2014.

**Defendant’s Infringing Activities**

10. Attached as Exhibit C is prior correspondence from counsel for Defendant to counsel for Plaintiff dated May 30, 2013. In this correspondence, Defendant includes an

Attachment A showing the design of the hot and cold food tray system made, used, offered for sale, and sold by Defendant as of May 30, 2013 (hereinafter the “Infringing Tray Design”).

11. The Defendant’s Infringing Tray Design is covered by at least claims 1 to 5 and 15 to 19 of the ‘554 patent, and at least claims 1 to 6 of the ‘640 patent.

12. In a letter from counsel for Plaintiff to counsel for Defendant dated June 6, 2014, Plaintiff asserted, among other things, that Defendant’s Infringing Tray Design infringed the ‘554 patent. Plaintiff made demand that Defendant cease all manufacture, use, offers for sale, and sale of the Infringing Tray Design.

13. In correspondence between counsel subsequent to the June 6, 2014 letter (and despite *repeated* requests from counsel for Plaintiff thereafter, but prior to the filing of this lawsuit), Defendant steadfastly refused to state whether Defendant had ceased making, using, selling, and/or offering to sell the Infringing Tray Design. All requests from counsel for Plaintiff to learn this information were ignored by Defendant. Subsequent to the filing of this lawsuit, Defendant has acknowledged that Defendant makes, uses, offers to sell, and/or sells products according to the Infringing Tray Design.

14. Upon information and belief, Defendant has made, used, offered for sale, and/or sold the Infringing Tray Design after issuance of the ‘554 patent on April 22, 2014, and after issuance of the ‘640 patent on April 7, 2015.

15. In a prior letter dated January 2, 2014, counsel for Plaintiff formally put Defendant on notice of the application that issued as the ‘554 patent and provided a copy of said patent application to Defendant. Defendant was thus on notice of the application for the ‘554 patent prior to issuance of the ‘554 patent.

**COUNT I: Infringement of U.S. Patent No. 8,701,554**

16. Plaintiff incorporates by reference Paragraphs 1 through 15 of this First Amended Complaint as if fully set forth herein.

17. Defendant's making, using, offering for sale, and sale of the Infringing Tray Design directly infringes at least claims 1 to 5 and 15 to 19 of the '554 patent under 35 U.S.C. § 271. Defendant has thus infringed and is still infringing the '554 patent and will continue to do so unless enjoined by this Court.

18. Plaintiff has been damaged by Defendant's infringement of the '554 patent.

19. Given Defendant's knowledge of the '554 patent and prior notice of the application for the '554 patent, at all relevant times since January 2, 2014, Defendant's infringement of the '554 patent has been knowing and willful.

20. Plaintiff is without an adequate remedy at law and will be irreparably harmed if the Court does not enter an order preliminarily and permanently enjoining Defendant from infringing the '554 patent.

**COUNT II: Infringement of U.S. Patent No. 8,997,640**

21. Plaintiff incorporates by reference Paragraphs 1 through 20 of this First Amended Complaint as if fully set forth herein.

22. Defendant's making, using, offering for sale, and sale of the Infringing Tray Design directly infringes at least claims 1 to 6 of the '640 patent under 35 U.S.C. § 271. Defendant has thus infringed and is still infringing the '640 patent and will continue to do so unless enjoined by this Court.

23. Plaintiff has been damaged by Defendant's infringement of the '640 patent.

24. Plaintiff is without an adequate remedy at law and will be irreparably harmed if the Court does not enter an order preliminarily and permanently enjoining Defendant from infringing the '640 patent.

**Jury Demand**

25. Plaintiff requests a trial by jury, pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, of all issues triable to a jury.

**Prayer for Relief**

WHEREFORE, Plaintiff Kitchen Equipment Fabricating Company d/b/a CounterCraft requests the Court to enter judgment against Defendant Commercial Kitchens, Inc. d/b/a Mod-U-Serve and respectfully prays that the Court enter an Order:

- A. Finding that Defendant has infringed U.S. Patent Nos. 8,701,554 and 8,997,640;
- B. Preliminarily and permanently enjoining Defendant, and each of its respective officers, agents, servants, employees, and attorneys, and all of those persons in active concert or participation with it, from directly or indirectly infringing U.S. Patent Nos. 8,701,554 and 8,997,640, and from making, using, importing, offering to sell, or selling Defendant's Infringing Tray Design;
- C. Awarding Plaintiff damages in the amount of Plaintiff's lost profits, but in no event less than a reasonable royalty under 35 U.S.C. § 284;
- D. Finding that Defendant has willfully infringed U.S. Patent Nos. 8,701,554 and trebling the damages under 35 U.S.C. § 284;
- E. Awarding pre-judgment and post-judgment interest and costs against Defendant;
- F. Awarding reasonable attorneys' fees to Plaintiff under 35 U.S.C. § 285; and
- G. Providing such other and further relief as the Court may deem just and proper.

Dated: May 8, 2015

Respectfully submitted,

/s/ Robert M. Evans, Jr.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a) and served on all counsel who have consented to electronic service on this the 8th day of May, 2015.

/s/ Robert M. Evans, Jr.