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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASCADE DESIGNS INCORPORATED,

Plaintiff,

v.

WINDCATCHER TECHNOLOGY LLC,

Defendant.

No. 2:15-cv-01310

**FIRST AMENDED COMPLAINT
FOR DECLARATORY JUDGMENTS,
UNFAIR COMPETITION, FALSE
ADVERTISING, TRADE LIBEL, AND
TORTIOUS INTERFERENCE WITH
A BUSINESS EXPECTANCY**

JURY TRIAL DEMANDED

Cascade Designs, Inc. (“CDI”) states the following facts in support of its First Amended Complaint against Windcatcher Technology LLC (“Windcatcher”).

THE PARTIES

1. Plaintiff Cascade Designs Inc. is a corporation organized and existing under the laws of Washington and having its principal place of business in Seattle, Washington.
2. Upon information and belief, Defendant Windcatcher Technology LLC is a corporation organized and existing under the laws of Oregon and having its principal place of business in Portland, Oregon.

JURISDICTION AND VENUE

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2 3. This civil action arises in part under the Patent Laws of the United States,
3 35 U.S.C § 1, *et. seq.* Accordingly, this Court has original subject matter jurisdiction under
4 28 U.S.C. §§ 1331 and 1338(a) and (b). This Court also has jurisdiction under 15 U.S.C. § 1121
5 because this action arises in part under the Lanham Act. This Court further has jurisdiction under
6 the Declaratory Judgment Act, 28 U.S.C. §§ 2201 - 2202, because an immediate and substantial
7 controversy exists between CDI and Windcatcher regarding whether CDI infringes any valid
8 claim of U.S. Patent No. 8,978,693, whether CDI's actions constitute trade dress infringement,
9 and whether CDI's actions constitute theft of trade secrets. This Court also has supplemental
10 jurisdiction over CDI's state law claims under 28 U.S.C. § 1367(a).
11

12 4. Windcatcher is subject to this Court's personal jurisdiction pursuant to due
13 process and the Washington Long Arm Statute, having made allegations against CDI in this
14 District, and because CDI's alleged actions – which actions Windcatcher falsely claims
15 constitute patent infringement, trade dress infringement, and theft of trade secret(s) – all occur or
16 occurred in this District.
17

18 5. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b), 1391(c) and
19 1400(b).
20

FACTUAL BACKGROUND

21 6. CDI, a private, family-owned company, was founded in 1972 by engineers who
22 were also avid backpackers. Throughout its existence, CDI has been a leader and innovator in the
23 field of outdoor recreation products.
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1 7. CDI offers almost 1,000 individual products, most of which require sophisticated,
2 proprietary, innovative solutions to that help outdoor recreationalists enjoy outdoor activities.
3 CDI's brands include the world famous Therm-A-Rest® brand of sleeping mats, MSR® branded
4 camping stoves, and many other products. These products are designed by the very best
5 engineers making outdoor gear; CDI's engineers are professionally accomplished, extensively
6 educated and highly trained – but they also bring long, rich, and deep experience in the outdoors
7 to their design tasks.
8

9 8. Because of its dedication to engineering and innovation in outdoor products, CDI
10 devotes substantial resources to developing new intellectual property; indeed, CDI is known as
11 an innovator in the field of outdoor recreational products. CDI also respects intellectual property
12 rights of other companies in the field.
13

14 9. CDI showcases its expertise at the Summer Outdoor Retailer convention in Salt
15 Lake City, Utah. The Outdoor Retailer convention brings over 2,000 exhibitors to display the
16 newest and best outdoor products to potential buyers. Buyers include large retail outdoor chains,
17 most of which carry many of CDI's products. This is arguably the biggest convention in the
18 industry; corporate reputations are earned, cemented, and lost at the Outdoor Retailer
19 convention.
20

21 10. CDI's engineers recently developed the NeoAir Camper SV sleeping mat. The
22 NeoAir Camper SV mat was developed as a result of years of research and development by
23 CDI's dedicated Therm-a-Rest® sleeping mats design and engineering team. The Camper SV
24 mattress features a unique single one-way valve that, in addition to using the breath of the user,
25 entrains ambient air from the environment to quickly blow up the sleeping pad.
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1 11. Upon information and belief, Windcatcher has one product: allegedly the
2 commercial embodiment of U.S. Patent No. 8,978,693 B2 (“the ‘693 Patent”). Windcatcher
3 disclosed this as early as May 2013, when a video of its product was placed on the internet for
4 crowd-funding purposes: [https://www.kickstarter.com/projects/1484284472/windcatcher-](https://www.kickstarter.com/projects/1484284472/windcatcher-inflates-in-seconds-with-no-power-or-p/description)
5 [inflates-in-seconds-with-no-power-or-p/description](https://www.kickstarter.com/projects/1484284472/windcatcher-inflates-in-seconds-with-no-power-or-p/description).
6

7 12. The Kickstarter link was publicly available to anyone on the internet, and showed
8 that Windcatcher uses a one-way valve that quickly inflates and deflates a sleeping pad. It also
9 shows how Windcatcher keeps its valve closed in its sleeping pad and describes the general
10 principles behind the idea for the valve.

11 13. Windcatcher filed in the United States Patent Office on October 29, 2013.
12 Windcatcher’s ‘693 Patent has inarguably profoundly narrow patent claims because
13 Windcatcher’s “new idea” is, and was, simply not new (excepting the issued narrow patent
14 claims). Indeed, the face of the patent shows that roughly 100 different patents were cited by the
15 Patent Office during the course of prosecution of the patent; 20 patents were expressly cited by
16 the USPTO’s Examining Attorney – and three of *those cited* were more than 45 years old.
17 Indeed, even a cursory review of the file history shows how difficult it was for Windcatcher to
18 convince the Patent Office that its invention was “new.” Windcatcher’s idea was neither new,
19 nor novel, and was obvious to those skilled in the art of inflatable objects.
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21 14. During the 2013 Summer Outdoor Retailer convention at the beginning of August
22 2013, representatives for Windcatcher approached CDI asking CDI if it was interested in
23 licensing and distributing the Windcatcher product.
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1 15. After the initial contact at the 2013 Outdoor Retailer convention, CDI and
2 Windcatcher entered into an NDA in August 2013 to further discuss potential benefits of
3 working together. After the NDA was executed, Windcatcher did give CDI two pieces of
4 information under the NDA that it did not previously, but neither piece of information related to
5 the overall general design of Windcatcher's valve.
6

7 16. At the 2015 Summer Outdoor Retailer convention, CDI featured its NeoAir
8 Camper SV mattress. Upon information and belief, at the same time a representative from
9 Windcatcher distributed a flyer at the Outdoor Retailer convention. The flyer distributed by
10 Windcatcher, or its representatives, is attached to the Complaint as **Exhibit A**.

11 17. **Exhibit A** accuses CDI of breaching Windcatcher's "IP rights" and an NDA. The
12 flyer further states "SALE OF ANY INFRINGING PRODUCT IS A VIOLATION OF US LAW
13 and will be subject to the injunctions we will be filing this year, to prevent the sale of these
14 knock-offs." It goes on to list only two entities that allegedly have a license from Windcatcher
15 and directs the reader to only buy from those entities.
16

17 18. **Exhibit A** was distributed to the public, including to actual and prospective
18 customers of CDI.

19 19. Upon information and belief, Windcatcher knew that it gave **Exhibit A** to actual
20 and potential customers of CDI.
21

22 20. Upon information and belief, an employee, representative and/or agent of
23 Windcatcher also made multiple social media postings accusing CDI of stealing technology from
24 Windcatcher, infringing multiple unnamed Windcatcher patents, violating an NDA, and accusing
25 CDI of illegally using a Windcatcher invention. These statements were directed to the public,
26

1 including to publications and reviewers that feature outdoor recreational products. These
2 statements were also accessible to any actual or potential CDI customer. Samples of this social
3 media campaign are attached as **Exhibit B**.

4 21. Upon information and belief, the accusations made by Windcatcher and its agents
5 or representatives have caused actual and potential customers of CDI to cancel, delay, or
6 decrease expected sales of CDI products. These accusations have created, for instance, the false
7 belief that if these CDI's retailer customers purchased or continued to purchase CDI's products,
8 those retailers would ultimately be liable for patent infringement for selling to end users.
9 *See* 35 U.S.C. 271(a) ("Except as otherwise provided in this title, whoever without authority
10 makes, uses, offers to sell, or sells any patented invention, within the United States or imports
11 into the United States any patented invention during the term of the patent therefor, infringes the
12 patent.")
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15 22. Windcatcher's statements regarding CDI's products are not in furtherance of, or
16 incidental to, any pending litigation. Windcatcher has not asserted any claim against CDI in any
17 proceeding, nor has there has ever been a judicial determination that CDI infringes any of
18 Windcatcher's allegedly valid intellectual property rights.

19 23. Upon information and belief, Windcatcher knew that the statements made about
20 CDI's products were not in furtherance of, or incidental to, any pending litigation.

21
22 24. Upon information and belief, Windcatcher made the statements to harm CDI's
23 sales.

1 25. **The statements made by Windcatcher about CDI's products are not true.**

2 CDI's products do not infringe any valid patent owned by Windcatcher; CDI did not violate the
3 NDA between Windcatcher and CDI; and CDI did not violate any other right(s) of Windcatcher.

4 26. Upon information and belief, Windcatcher did not – and could not –believe that
5 NeoAir Camper SV sleeping mat infringes the '693 Patent. No reasonable person could possibly
6 believe CDI's NeoAir Camper SV sleeping mat infringes Windcatcher's '693 Patent.

7 27. CDI did not use any information given under the NDA with Windcatcher to
8 develop any of its own products.

9 28. Nonetheless, on August 7, 2015, Windcatcher delivered a letter to CDI accusing
10 CDI of using Windcatcher's "trade secrets and other proprietary information" in developing
11 CDI's NeoAir Camper SV. The letter also accuses CDI of copying "Windcatcher's trade dress in
12 connection with an identical product [that] will create a likelihood of confusion as to source,
13 sponsorship and approval." The letter is attached as **Exhibit C**.

14 **COUNT I: DECLARATORY JUDGMENT OF NON-INFRINGEMENT OF U.S. PATENT NO. 8,978,693**

15 29. CDI incorporates by reference the allegations in the paragraphs above.

16 30. An actual and justiciable controversy exists between CDI and Windcatcher
17 regarding whether CDI infringes the '693 Patent.

18 31. CDI does not infringe, the '693 Patent, either directly, indirectly, literally,
19 pursuant to the doctrine of equivalents, or via other legally recognized theory of infringement.

20 32. This is an exceptional case under 35 U.S.C. § 285 because no reasonable person
21 could possibly believe that CDI infringes the '693 Patent via any legally recognized theory of
22 infringement, and any allegation to the contrary could not have been made in good faith.

1 **COUNT II: DECLARATORY JUDGMENT OF NON-INFRINGEMENT OF TRADE DRESS**

2 33. CDI incorporates by reference the allegations in the paragraphs above.

3 34. An actual and justiciable controversy exists between CDI and Windcatcher
4 regarding whether the Windcatcher product has protectable trade dress, and whether CDI
5 infringes any protectable trade dress should one be identified.

6 35. Upon information and belief, Windcatcher's product is designed to be functional
7 and all aspects were chosen for functional reasons. Accordingly, Windcatcher's product lacks
8 any protectable packing and/or product trade dress under 15 U.S.C. § 1052(e)(5).

9 36. The alleged packing and product design of Windcatcher's product has no
10 secondary meaning.

11 37. To the extent that Windcatcher does have any non-functional, protectable aspects
12 of its product or product packaging to obtain trade dress protection, there is no likelihood of
13 confusion between those non-functional, protectable aspects and any CDI product.

14 **COUNT III: DECLARATION THAT CDI'S ACTIONS DO NOT CONSTITUTE**
15 **THEFT OF TRADE SECRETS**

16 38. CDI incorporates by reference the allegations in the paragraphs above.

17 39. An actual and justiciable controversy exists between CDI and Windcatcher
18 regarding whether CDI's actions constitute theft of trade secrets from Windcatcher.

19 40. Windcatcher disclosed its product to the public and to CDI prior to entry of any
20 NDA between CDI and Windcatcher.

21 41. All information used by CDI in the design of its products, including the NeoAir
22 Camper SV, was created by CDI from publicly available non-confidential material and/or long-
23 standing trade secrets of CDI.
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1 42. Upon information and belief, the information Windcatcher believes is a trade
2 secret was not kept secret through any reasonable precautions by Windcatcher.

3 43. Upon information and belief, the information Windcatcher believes is a trade
4 secret was disclosed to the public by Windcatcher or was otherwise publicly available from other
5 sources.

6
7 **COUNT IV: WASHINGTON STATE UNFAIR COMPETITION (RCW 19.86)**

8 44. CDI incorporates by reference the allegations in the paragraphs above.

9 45. Windcatcher's misconduct constitutes an unfair and deceptive act or practice and
10 an unfair method of competition in the conduct of trade or commerce, having a public interest
11 impact, in violation of RCW 19.86.020, and has harmed CDI in its business and property.

12 46. Upon information and belief, Windcatcher knew, or should have known, that
13 CDI's products, including the NeoAir Camper SV, do not infringe any valid intellectual property
14 right(s) of Windcatcher.

15 47. Windcatcher made these false statements in material given to actual and
16 prospective customers and social media statements made to the public.

17 48. Upon information and belief, Windcatcher knew, or should have known, that such
18 statements would be deceptive and had the capacity to deceive a substantial portion of the public.

19 49. Windcatcher's deceptive statements have an impact on the public interest because
20 they have the potential to injure other persons by limiting free market competition for inflatable
21 mattress pads.

22 50. Windcatcher's deceptive statements caused damage to CDI including, but not
23 limited to, damage to Cascade's profits, reputation, contracts, business, business relationships, or
24 business expectancies.

25 51. CDI is entitled to recover damages, treble damages, and attorney fees pursuant to
26 RCW 19.86.090.

COUNT V: WASHINGTON STATE FALSE ADVERTISING

52. CDI incorporates by reference the allegations in the paragraphs above.

53. Windcatcher has used and continues to use in advertising and commerce false and misleading descriptions of fact, or false and misleading representation of fact, concerning CDI's products.

54. Windcatcher's deceptive statements were published, disseminated, or displayed to the public, including actual and prospective customers of CDI.

55. Windcatcher knew its statements were false, deceptive, or misleading.

56. Windcatcher's acts were for business, trade, or commercial purposes as they directed the public to buy from Windcatcher, or businesses which Windcatcher alleges it has a relationship with, or to prevent the public from buying CDI products.

57. Upon information and belief, Windcatcher's statements are for the purpose of influencing buyers to purchase Windcatcher's goods.

58. Windcatcher's deceptive statements caused damage to CDI including, but not limited to, damage to CDI's profits, reputation, contracts, business, business relationships, or business expectancies.

COUNT VI: LANHAM ACT UNFAIR COMPETITION

59. CDI incorporates by reference the allegations in the paragraphs above.

60. CDI and Windcatcher are competitors in the outdoor recreational product market.

61. Windcatcher's statements that CDI's products, including the NeoAir Camper SV, infringe Windcatcher's alleged intellectual property and that CDI's products are thefts of Windcatcher's products are false or misleading statements of fact.

1 62. Windcatcher's statements are likely to cause confusion or deceive the public
2 regarding the quality of CDI's products, whether CDI needs Windcatcher's permission to sell its
3 products, including the NeoAir Camper SV, and whether buying such products is legal.

4 63. Windcatcher's deceptive statements caused damage to CDI including, but not
5 limited to, damage to CDI's profits, reputation, contracts, business, business relationships, or
6 business expectancies.

7 **COUNT VII: LANHAM ACT FALSE ADVERTISING**

8 64. CDI incorporates by reference the allegations in the paragraphs above.

9 65. Windcatcher's statements that CDI's products, including the NeoAir Camper SV,
10 infringe Windcatcher's alleged intellectual property and that CDI's products are thefts of
11 Windcatcher's products are false or misleading.

12 66. The above statements are all materially false and misleading. CDI does not
13 infringe any valid claim of any Windcatcher patent. Windcatcher has a singular patent at issue,
14 not multiple patents. CDI's products, including the NeoAir Camper SV were designed without
15 the use of any alleged Windcatcher trade secrets. CDI does not infringe any valid trade dress
16 rights of Windcatcher. Additionally, Windcatcher's flyer references litigation that has not been
17 filed and inappropriately speculates, *inter alia*, as to the scope of an injunction that also has not
18 issued and further implies liability for any purchasers of CDI products.

19 67. Upon information and belief, Windcatcher knew the above statements were false.

20 68. These false and misleading statements have the tendency to deceive, or actually
21 deceived a substantial segment of the audience to whom Windcatcher disseminated the
22 statements, including customers or potential customers of CDI or CDI products.
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1 69. Windcatcher's statements were made in advertising or commercial promotion as
2 they were distributed both in social media to publishing companies and the general public, and
3 advertised in a flyer at the Outdoor Retailer show.

4 70. Windcatcher's acts violate the Lanham Act Section 43(a), 15 U.S.C. §1125(a).

5 71. Upon information and belief, Windcatcher's statements are for the purpose of
6 influencing the public, including retail stores and the buying public, to purchase Windcatcher's
7 goods.
8

9 72. Windcatcher's false advertising caused damage to CDI including, but not limited
10 to, damage to CDI's profits, reputation, contracts, business, business relationships, or business
11 expectancies.
12

13 **COUNT VIII: TRADE LIBEL**

14 73. CDI incorporates by reference the allegations in the paragraphs above.

15 74. Windcatcher made unprivileged false or misleading statements concerning its
16 intellectual property rights alleging that CDI's products are violations of Windcatcher's alleged
17 rights.

18 75. Windcatcher's statements were communicated to CDI's actual or potential
19 customers.
20

21 76. Windcatcher is at fault for such statements, and the statements were made at a
22 time when it knew or should have known that its claims were false.

23 77. Upon information and belief, Windcatcher intended to prevent sales of CDI
24 products by such false statements.

25 78. Windcatcher's statements caused damage to CDI including, but not limited to,
26 damage to CDI's profits, reputation, contracts, business, business relationships, or business

1 expectancies.

2 **COUNT IX: TORTIOUS INTERFERENCE WITH A BUSINESS EXPECTANCY**

3 79. CDI incorporates by reference the allegations in the paragraphs above.

4 80. CDI has valid business expectancies with retailers who agreed to purchase CDI's
5 products, including the NeoAir Camper SV.

6 81. Upon information and belief, Windcatcher had knowledge of these expectancies.

7 82. Upon information and belief, Windcatcher intentionally and knowingly contacted
8 actual and prospective customers of CDI through the flyer distributed at the Outdoor Retailer
9 convention, through social media postings, and through possible other direct contacts.

10 83. Windcatcher made these statements to the general public, including to actual and
11 prospective customers of CDI and to retailers who have not sold CDI products.

12 84. Windcatcher's statements caused damage to CDI including, but not limited to,
13 damage to CDI's profits, reputation, contracts, business, business relationships, or business
14 expectancies.

15 85. Windcatcher is continuing to make these statements and representations to CDI's
16 current, past and prospective customers, further endangering CDI's profits, reputation, contracts,
17 business, business relationships, or business expectancies.

18 **PRAYER FOR RELIEF**

19 WHEREFORE, Cascade Designs, Inc. respectfully requests this Court to:

20 A. Enter judgment that Windcatcher's actions constitute unfair competition and false
21 advertising under the Lanham Act;

22 B. Enter judgment that Windcatcher's actions constitute unfair competition and false
23 advertising under the Washington Consumer Protection Act and Washington common law;

1 C. Enter judgment that Windcatcher's actions constitute trade libel;

2 D. Enter judgment that Windcatcher's actions constitute tortious interference with a
3 business expectancy;

4 E. Enter judgment that CDI does not infringe any valid claim of the '693 Patent;

5 F. Enter judgment that CDI does not infringe any protectable trade dress of
6 Windcatcher;

7 G. Enter judgment that CDI has not committed any violation of the Washington
8 Uniform Trade Secrets Act, RCW 19.108;

9 H. Order that Windcatcher and its affiliates, officers, agents, servants, employees,
10 attorneys, and all other persons in active concert or participation with any of them, be
11 preliminarily and permanently enjoined and restrained from all acts of false or misleading
12 description of fact and false or misleading representation of fact, and all other acts of false
13 advertising, unfair competition, unfair and deceptive acts or practices, and tortious interference
14 with business expectancies and relations, including but not limited to stating and misrepresenting
15 to CDI's customers and other third parties that CDI infringes Windcatcher's IP rights;

16 I. Award CDI damages, in an amount to be determined at trial, together with interest
17 and costs as fixed by this Court;

18 J. Declare that Windcatcher's false advertising, unfair competition, and other
19 wrongful acts are determined to be deliberate, willful, and in conscious disregard of CDI's rights
20 pursuant to 15 U.S.C. § 1117(a), 15 U.S.C. § 1125(a) and at common law;

21 K. Declare that this case is exceptional pursuant to 35 U.S.C. § 285, 15 U.S.C. §
22 1117(a), and RCW §19.86.090, and an award of CDI's attorneys' fees and costs; and
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1 L. Grant CDI such other and further relief as this Court deems just and proper.

2 **JURY DEMAND**

3 Under Rule 38 of the Federal Rules of Civil Procedure, CDI requests a trial by jury of
4 any issues so triable by right.

5
6 DATED this 14th day of September, 2015.

7
8 *s/Douglas A. Grady*

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