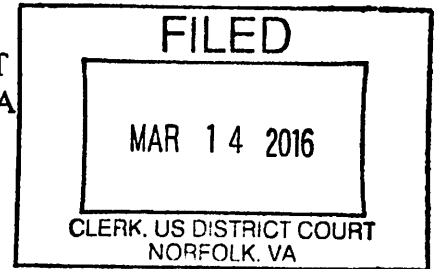


IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Norfolk Division)



STEPHEN F. EVANS

and

ROOF N BOX, INC.,

Plaintiffs,

v.

BUILDING MATERIALS
CORPORATION
OF AMERICA d/b/a
GAF-ELK CORPORATION,

Defendant.

Case No. 1:16 cv 282 GVL-IDD

COMPLAINT

Plaintiffs Stephen F. Evans and Roof N Box, Inc. (collectively, "Plaintiffs") for their Complaint against Defendant Building Materials Corporation of America d/b/a GAF-Elk Corporation (collectively, "Defendant"), state as follows.

NATURE OF ACTION

1. This is an action for patent infringement, trade dress infringement, and unfair competition, in which Plaintiffs seek injunctive relief and damages in excess of ONE MILLION DOLLARS (\$1,000,000.00).

PARTIES, JURISDICTION AND VENUE

2. Plaintiff Stephen F. Evans ("Evans") is an adult citizen of the Commonwealth of Virginia who resides in Virginia Beach, Virginia.

3. Plaintiff Roof N Box, Inc. (“Roof N Box”) is a corporation organized and existing under the laws of the Commonwealth of Virginia, with its principal place of business in Virginia Beach, Virginia. Evans is the founder and President of Roof N Box.

4. Defendant Building Materials Corporation of America d/b/a GAF-Elk Corporation (“GAF”) is a corporation organized and existing under the laws of the state of Delaware, with its principal place of business in New Jersey.

5. This Court has jurisdiction over this matter under 28 U.S.C. §1331 and 1338(a) because it involves claims for patent and trade dress infringement. This court also has jurisdiction over this matter pursuant to 28 U.S.C. §1332 because there is complete diversity between the parties and the amount at issue, exclusive of interest and costs, exceeds \$75,000.00.

6. This Court may exercise personal jurisdiction over the Defendant because, among other things, it regularly conducts business in Virginia and a substantial portion of the events giving rise to this dispute arose in Virginia Beach, Virginia.

7. This district is a proper venue for this action pursuant to 28 U.S.C. §1391.

FACTUAL BACKGROUND

8. Evans has been in the roofing business for several years. In or around 2006, he developed the “Roof N Box” product — a three-dimensional roofing model to use during presentations for selling roofing products and services to a homeowner.

9. The model serves as an education tool, sales tool, training tool, and a product highlight and differentiating tool.

10. The model allows a salesperson to remove the roofing portions and layers of roofing of the model in front of a homeowner and replace each roofing layer while explaining the

different roofing layers, their respective functions, their terminologies, and other product and service differentiations and placements.

11. On June 25, 2007, Evans filed a patent application for the model, which issued as design patent number D575,509 on August 26, 2008 to Evans as the sole owner (the '509 Patent). A true and correct copy of the '509 Patent is attached as Exhibit 1.

12. Plaintiffs invested substantial time, effort, and funds in designing and manufacturing the Roof N Box product.

13. In 2008, Plaintiffs began selling the Roof N Box product to other roofing professionals. Evans also used the Roof N Box product in his own sales presentations to homeowners.

14. The Roof N Box product was favorably received in the marketplace.

15. In 2008, a representative of GAF contacted Evans in Virginia Beach and recommended that Evans contact GAF headquarters to enter GAF's Certified Contractors Program to sell the Roof N Box product directly to resellers of GAF roofing products (the GAF Contractors). The GAF representative indicated that GAF was interested in entering into a partnership with Evans to market the Roof N Box product.

16. In October 2008, Evans sent an email from Virginia Beach to a GAF representative to pursue a partnership with GAF related to the Roof N Box product. The GAF representative responded and set up a meeting with Evans.

17. Thereafter, Evans met with GAF representatives in New Jersey to discuss selling the Roof N Box product to GAF Contractors.

18. Following the New Jersey meeting, Evans commenced discussions with GAF representatives in GAF's Dallas, Texas office.

19. In September 2009, GAF and Roof N Box entered into a Promotional Agreement whereby Roof N Box agreed to sell the Roof N Box product to GAF Contractors at discounted prices, and GAF agreed to promote the Roof N Box® product to the GAF Contractors.

20. After entering into the Promotional Agreement, Roof N Box began to sell the Roof N Box product to GAF Contractors at the discounted prices, and Evans even attended the GAF 2010 National Sales Meeting to present the Roof N Box product to other resellers and customers of GAF roofing products. A true and correct copy of a sample of Plaintiffs' promotional materials advertising the Roof N Box product to GAF Contractors is attached as Exhibit 2.

21. Thereafter, Evans met with GAF representatives in Texas. At this meeting, and at other times during the parties' relationship, Evans provided GAF with Roof N Box and Evans confidential information, including information concerning the design, manufacture, and marketing of the Roof N Box product and strategies for using the Roof N Box product in sales presentations for roofing services and products. Evans and GAF agreed that such Roof N Box and Evans confidential information would be kept confidential by GAF.

22. Sometime after the Texas meeting, GAF orally advised Roof N Box that it was terminating the Promotional Agreement with Roof N Box.

23. Thereafter, GAF commenced manufacturing and selling, and upon information and belief, continues to manufacture and sell, a competing roofing model.

24. Defendant has advertised its competing roofing model for sale in a GAF catalog and on its website. A true and correct copy of the page from the catalog is attached as Exhibit 3, and true and correct copy of the web page is attached as Exhibit 4.

25. Defendant's catalog and advertisements for its competing roofing model are substantially similar to Plaintiffs' promotional literature for the Roof N Box product. *Compare* Exhibit 2 to Exhibits 3 and 4.

26. Defendant's competing roofing model has the same "look and feel" of the Roof N Box product, performs the same function, and copies the design of the Roof N Box product. True and correct photographs of the GAF competing roofing model are attached as Exhibit 5. True and correct photographs of the Roof N Box product are attached as Exhibit 6.

27. Defendant advertises, manufactures, and sells its competing roofing model to its GAF Contractors. Defendant encourages its GAF Contractors to use the roofing model to "close more GAF Lifetime Roofing System sales by demonstrating the roofing process and its key components." *See* Exhibit 3; *see also* Exhibit 4.

28. Defendant has made (directly or indirectly), sold, and upon information and belief, continues to sell, its competing roofing model in interstate commerce, and has advertised it for sale, offered it for sale, and/or sold it to persons in Virginia.

29. Defendant's roofing model infringes the '509 Patent.

COUNT I – PATENT INFRINGEMENT (DIRECT)

30. Plaintiffs incorporate by reference Paragraphs 1-29, above as if fully set forth herein.

31. 35 U.S.C §271(a) provides that any person, without authority, who makes, uses, offers to sell, sells, or imports into the United States, any patented invention during the term of the patent infringes the patent.

32. Defendant has infringed the '509 Patent by making, using, offering to sell, selling, and/or importing into the United States its competing roofing model, without Evans' authorization or license.

33. Defendant will continue to manufacture, offer to sell, sell, and/or import its infringing roofing model unless enjoined by this Court.

34. Due to Defendant's infringement, Evans is suffering, and will continue to suffer, irreparable injury.

35. Evans has suffered damages as a result of Defendant's infringement and/or Defendant has been unjustly enriched by such infringement.

36. Evans is entitled to damages as a result of Defendant's infringement, including but not limited to, disgorgement of all Defendant's profits, in an amount to be proven at trial, as well as injunctive relief.

37. At all relevant times, Defendant knew that the Roof N Box product was the subject of a design patent.

38. Defendant willfully, knowingly, and intentionally infringed the '509 Patent.

39. Evans is entitled to treble damages for Defendant's willful infringement.

40. Defendant's conduct, as alleged herein, renders this an "exceptional case" and Evans is entitled to recover his attorney's fees and costs.

COUNT II – PATENT INFRINGEMENT (INDUCED)

41. Plaintiffs incorporate by referenced Paragraphs 1 through 40, above as if fully set forth herein.

42. Pursuant to 35 U.S.C. 271(b) "whoever actively induces infringement of a patent shall be liable as an infringer."

43. Defendant has induced third parties, including its GAF Contractors, to infringe the '509 Patent, by intentionally encouraging them to use the infringing roofing model in sales presentations in order to "close more sales."

44. Defendant will continue to induce third parties to infringe unless enjoined by this Court.

45. Due to Defendant's induced infringement, Evans is suffering, and will continue to suffer, irreparable injury.

46. Evans has suffered damages as a result of Defendant's induced infringement and/or Defendant has been unjustly enriched by such infringement.

47. Evans is entitled to damages as a result of Defendant's induced infringement, including but not limited to, a disgorgement of all Defendant's profits, in an amount to be proven at trial, as well as injunctive relief.

48. At all relevant times, Defendant knew that the Roof N Box product was the subject of a design patent.

49. Defendant willfully, knowingly, and intentionally induced infringement of the '509 Patent.

50. Evans is entitled to treble damages for Defendant's willful infringement.

51. Defendant's conduct, as alleged herein, renders this an "exceptional case" and Evans is entitled to recover his attorney's fees and costs.

**COUNT III – FEDERAL UNFAIR COMPETITION AND TRADE DRESS
INFRINGEMENT**

52. Plaintiffs incorporate by referenced Paragraphs 1-51, above as if fully set forth herein.

53. Plaintiffs have acquired exclusive and protectable trade dress rights in the packaging and/or design of the Roof N Box product.

54. The non-functional trade dress of the Roof N Box product includes its packaging and/or design which includes a single-story house, with removable roofing portions and layers of roofing, siding, exterior shutters, outside lights, garage, window over garage, door lights, and neutral colors, as depicted in Exhibit 6.

55. Plaintiffs' trade dress is inherently distinctive and/or has acquired secondary meaning such that customers associate the trade dress with Plaintiffs and Plaintiffs' Roof N Box product.

56. Defendant's use in commerce of Plaintiffs' trade dress constitutes a false designation of origin and/or a false and misleading representation of fact that is likely to cause confusion, deception, and mistake.

57. Defendant's use in commerce of Plaintiffs' trade dress wrongly suggests that Defendant's roofing model is affiliated, connected, or associated with Plaintiffs; that Defendant's roofing model is manufactured or distributed by Plaintiffs; or that Plaintiffs have sponsored, endorsed or approved the Defendant's roofing model.

58. Defendant has infringed Plaintiffs' trade dress in violation of 11 U.S.C §1125(a), and will continue to engage in such infringement unless enjoined by this Court.

59. Due to Defendant's trade dress infringement, Plaintiffs are suffering, and will continue to suffer, irreparable injury.

60. Plaintiffs have suffered damages as a result of Defendant's trade dress infringement and/or Defendant has been unjustly enriched by such infringement.

61. Plaintiffs are entitled to damages as a result of Defendant's trade dress infringement, including but not limited to, a reasonable royalty, lost profits and/or disgorgement of all Defendant's profits, in an amount to be proven at trial, as well as injunctive relief.

62. Defendant's trade dress infringement was willful and intentional, and Plaintiffs are entitled to recover treble damages and attorney's fees and costs.

**COUNT IV – COMMON LAW UNFAIR COMPETITION AND TRADE DRESS
INFRINGEMENT**

63. Plaintiffs incorporate by referenced Paragraphs 1-62, above as if fully set forth here

64. Plaintiffs have acquired common law trade dress rights in the packaging and/or design of the Roof N Box product.

65. Defendant's acts described herein are likely to confuse and deceive the public as to the source and origin of Defendant's roofing model.

66. Defendant has violated Plaintiffs' common law trade dress rights and otherwise engaged in unfair competition with Plaintiffs under the laws of the Commonwealth of Virginia and other applicable state law, such as Texas and New Jersey, including by using Plaintiffs' confidential information and the fruits of Plaintiffs' time, labor and expense, to compete with Plaintiffs.

67. Defendant will continue to violate Plaintiffs' common law trade dress rights and/or engage in unfair competition unless enjoined by this Court.

68. Due to Defendant's common law trade dress infringement and/or unfair competition, Plaintiffs are suffering, and will continue to suffer, irreparable injury.

69. Plaintiffs have suffered damages as a result of Defendant's violation of Plaintiffs' common law trade dress rights and Defendant's unfair competition and/or Defendant has been unjustly enriched by such wrongful conduct.

70. Plaintiffs are entitled to damages as a result of Defendant's common law trade dress infringement and/or unfair competition, including but not limited to a reasonable royalty, lost profits and/or disgorgement of Defendant's profits, in an amount to be proven at trial, as well as injunctive relief.

71. Defendant's actions were intentional, willful, and undertaken with malice and in reckless disregard for Plaintiffs' rights, and therefore, Plaintiffs are entitled to recover punitive damages.

COUNT V – STATUTORY UNFAIR COMPETITION

72. Plaintiffs incorporated by reference Paragraphs 1-71 above, as if fully set forth herein.

73. Defendant's principal place of business is in New Jersey, and it is subject to the laws of New Jersey, including N.J. Code §56:8-2.

74. N.J. Code §56:8-2 provides that "The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression or omission of any material fact with the intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate . . . whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice."

75. Defendant's conduct, as alleged herein, violates N.J. Code §56:8-2.

76. Defendant, by its conduct, as alleged herein, will continue to violate N.J. Code §56:8-2 unless enjoined by this Court.

77. Due to Defendant's violation of N.J. Code §56:8-2, Plaintiffs are suffering, and will continue to suffer, irreparable injury.

78. Plaintiffs have been damaged by Defendant's violation of N.J. Code §56:8-2.

79. Plaintiffs are entitled to recover damages in an amount to be proven at trial, including treble damages, attorney's fees, and costs of suit, in addition to other legal or equitable relief, including injunctive relief, as a result of Defendant's violation of N.J. Code §56:8-2.

WHEREFORE, Plaintiffs Stephen F. Evans and Roof N. Box, Inc. request that the Court enter judgment in their favor and award them the following relief against the Defendant Building Materials Corporation of America d/b/a GAF-Elk Corporation:

- a. On Counts I-II, damages, including a reasonable royalty, lost profits, and/or disgorgement of all Defendant's profits, in an amount to be proven at trial, treble damages, attorney's fees and costs, and pre- and post-judgment interest as well as injunctive relief.
- b. On Count III, damages, including a reasonable royalty, lost profits and/or disgorgement of all Defendant's profits, in an amount to be proven at trial, treble damages, attorney's fees and costs, and pre- and post-judgment interest as well as injunctive relief.
- c. On Count IV, damages, including a reasonable royalty, lost profits and/or disgorgement of all Defendant's profits, in an amount to be proven at trial, punitive damages, and pre- and post-judgment interest as well as injunctive relief.

- d. On Count V, damages in an amount to be proven at trial, including treble damages, attorney's fees, and costs of suit, in addition to other legal or equitable relief, plus pre- and post-judgment interest as well as injunctive relief.
- e. Such other and further relief as the Court deems just and proper.

TRIAL BY JURY IS DEMANDED

Respectfully submitted,

STEPHEN F. EVANS and
ROOF N BOX, INC.

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