

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION**

CHRISMAN MILL FARMS, LLC

Plaintiff,

v.

**BRIAN R. BLAZER
D/B/A CARPENTER BEE SOLUTIONS**

Defendant.

Case No. 5:17-cv-0011-DCR

Filed via ECF

FIRST AMENDED COMPLAINT

Plaintiff Chrisman Mill Farms, LLC (hereafter sometimes referred to as “Plaintiff” or “Chrisman Mill Farms”), through counsel, brings this action against Defendant, the Brian R. Blazer (hereafter sometimes referred to as “Blazer” or “Carpenter Bee Solutions” or “Defendant”) and alleges as follows:

NATURE OF THE ACTION

1. This complaint seeks a declaration of non-infringement and invalidity of United States Patent No. 8,375,624 (“the ‘624 patent”) attached as Exhibit A.
2. This complaint seeks relief under the Antitrust laws of the United States, for tortious interference with Chrisman Mill Farms legitimate business interests, and for breach of the implied warranty of fitness for a particular purpose.
3. There is an actual justiciable case or controversy pursuant to 28 U.S.C. § 2201 regarding the validity and infringement of the ‘624 patent. A judicial determination that the claims of the ‘624 patent are invalid and that the Plaintiff has not infringed any valid claim of the

‘624 patent is necessary and appropriate at this time so that the Plaintiff may ascertain its rights and duties with respect to the ‘624 patent.

4. This Declaratory Judgment action arises out of Blazer’s threat of legal action against Chrisman Mill Farms, LLC for the alleged infringement of Blazer’s patent rights for a Carpenter Bee Trap and for threatened interference with any attempt to market the product.

PARTIES

5. Plaintiff, Chrisman Mill Farms, is a limited liability company organized under the laws of the Commonwealth of Kentucky and operating from its principle place of business at 2700 Chrisman Mill Road, Nicholasville, KY 40356.

6. Chrisman Mill Farms is a manufacturer of carpenter bee traps and was a licensee under the ‘624 patent until December 31, 2016.

7. Chrisman Mill Farms is owned and operated by Anthony Robinson, a resident of Nicholasville, KY.

8. Defendant, Brian R. Blazer, is the assignee of the ‘624 patent and does business as Carpenter Bee Solutions at 230 County Road 880, Heflin, AL 36264.

JURISDICTION AND VENUE

9. This Complaint arises under the Patent Laws of the United States of American, 35 U.S.C. § 1 *et seq.*, the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and the Antitrust Laws of the United States, 15 U.S.C. § 1 *et seq.*

10. This Court has subject matter jurisdiction over this Complaint under 28 U.S.C. §§ 1331, 1337, and 1338(a).

11. This Court has personal jurisdiction over Blazer because Blazer (a) maintains regular and systematic business contacts with the Commonwealth of Kentucky and within this judicial district

and division; (b) Blazer purposely, regularly, and continuously conducts business in the Commonwealth of Kentucky and within this judicial district and division, (c) Blazer purposefully directs its activities at residents of the Commonwealth of Kentucky; (d) the causes of action set forth herein arises out of or relates to Blazer's activities within the Commonwealth of Kentucky; and (e) the exercise of jurisdiction over Blazer will not offend traditional notions of fair play and substantial justice.

12. Venue is proper in this judicial district pursuant to 28 U.S.C. §1391(b)(2) as a substantial part of the events occurred in this judicial district, the Defendant sells products in this judicial district, and the Defendant's allegations of patent infringement, threats of litigation, and threats of tortious interference with existing and prospective business relationships were communicated to the Plaintiff in this jurisdiction.

13. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1400(b) because the alleged acts of infringement took place in this jurisdiction and Chrisman Mill Farms has a regular and established place of business within this jurisdiction.

14. Venue is proper in this judicial district pursuant to 15 U.S.C. § 22 because Blazer transacts business in this jurisdiction.

15. This Court is authorized to grant a declaratory judgment under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, as implemented through Federal Rule of Civil Procedure 57.

16. This Court is authorized to grant Chrisman Mill Farms prayer for relief regarding costs, including a reasonable attorney's fee, pursuant to 35 U.S.C. § 285.

RELEVANT FACTS

17. On or about February 19, 2013, the United States Patent and Trademark Office ("USPTO") issued United States Patent No. 8,375,624, entitled "Carpenter Bee Traps."

18. Blazer is an inventor of record for the '624 patent.
19. Blazer does business as Carpenter Bee Solutions in Heflin, Alabama.
20. Upon information and belief, Blazer has licensed the '624 patent to Best Bee Brothers, LLC.
21. Upon information and belief, Blazer is a member of Best Bee Brothers, LLC.
22. Blazer benefits financially from the elimination of competition to Best Bee Brothers, LLC in the carpenter bee trap market.
23. Best Bee Brothers benefits financially from the elimination of competition to Best Bee Brothers, LLC.
24. Carpenter Bee Solutions is the assignee of record at the United States Patent and Trademark Office for the '624 patent. See Exhibit B.
25. Claim 1 of the '624 patent is the only independent claim in the patent.
26. Claims 2 through 12 of the '624 patent depend from claim 1 and inherit all of the limitations of claim 1.
27. Each and every claim of the '624 patent requires, *inter alia*, that the claimed carpenter bee trap include "a means to shelter an entrance to [the] hole...to reduce the admittance of ambient light."
28. During the prosecution of the '624 patent, Blazer added the requirement that the entrance to the hole be sheltered so as to reduce the admittance of ambient light into the trap to overcome the patent examiner's rejection of the claims as unpatentable.
29. That the Plaintiff's WOOD BEE GONE carpenter bee trap does not possess a means to shelter the entrance to the hole that reduces the admittance of ambient light.

30. That the Plaintiff's WOOD BEE GONE II carpenter bee trap does not possess a means to shelter the entrance to the hole that reduces the admittance of ambient light.

31. The Plaintiff marketed its WOOD BEE GONE carpenter bee trap until December 31, 2016.

32. The Plaintiff manufactured and sold the WOOD BEE GONE carpenter bee trap (see Exhibit C) under a license from Blazer which expired on December 31, 2016.

33. That Plaintiff purchased carpenter bee traps ("trap units") from Blazer at a cost of \$10.00 per unit, of which \$3.00 was a prepaid royalty.

34. That 692 trap units purchased from Blazer were not usable and required significant rework to be merchantable.

35. That Blazer was notified as to the defective trap units.

36. That after being placed on notice as to the defective trap units, Blazer has refused to honor any warranty as to defective trap units.

37. That the trap units Plaintiff purchased from Blazer are stored and available for inspection in Lexington, Kentucky.

38. The Plaintiff developed a new carpenter bee trap, the WOOD BEE GONE II, and on January 3, 2017 shared drawings of the product with the Defendant along with a construction of claim 1 which demonstrated that the WOOD BEE GONE II carpenter bee trap does not infringe the '624 patent because there is no means to shelter the entrance to the hole and asking Blazer to identify how the WOOD BEE GONE II trap infringes the '624 patent if he held that belief. See Exhibit D.

39. On or about January 5, 2017, the Defendant alleged, via text message to Anthony Robinson, that the Plaintiff's WOOD BEE GONE and WOOD BEE GONE II carpenter bee trap

models infringe the '624 patent and has threatened to file a patent infringement lawsuit. See Exhibit E.

40. At no time has Blazer provided any explanation to the Plaintiff as to why he believes that the WOOD BEE GONE II trap infringes the '624 patent.

41. The Plaintiff has a good faith belief that Blazer will in fact file suit against Chrisman Mill Farms because Blazer previously litigated a patent infringement suit regarding the '624 patent against Amazon.com, Inc. ("Amazon") in the Northern District of Alabama ("the Amazon case"), docketed as case 1:15-cv-1063-SGC, and is currently litigating a patent infringement suit he filed against eBay in the Northern District of Alabama ("the eBay case"), docketed as case 1:15-cv-01059-KOB, in which he alleges that eBay has infringed the '624 patent.

42. On or about January 24, 2017, Blazer communicated his intent to Plaintiff's counsel's office to hire counsel to dismiss this civil action so that he could subsequently file a patent infringement suit in the Northern District of Alabama.

43. In the eBay case, Blazer initially contended that a wide variety of carpenter bee traps, including those that lacked roofs overhanging the entrance to the trap's tunnel, infringed the '624 patent.

44. Upon information and belief, Blazer's infringement contentions served on eBay removed all allegations of patent infringement regarding carpenter bee traps that lacked the aforementioned overhanging roof.

45. Blazer contacted Amazon. on or about February 7, 2017 and alleged that the WOOD BEE GONE II carpenter bee trap being sold on Amazon's website, having Amazon product identification ASIN B01N4SLB81, infringed the '624 patent, and demanded that Amazon remove the product from the Amazon's website.

46. On or about February 7, 2017, Blazer provided a claims construction chart to Amazon, attached as Exhibit F, in which he alleged that the WOOD BEE GONE II carpenter bee trap infringed the '624 patent because the roof overhangs the front of the trap to shelter the entrance to the trap's hole and included the photograph below.



47. The photograph that Blazer provided to Amazon shows that the roof does not extend past the face of the trap having the entrance to the trap's tunnel and does not shelter the entrance to the hole from ambient light as required in all claims of the '624 patent.

48. That on or about February 7, 2017, Amazon complied with Blazer's demand and removed the listing for the WOOD BEE GONE II carpenter bee trap.

49. That on or about February 9, 2017, Blazer contacted Etsy, Inc. ("Etsy") to allege that the WOOD BEE GONE II carpenter bee trap infringes the '624 patent and demanded that it be removed from sale on the Etsy website.

50. That on or about February 9, 2017, Etsy complied with Blazer's demand and removed

the WOOD BEE GONE II trap from its website.

51. That the Plaintiff has lost sales and continues to lose sales due to the delisting of its products from Amazon.com and Etsy.com.

CAUSES OF ACTION

COUNT 1

Declaratory Judgment that the WOOD BEE GONE Carpenter Bee Trap Does Not Infringe any Valid Claim of the '624 Patent

52. The Plaintiff hereby restates and realleges each of the foregoing paragraphs as if fully set forth herein.

53. The Defendant is the assignee and owner of the '624 patent.

54. The Defendant has communicated to the Plaintiff that Chrisman Mill Farms' WOOD BEE GONE carpenter bee trap infringes the '624 patent and has indicated that he intends to file suit seeking treble damages for willful infringement.

55. The manufacture, use, offer to sell, sale, and importation of the WOOD BEE GONE carpenter bee trap does not infringe any valid and enforceable claim of the '624 patent within the United States of America, either directly, indirectly, jointly, or otherwise, and the Plaintiff has not induced others to infringe.

56. The WOOD BEE GONE model of carpenter bee trap has not been made, sold, offered for sale, or imported since the expiration of the patent license under which the Plaintiff operated.

57. The WOOD BEE GONE model of carpenter bee trap does not infringe the claims of the '624 patent because it does not possess a means to shelter the entrance to the tunnel hole from ambient light.

58. A judicial declaration is necessary to resolve this controversy.

59. The Plaintiff requests a declaratory judgment that it does not and has not infringed nor induced others to infringe any valid and enforceable claim of the '624 patent.

COUNT 2

**Declaratory Judgment that the WOOD BEE GONE II Carpenter Bee Trap
Does Not Infringe any Valid Claim of the '624 Patent**

60. The Plaintiff hereby restates and realleges each of the foregoing paragraphs as if fully set forth herein.

61. The Defendant is the assignee and owner of the '624 patent.

62. The Defendant has communicated to the Plaintiff that Chrisman Mill Farms' WOOD BEE GONE II carpenter bee trap infringes the '624 patent and has indicated that he intends to file suit seeking treble damages for willful infringement.

63. The manufacture, use, offer to sell, sale, and importation of the WOOD BEE GONE II carpenter bee trap does not infringe any valid and enforceable claim of the '624 patent within the United States of America, either directly, indirectly, jointly, or otherwise, and the Plaintiff has not induced others to infringe.

64. The WOOD BEE GONE II model of carpenter bee trap does not infringe the claims of the '624 patent because it does not possess a means to shelter the entrance to the tunnel hole from ambient light.

65. A judicial declaration is necessary to resolve this controversy.

66. The Plaintiff requests a declaratory judgment that it does not and has not infringed nor induced others to infringe any valid and enforceable claim of the '624 patent.

COUNT 3

Declaratory Judgment of Invalidity

67. The Plaintiff hereby restates and realleges each of the foregoing paragraphs as if fully set

forth herein.

68. The Defendant purports to be assignee and owner of the '624 patent.

69. The Defendant has communicated to the Plaintiff that the Chrisman Mill Farms WOOD BEE GONE and WOOD BEE GONE II carpenter bee traps infringe the '624 patent and has indicated that he intends to file suit.

70. The claims of the '624 patent are and have always been invalid and void on the grounds that the purported invention, attempted to be patented by Blazer, fails to meet the conditions of patentability specified in Title 35 U.S.C. §§ 101, 102, 103, and/or 112 of the code.

71. A judicial declaration is necessary to resolve this controversy.

72. The Plaintiff is entitled to a declaratory judgment that each of the claims of the '624 patent are invalid.

COUNT 4

Monopolization and/or Attempted Monopolization in Violation of 15 U.S.C. § 2

73. The Plaintiff hereby restates and realleges each of the foregoing paragraphs as if fully set forth herein.

74. The facts described in preceding paragraphs, including Plaintiff's notice to Blazer that the WOOD BEE GONE and WOOD BEE GONE II traps have no means to shelter the hole from ambient light as required by all claims of the '624 patent, Blazer's use of the '624 patent to stop on-line sales of the Plaintiff's non-infringing WOOD BEE GONE II carpenter bee trap, and Blazer's claim construction chart he provided to Amazon which clearly demonstrates that he knows that the WOOD BEE GONE II carpenter bee trap does not infringe by disingenuously claiming that the WOOD BEE GONE II trap has a plenum which overhangs the face of the trap to shelter the entrance to hole while including a photograph of the WOOD BEE GONE II that

clearly demonstrates that the plenum does not shelter the entrance to the hole, renders Blazer's claims to Amazon and Etsy that the WOOD BEE GONE II trap infringes the '624 patent both objectively and subjectively baseless, as no reasonable person would believe that the WOOD BEE GONE II carpenter bee trap infringes the '624 patent and that Blazer demanded and accomplished the removal of these products in bad faith as a naked restraint on competition with no procompetitive justification.

75. That the aforementioned actions of Blazer constitute patent misuse.

76. The removal of Chrisman Mill Farms from Amazon and Etsy resulted in the elimination of Blazer's primary competition on those websites.

77. Plaintiff has a good faith belief that Blazer has attempted or will attempt to prevent the sales of the WOOD BEE GONE II carpenter bee trap through Chrisman Mill Farms remaining retailers.

78. For antitrust purposes, the relevant product market is the market for carpenter bee traps, and the relevant geographic market is the United States.

79. On information and belief, Blazer engaged in the aforementioned anticompetitive acts against Chrisman Mill Farms with the specific intent to obtain and maintain a dominant market position and monopoly power in the relevant market by having non-infringing competitive products removed from large on-line retailers.

80. On information and belief, Blazer engaged in the predatory and anticompetitive acts described herein in furtherance of his intent to restrict entry into the relevant market and improperly use their patent to create a monopoly by eliminating competing non-infringing products.

81. The unlawful activities alleged above constitute monopolization or attempted

monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

82. As a result of Blazer's anticompetitive conduct, baseless allegations of infringement to on-line retailers, and improper use of the '624 patent to prevent the sale of products which Blazer cannot reasonably believe would infringe any valid claim of the '624 patent, Blazer has eliminated almost all sales of Chrisman Mill Farms WOOD BEE GONE II carpenter bee trap product. Thus, by reason of Blazer's unlawful actions, Chrisman Mill Farms has been, and will continue to be, injured in its business and its property.

83. The injury Chrisman Mill Farms has suffered as a result of Blazer's monopolization or attempt to monopolize constitutes antitrust injury, for which Chrisman Mill Farms is entitled to recover treble damages including costs and attorney fees in connection with this litigation.

COUNT 5

Tortious Interference with Existing and Prospective Business

84. The Plaintiff hereby restates and realleges each of the foregoing paragraphs as if fully set forth herein.

85. A valid business relationship exists between Amazon and Chrisman Mill Farms which allows the Plaintiff to sell the WOOD BEE GONE II carpenter bee trap on Amazon's website.

86. A valid business relationship exists between Etsy and Chrisman Mill Farms which allows the Plaintiff to sell the WOOD BEE GONE II carpenter bee trap on Etsy's website.

87. Chrisman Mill Farms had the expectancy of valid business relationships with consumers who would purchase Plaintiff's WOOD BEE GONE II carpenter bee trap through Amazon and/or Etsy.

88. Chrisman Mill Farms had the expectancy of sales directly to Amazon.

89. Blazer knew of the aforementioned business relationships and expectations of business

relationships through his business dealings with the Plaintiff.

90. Blazer intentionally interfered with the aforementioned business relationships and expectations of business relationships by causing the removal of the WOOD BEE GONE II carpenter bee trap from Amazon's and Etsy's websites by falsely alleging that it infringed the '624 patent.

91. Blazer's motives were improper in that he intended to prevent the sales of the WOOD BEE GONE II carpenter bee trap in order gain a competitive advantage for Best Bee Brothers over Chrisman Mill Farms in the carpenter bee trap product market and to cause harm to Chrisman Mill Farms for seeking a declaratory judgment of non-infringement and invalidity of the '624 patent.

92. That were it not for Blazer's interference with the Plaintiff's valid business relationships with Amazon and Etsy and further interference with expected business relationships, the WOOD BEE GONE II carpenter bee trap would still be available for purchase on Amazon's and Etsy's websites.

93. That Chrisman Mill Farms has lost sales revenue and good will due to the removal of the WOOD BEE GONE II carpenter bee trap from Amazon's and Etsy's websites and from having to pay attorney fees and costs associated with this civil action.

COUNT 6
Breach of the Implied Warranty of Fitness for a Particular Purpose
(KRS 355.2-315)

94. The Plaintiff hereby restates and realleges each of the foregoing paragraphs as if fully set forth herein.

95. The Blazer is a manufacturer and seller of carpenter bee traps.

96. That in 2016, Plaintiff purchased carpenter bee trap units from Blazer at a cost of \$10.00

per unit, of which \$3.00 was a prepaid royalty.

97. That Blazer had reason to know of the particular purpose for which the goods were required.

98. That Plaintiff relied upon the seller's skill or judgment to furnish suitable goods.

99. That 930 of the carpenter bee trap units from Blazer in 2016 were unusable in that they were constructed in poor quality and required significant rework to be merchantable.

100. That there is an implied warranty of fitness for the particular purpose for which they were intended.

101. That Plaintiff provided notice to Blazer that the trap units were defective.

102. That Blazer has breached this warranty by refusing accept returns of the defective product.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests a trial by jury and prays that the Court enter a judgment as follows:

1. A declaration by this Court that the use, sale, offer for sale or importation of the WOOD BEE GONE carpenter bee trap does not constitute infringement of any valid claim of the '624 patent either literally, under the doctrine of equivalents, by inducement, or otherwise;

2. A declaration by this Court that the use, sale, offer for sale or importation of the WOOD BEE GONE II carpenter bee trap does not constitute infringement of any valid claim of the '624 patent either literally, under the doctrine of equivalents, by inducement, or otherwise;

3. A declaration that Plaintiff has not willfully infringed any valid claim of the '624 patent;

4. A declaration by this Court that the claims of the '624 patent are invalid;
5. A declaration by this Court that the claims of the '624 patent are unenforceable;
6. Permanently enjoining Defendant Blazer and all those acting under the authority of or in privity with him from asserting or otherwise seeking to enforce the '624 patent against Chrisman Mill Farms;
7. A finding by this Court that this case is exceptional under 35 U.S.C. § 285 and that an award to Chrisman Mill Farms, LLC for their costs of suit, including reasonable attorney's fees, costs, and expenses as provided by law is appropriate;
8. Adjudging and declaring that Defendant Blazer has violated Section 2 of the Sherman Act (15 U.S.C. §§ 2), awarding damages to Chrisman Mill Farms and that such damages be trebled;
9. Adjudging and declaring that Defendant Blazer has tortiously interfered with Chrisman Mill Farms valid business relationships and prospective business relationships, awarding appropriate special and punitive damages to Chrisman Mill Farms;
10. Adjudging and declaring that Defendant Blazer has breached the implied warranty of fitness for a particular purpose, awarding appropriate damages to Chrisman Mill Farms; and
11. Granting such other and further relief as the Court deems just and proper.

Respectfully submitted,

s/ James M. Francis

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