

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION
Civil Action No. 1:18-cv-002-WO-LPA**

US EXTRUDED PRODUCTS LLC,

Plaintiff,

v.

**EVAPCO, INC., EVAPTECH, INC., and
TOWER COMPONENTS, INC.,**

Defendants.

**EVAPCO, INC., EVAPTECH, INC. and
TOWER COMPONENTS, INC.**

Counter-Plaintiffs,

v.

**US EXTRUDED PRODUCTS LLC, a
North Carolina Company,**

Counter-Defendant.

**EVAPCO, INC., EVAPTECH, INC. and
TOWER COMPONENTS, INC.,**

Third-Party Plaintiffs,

v.

**US EXTRUSION PRODUCT LLC, a Texas
Company,**

Third-Party Defendant.

AMENDED COMPLAINT

Plaintiff US Extruded Products LLC (“Plaintiff”) submits this amended complaint prior to expiration of the Court’s March 25, 2019 deadline for amending the pleadings without leave of court. [D. 45; D. 44 ¶ 5; D. 44-1.] Herein, Plaintiff complains of the conduct of Defendants EvapCo, Inc., EvapTech, Inc. and Tower Components, Inc. (collectively “Defendants”) by alleging as follows:

PRELIMINARY STATEMENT

1. This case involves an abuse of process using customer lists and a patent for wrongful purposes. It also involves, *inter alia*, letters—authored by Defendants—making false representations to deliberately disparage Plaintiff’s position in the marketplace.

2. More specifically, Defendants’ intentional and anticompetitive effort to convince Plaintiff’s customers to do business with Defendants instead of Plaintiff through threats of patent infringement constitutes an abuse of process—particularly when Plaintiff’s customer lists were obtained through wrongful means. Tied to this is Defendants’ awareness that they are using their patent as a land grab—stretching the claims of that instrument so far that it makes its validity position untenable. Plaintiff will seek attorneys’ fee for this ill-conceived claim.

3. But what’s more, the letters sent to Plaintiff’s customers are demonstrably deceptive—necessarily implying that a judgment of \$3 million has been issued against Plaintiff (when it was *not*). Because these letters constitute false advertising under the Lanham Act, this intentional effort to deceive customers mandates judicial intervention. The amended claim seeks just this—requesting the Court to stop these falsities and restore the market to one of fair competition, not one predicated on clever, calculating

and deceptive conduct depicted in the Defendants letters to Plaintiff's customers and potential customers.

4. This amended claim is also brought to repair Plaintiff's goodwill through retraction of the letters, coupled with corrective advertising that will require an explanation to each customer—via letter—that Defendant engaged in intentional, deceptive conduct. Permanent injunctive relief is called for in this regard to right the wrongs wrought by Defendants in their misleading letter campaign. Plaintiff further seeks monetary relief for an accounting of ill-gotten gains that have resulted from Defendants' false letter campaign, along with willful (treble) damages and recovery of Plaintiff's costs and reasonable attorneys' fees incurred.

PARTIES

5. US Extruded Products LLC is a limited liability company with its principle place of business in North Carolina.

6. EvapCo, Inc. is a corporation with its principle place of business in Maryland.

7. EvapTech, Inc. is a corporation with its principle place of business in Kansas.

8. Tower Components, Inc. is a corporation with its principle place of business in Ramseur, North Carolina.

JURISDICTION AND VENUE

9. This suit is brought under the laws of the United States, to include the Patent Act. This Court has subject matter jurisdiction over these claims.

10. Defendants directed their accusations of patent infringement against Plaintiff to Plaintiff in North Carolina and this judicial district. Defendants have offices, locations and/or employees in this judicial district. Defendants conduct business in North Carolina and avail themselves of the laws of this state in the conduct of their business. Defendants' tortious conduct complained of herein was intended to and in fact has harmed Plaintiff in the State of North Carolina. Defendants abused the legal mechanisms of the Federal Bankruptcy Court in this federal judicial district as part of their scheme to harm Plaintiff. As such, this Court has personal jurisdiction over Defendants and venue is appropriate in this district.

FACTS

11. Cooling towers are used in numerous industries to remove waste heat by cooling a water stream, such as through evaporation. To increase the rate of evaporation, materials called "fill" are utilized in the cooling tower. One of the basic types of fill is "splash fill," which interrupts the flow of water and causes the water to splash. Numerous companies offer various splash fill devices, which often take the form of plastic or wood bars that are placed within the cooling tower.

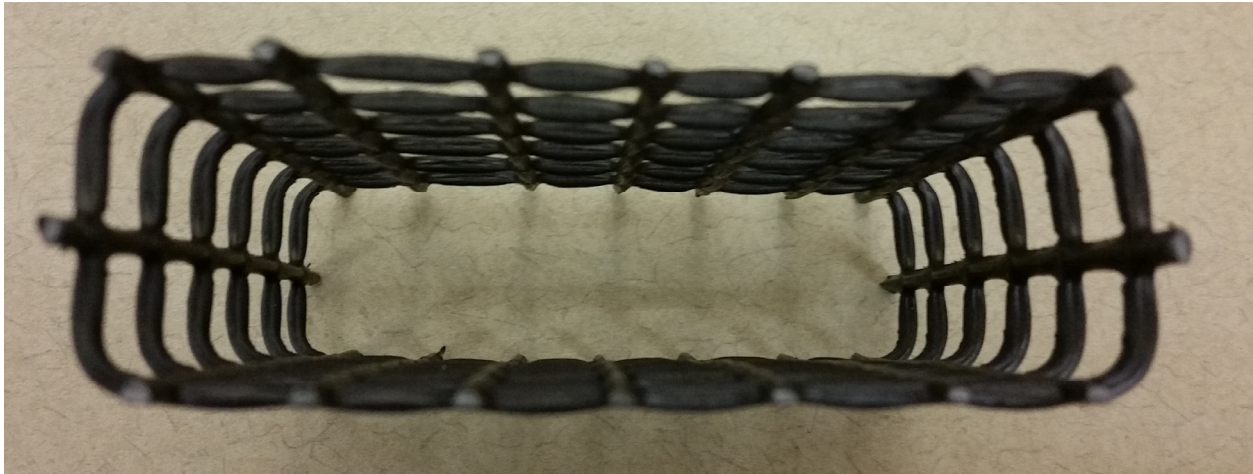
12. Plaintiff sells cooling tower products, to include splash fill. Plaintiff sells these products to cooling tower companies and operators in the United States and Mexico.

13. Plaintiff is owned and operated by Charles A. Peterson II. Mr. Peterson's father, Charles A Peterson (hereinafter "Augie Sr.") was a successful businessman in the tower cooling industry. Augie Sr. worked for Hamon Cooling towers for many years

manufacturing and designing cooling tower products. In 1990, he started Defendant Tower Components Inc. with his wife Mrs. Peterson (who is Charles A. Peterson II's mother) to manufacture and design cooling tower fill and components.

14. In 1993, the United States Patent and Trademark Office awarded U.S. Patent No. 5,185,105 (“105 Patent”) to Augie Sr. for an innovative splash bar that improved cooling efficiency by approximately 10%.

15. Augie Sr. designed and sold the patented device as the Opti-Bar. The Opti-Bar comprised a tubular mesh bar and is shown below.



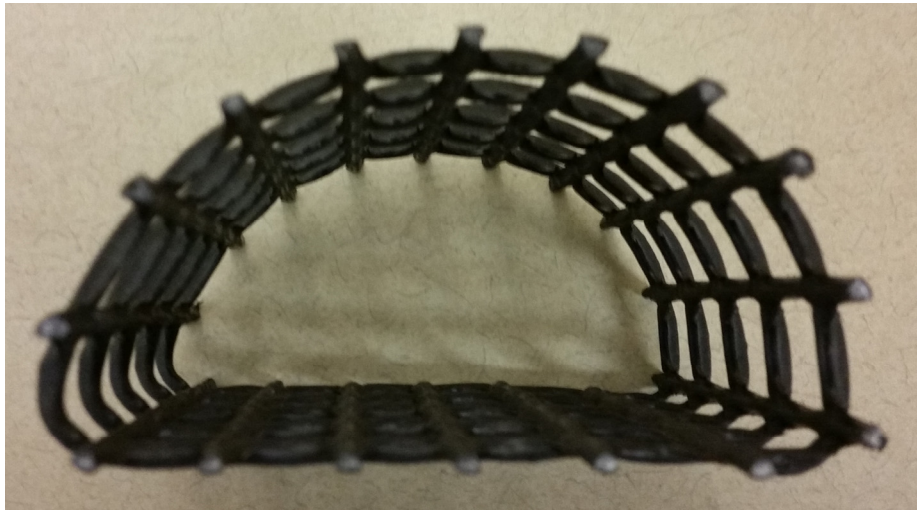
16. In 2005, Mr. & Mrs. Peterson sold Tower Components to Defendant Evapco, Inc. and Augie Sr. continued working for Tower Components until 2014. Augie Sr.'s employment ended poorly with Defendants, and in fact led to years of protracted litigation involving Augie Sr. & Mrs. Peterson.

17. None of Augie Sr.'s legal issues or lawsuit with Defendants involved or involve Plaintiff.

18. Defendants still market and sell the Opti-Bar. The '105 Patent expired in

2012.

19. While Augie Sr. was still employed with Defendants, Defendants expressed a desire to strengthen the Opti-Bar so that it had more lateral strength. Upon information and belief, Augie Sr. suggested modifying the Opti-Bar to an arched configuration, where the top portion was “upwardly arcuate.” Upon further information and belief, the following image is an early generation of Defendants’ splash bar that was sold as the ArchBar:



20. Upon further information and belief, Defendants modified the initial ArchBar design somewhat to a more four-sided configuration as shown in the following image:



21. In anticipation of the '105 Patent expiring, Defendant Evapco applied for a U.S. patent based on a four sided splash bar configuration that incorporated an upwardly arcuate top portion. The application resulted in U.S. Patent No. 8,020,837 (the '837 Patent) in 2011, a few months in advance of the expiration of the '105 Patent.

22. Claim 1 of the 837 Patent recites:

A splash bar comprising:

a tubular splash bar body in a form of a lattice structure having a plurality of openings formed therethrough, the splash bar body positioned centrally along and about an imaginary three-dimensional coordinate system having a lengthwise axis defining a lengthwise direction, a widthwise axis defining a widthwise direction, and a heightwise axis defining a heightwise direction with the lengthwise axis, the widthwise axis and the heightwise axis being oriented perpendicularly relative to one another, the splash bar body defining a hollow passageway extending therethrough in the lengthwise direction, the splash bar body having a top portion, a bottom portion disposed generally opposite the top portion, and a pair of opposing side portions interconnecting respective ones of the bottom and top portions with the top and bottom portions spanning the opposing side portions;

wherein the top portion is generally upwardly arcuate in shape as viewed in cross-section; and

wherein respective ones of the pair of opposing side portions move

away from each other as the pair of opposing side portions extend from the bottom portion to the top portion.

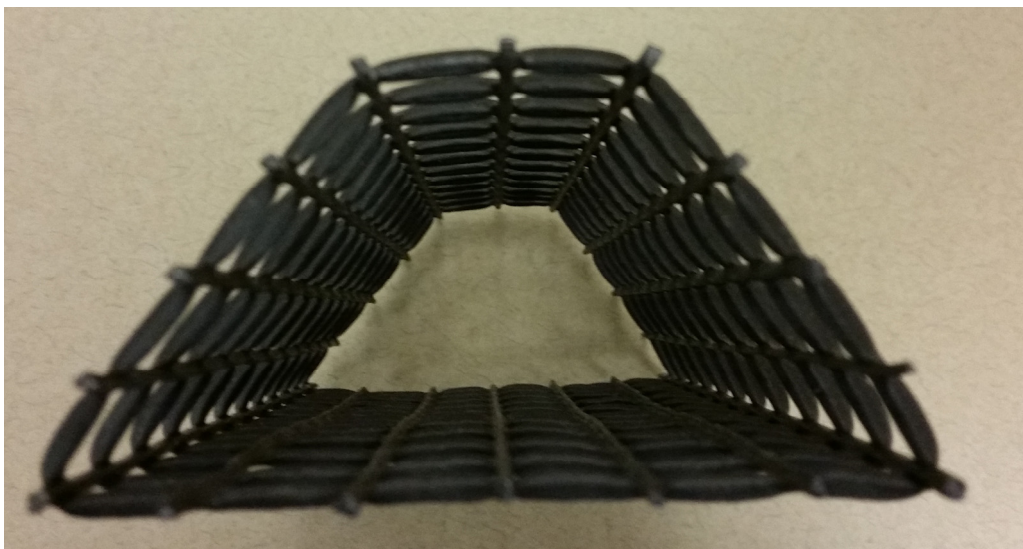
23. Every claim in the '837 Patent includes the limitation that the top portion of the splash fill structure is “upwardly arcuate.”

24. The “upwardly arcuate” limitation for the top portion of the splash fill structure was added during prosecution of the '837 Patent in order to advance a patentability argument before the USPTO.

25. Mr. Charles A. Peterson II, desiring to follow in his parents' footsteps and work in the cooling tower industry, formed Plaintiff in 2015 to develop and sell goods and services in the cooling industry.

26. Augie Sr. is not and has never been an owner or officer of Plaintiff.

27. One of the products developed by Plaintiff is its “D-Bar”, which is a bar style splash fill device. The device uses a flat sided “D” configuration as shown below:



28. Plaintiff's D-Bar is a trapezoid with four flat sides.

29. The D-Bar is one of many options from many companies available on the market for splash fill products and splash bars in particular. The D-Bar competes against third party products, as well as products from Defendants.

30. Defendants are direct competitors of Plaintiff.

31. Under letter dated November 2, 2017, from Baltimore attorney Peter J. Davis, Defendants accused Plaintiff of patent infringement. Defendant also addressed the letter to Augie Sr. and to an entity in Texas that manufactures the D-bar for Plaintiff. Without any explanation, Defendants told Plaintiff that Plaintiff's "'D-bar' splash fill products infringe claims of [Defendants'] Patent." Defendants stated in their letter that Defendants' "patented ArchBarTM splash bar and [their] '837 patent are very important to the company." Defendants failed to explain how being "very important" related to infringement. A true and accurate letter of Defendant's letter to Plaintiff is attached hereto as Exhibit A.

32. Defendants did not identify any specific facts supporting their conclusory accusation of patent infringement.

33. In fact, the D-bar does not infringe the '837 Patent. No reasonable person would find a flat surface to be an "upwardly arcuate" surface.

34. Defendants further accused Plaintiff of calling another of Plaintiff's products "Opti-Bar."

35. The corresponding product Plaintiff sells is branded PolyBar. Plaintiff does not use and has not used the name "Opti-Bar" to sell product.

DEFENDANTS CONTACT PLAINTIFF'S CUSTOMERS

36. In early and mid-2017, stemming from he and his wife's multi-year lawsuit with Defendants, Augie Sr. filed for bankruptcy in the Middle District of North Carolina, Case No. 17-10066 (the "Peterson Bankruptcy Proceeding"). Defendants had an interest in those proceedings arising from a judgment rendered in their lawsuit with Augie Sr. and his wife.

37. Plaintiff is not a party to the Peterson Bankruptcy Proceeding.

38. Using the federal discovery mechanisms available in the Peterson Bankruptcy Proceeding, Defendants Evapco, Inc. retained an attorney to issue a subpoena in that proceeding requesting production of certain documents and information from Plaintiff, to include Plaintiff's confidential customer information.

39. Plaintiff's confidential customer information is not relevant to Augie Sr.'s or his wife's bankruptcy.

40. Plaintiff's customers are not relevant to Augie Sr.'s or his wife's bankruptcy.

41. Plaintiff understood that its documents would be treated as ATTORNEYS EYES ONLY. Based on this understanding, Plaintiff agreed to produce the documents, despite their irrelevancy. Thereafter, Plaintiff produced its documents to Defendant's attorneys based on this agreement between counsel.

42. Upon information and belief, Defendants' attorneys did not treat Plaintiff's customer information as ATTORNEYS EYES ONLY. Through no act of Plaintiff or the Bankruptcy Court, Plaintiff's customer information found its way into the hands of a

second, separate set of Defendants' attorneys, the aforementioned Baltimore attorney Peter J. Davis, from the firm of Whiteford, Taylor & Preston LLP.

43. The attorneys representing Defendants in the Peterson Bankruptcy Proceeding and who issued the subpoena to Plaintiff were and are Joshua A. Glikin and Constance L. Young of the law firm Bowie & Jensen.

44. Upon information and belief, Mark Jensen is a co-founder of and partner of the law firm of Bowie & Jensen. Upon further information and belief, Mr. Jensen is and/or was a board member and corporate officer of Defendant Evapco, Inc.

45. Upon further information and belief, the law firm of Bowie & Jensen conveyed Plaintiff's customer information to one or more Defendants and/or the law firm of Whiteford, Taylor & Preston.

46. On November 2, 2017, Defendants, through Peter J. Davis of Whiteford, Taylor & Preston, sent letters to Plaintiff's customers and potential customers that were disclosed in response to the subpoena the Peterson Bankruptcy Proceeding.

47. In these letters, Defendants told Plaintiff's customers that Plaintiff's D-bar infringed Defendants' '837 Patent, that Defendants obtained a \$3 million judgment for misappropriation of trade secrets, and "that both the design and manufacturing technology for the D-bar splash fill product were misappropriated from Evapco." A true and accurate copy of one such letter from Defendants to one of Plaintiff's potential customers is attached hereto as Exhibit B.

48. Defendants told Plaintiff's customers that if they used Plaintiff's D-bar product, they would be infringing Defendants' '837 Patent, and that Plaintiff's customers

could face “remedies for which may include damages and a court order forbidding continued use of the infringing product” and, if willful, “payment of three times the actual damages awarded to the patentee, plus payment of the patentee [‘s] attorneys’ fees.”

49. Defendants told Plaintiff’s customers that if they purchased D-bar products from Plaintiff, their “supply could well be interrupted...if Evapco is forced to file suit against” Plaintiff.

50. Plaintiff’s D-bar does not infringe the ‘837 Patent and there is no reasonable basis for concluding that it does.

51. Defendants further told Plaintiff’s customers that Plaintiff was “fraudulently offering its products under [Defendant Tower Component Inc.’s] Opti-Bar trademark ...” in violation of various laws.

52. Plaintiff has not offered its products under the Opti-Bar trademark and there was no reasonable basis for alleging that Plaintiff had done so. The product Plaintiff sells that competes directly with the Opti-Bar is called and has been named PolyBar.

53. Upon information and belief, Defendants sent the same allegations to all or most of the customers identified by Plaintiff in the Peterson Bankruptcy Proceeding. Upon further information and belief, Defendants obtained the customer identities through Plaintiff’s ATTORNEYS EYES ONLY production.

54. As a result of Defendants’ letters, Plaintiff’s customers and potential customers decided to not do business or no longer do business with Plaintiff.

Defendants' letters damaged and harmed Plaintiff's business relationships with these customers and harmed Plaintiff's sales.

55. Defendant's letters are harmful at two further levels. First, Defendants' letters falsely and necessarily imply that Defendants obtained judgment against Plaintiff of "more than \$3 million."¹ This is not true. Second, the letters falsely and necessarily imply that Plaintiff is an entity that engaged in trade secret misappropriation when it was not a party to the litigation finding same. More specifically, the letter states that Defendant "secured a more than \$3 million judgment against Mr. Peterson *and companies with whom he is affiliated* and this judgment includes claims for misappropriating trade secrets." (emphasis added.). In the very next paragraph, Defendant states: "Accordingly, we have today written to Mr. Peterson *and* US Extrusion Products, LLC [being Plaintiff in this proceeding] formally advising them of the infringement . . ." ² (emphasis added.)

56. Upon information and belief, a reasonable customer would necessarily assume that the company Mr. Peterson is "affiliated" with would include Plaintiff—and that the judgment of "more than \$3 million" was issued against Plaintiff.

57. Further, Defendants' intentionally communicated and encouraged

¹ See *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 274 (4th Cir. 2002) ("A *literally* false message may be either explicit or conveyed by necessary implication when, considering the advertisement in its entirety, the audience would recognize the claim as readily as if it had been explicitly stated.") That is precisely the case here *vis-à-vis* the necessary implication that Plaintiff was involved in a misappropriation case—and more than \$ 3 million was entered against it. These representations are untrue.

² Definition of "accordingly" in Collins Online Dictionary (adverb): "You use accordingly to introduce a fact or situation that is because result or consequence of something that you have just referred to."

Plaintiff's customers to purchase Defendants' products instead of Plaintiff's products using information that was not otherwise publicly known. Defendants intentionally used Plaintiff's customer lists from the Peterson Bankruptcy Proceeding, misusing the subpoena powers of a court.

58. Compounding the calculated use of the information for commercial gain was the fact that Mr. Jensen—being a board member and corporate officer of Defendant Evapco, Inc.—was actively involved in the relaying information of the customer lists to one or more Defendants and/or the law firm of Whiteford, Taylor & Preston for the purposes of sending the false letters (*e.g.* Exhibit B) to Plaintiff's customers.

59. The intentional and willful dissemination of the false letters constituted willful commercial advertising by wrongfully disparaging Plaintiff's reputation regarding a judgment against it of "more than \$3 million."

60. The representations constituted commercial speech against Plaintiff for the sole purpose of influencing Plaintiff's customers—all of who were purchasers or potential purchasers of Plaintiff's products. These material representations wrongfully placed Plaintiff in a false light when no judgment had been entered against it, nor had Plaintiff misappropriated any trade secret.

61. Upon information and belief, consumers could consider the letters as one of fact (not puffery)—particularly given the specific, concrete and numerical data that stated in the letters; all of which is capable of objective verification.

62. Upon information and belief, the representations caused injury to Plaintiff (and continue to do so without correction), at least, in terms of:

- a. loss of goodwill through disparaging representations regarding, for example, a judgment for misappropriation—thereby tarnishing Plaintiff as a trusted supplier;
- b. lost profits—*i.e.*, sale to customers that Plaintiff would have obtained but for Defendants' calculated and willful letters to disparage Plaintiff;
- c. unjust enrichment to Defendants through ill-gotten gains that Defendants would not have made but for Defendant's clever, calculating and willful letter campaign;
- d. lost market share caused by the disparaging representations. Defendants' accusations further eroded trust between Plaintiff and its customers.

63. Defendants' allegations in its letters to Plaintiff's customers and potential customers were malicious and knowingly false.

64. Because Defendants' misconduct is predicated on theories of literal falsehood and necessary implication, Defendants tendency to mislead customers and injure Plaintiff are readily presumed. In the alternative, the letters are at least an implied misrepresentations executed with the intention to harm Plaintiff's reputation give rise to presumption of deception and injury. Such intention is readily inferred from Defendant's calculated behavior to misuse the subpoena powers of a court, and then use that information obtained from that subpoena against Plaintiff for the purpose of harming its reputation *vis-à-vis* Plaintiff's own customers.

65. Further, and in the alternative, as a direct and proximate result of the wrongful conduct described herein, Defendants' have been unjustly enriched by the

amount of its gross profits and cost savings that it received through the deceptive advertising in letters to Plaintiff's customers.

COUNT I
Declaratory Judgment of Patent Non-Infringement
28 U.S.C. § 2201; 35 U.S.C. § 271

66. Plaintiff realleges the preceding paragraphs.

67. Defendants accused Plaintiff's D-bar product of violating Defendants' '837 Patent and threatened litigation against Plaintiff if Plaintiff did not stop selling the D-bar product.

68. Defendants wrote to Plaintiff's customers, claiming that Plaintiff's D-bar product infringed the '837 Patent and that, if the customers used the D-bar product, the customers would infringe the '837 Patent.

69. There is an actual case or controversy between the parties regarding whether the D-bar product infringes the '837 Patent.

70. Every independent claim of the '837 Patent includes the limitation that the top portion of the splash bar described therein is "upwardly arcuate in shape."

71. The dependent claims depend from at least one of the independent claims and therefore also include the limitation that the top portion of the splash bar is "upwardly arcuate in shape."

72. The top portion of the D-bar is flat and is not arcuate.

73. The D-bar does not practice each and every limitation of any claim of the '837 Patent.

74. The D-bar does not infringe any claim of the '837 Patent.

COUNT II
Patent Invalidity

75. Plaintiff realleges the preceding paragraphs.

76. The '837 Patent fails to satisfy the requirements of the Patent Act, to include the requirements of 35 U.S.C. §§ 102, 103 and/or 112.

77. On March 1, 2019, pursuant to this Court's Local Patent Rules and scheduling order, Plaintiff served detailed invalidity contentions on Defendants setting forth the basis for finding the '837 Patent invalid. Defendants have since acknowledged receipt and notice by responding to those contentions.

78. For the reasons set forth in Plaintiff's aforementioned invalidity contentions, and for whatever additional grounds may be revealed through the course of discovery in this proceeding, the claims the '837 Patent should be found invalid.

COUNT III
Abuse of Process

79. Plaintiff realleges the preceding paragraphs.

80. After the Peterson Bankruptcy Proceeding began, Defendants misused the legal process for an ulterior purpose.

81. Defendants misused the legal process by using the discovery process to obtain documents from Plaintiff that disclosed Plaintiff's customers. Defendants knew that Plaintiff's customers had no relevance to the Peterson Bankruptcy Proceeding, but nonetheless subpoenaed those records.

82. Defendants' misused the legal process by using the court's subpoena process in the bankruptcy proceeding, to obtain information to contact Plaintiff's

customers and accuse Plaintiff of patent infringement. Neither Plaintiff's customers nor any alleged claims of patent infringement against Plaintiff have relevancy to the Peterson Bankruptcy Proceeding.

83. Defendants did not use discovery to legitimately investigate issues related to the Peterson Bankruptcy Proceedings, but to harass Plaintiff and Plaintiff's customers, and to attempt to use anticompetitive means to convince Plaintiff's customers to do business with Defendants instead of Plaintiff.

84. Defendants undertook a willful act that was not proper in the regular course of the Peterson Bankruptcy Proceeding.

85. Defendants' had an ulterior purpose for their misuse of the legal process. Defendants wanted to obtain the contact information of Plaintiff's customers so that Defendants could contact Plaintiff's customers and try to convince Plaintiff's customers to do business with Defendants instead of Plaintiff.

86. Defendants' scheme harmed the relationships between Plaintiff and its customers. Plaintiff had to renegotiate agreements with some of their customers. The trust between Plaintiff and its customers was eroded. Plaintiff suffered harm from Defendants' acts.

COUNT IV
Tortious Interference with Prospective Economic Advantage

87. Plaintiff realleges the preceding paragraphs.

88. Plaintiff would have entered into sales contracts with one or more third parties but for Defendants' actions complained of herein.

89. Defendants maliciously induced Plaintiff's customers and potential customers to not purchase from or otherwise enter into sales contracts with Plaintiff.

90. Defendants' actions proximately caused Plaintiff to suffer actual damages.

COUNT V
Unfair and Deceptive Trade Practices
N.C. Gen. Stat. § 75-1.1

91. Plaintiff realleges the preceding paragraphs.

92. Defendants did not have a reasonable belief that Plaintiff's D-bar infringes the '837 Patent.

93. A reasonable person would not believe Plaintiff's D-bar infringes the '837 Patent, as the D-bar does not practice each and every limitation of any claim of the '837 Patent. In particular, the D-bar does not practice the element of a top portion that is "upwardly arcuate in shape" as recited, explicitly or by dependency, in every claim of the '837 Patent. The D-bar's top portion is flat.

94. Despite having no reasonable belief that Plaintiff's D-bar infringes the '837 Patent, Defendants wrote to Plaintiff's customers and told Plaintiff's customers that Plaintiff's D-bar infringed the '837 Patent.

95. Defendants' demand did not contain factual allegations concerning the specific areas in which Defendants' D-bar infringe the '837 Patent or are covered by specific, identified claims of the '837 Patent. In particular, Defendants' letter offered nothing but a conclusory statement that Plaintiff allegedly infringed.

96. Defendants' claim of patent infringement is meritless and Defendants knew or should have known that their claim of patent infringement is meritless. During

prosecution, Defendants specifically amended the claims to require the top portion of the patented fill bar to be upwardly arcuate. The top portion of Plaintiff's D-bar is flat. Defendants knew or should have known about this limitation, and would have known had they reviewed the prosecution history.

97. Despite having no reasonable belief that the D-bar infringes the '837 Patent, Defendants told Plaintiff's customers that if they used the D-bar, they would infringe the '837 Patent and could be found liable for monetary damages, treble damages, and attorneys' fees, and could be enjoined.

98. Defendants further told Plaintiff's customers that Plaintiff might not be able to provide D-bars to Plaintiff's customers if Defendants sued Plaintiff. Defendants then encouraged Plaintiff's customers to consider Defendant's ArchBar product.

99. As with the claims made directly to Plaintiff, Defendants failed to offer factual allegations containing the specific areas in which Defendants' D-bar infringed the '837 Patent or is covered by specific, identified claims of the '837 Patent. Defendants' letter instead relied upon conclusory statements that Plaintiff allegedly infringed and that Plaintiff's customers would allegedly infringe if they used Plaintiff's product.

100. Defendants' allegations made to Plaintiff's customers of trademark infringement and implied accusation of trade secret misappropriation against Plaintiff lacked a reasonable basis in fact.

101. Defendants' unreasonable accusations against Plaintiff to Plaintiff's customers were and are unfair and deceptive acts or practices.

102. Defendants used these unreasonable accusations against Plaintiff to

promote their competing product and harm Plaintiff.

103. Defendants made accusations in bad faith against Plaintiff.

104. Defendants' acts were in or affecting commerce.

COUNT VI
False Advertising Claim Under 15 U.S.C. § 1125(a)(1)(A)

105. Plaintiff realleges the preceding paragraphs.

106. Defendants' letters disparaging Plaintiff as a party to previous misappropriation litigation—owing more than \$3 million—constitutes representations that are likely to cause deception in the market place when Plaintiff was *not* a party to the prior litigation alleged above.

107. These misrepresentations are material disclosures upon which customers or potential customers have, and will rely, damaging Plaintiff's goodwill and reputation in violation of Section 43(a) of the Lanham Act, 15 U.S.C. §§ 1125(a)(1)(A).

108. Given Defendants' misuse of subpoena powers and knowledge of the customer lists, the dissemination of the letters were undertaken willfully and deliberately with the intention to cause deception in the market place—harming Plaintiff's reputation.

109. Dissemination of the letters were in commerce and have caused, and will continue to cause, damage to Plaintiff in an amount to be determined at trial.

110. The abovementioned acts by Defendants have caused, and unless restrained and enjoined by this Court, will continue to cause irreparable harm, loss, and injury to Plaintiff for which Plaintiff has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE Plaintiff respectfully prays the Court:

- A. Declare Plaintiff has not infringed the '837 Patent;
- B. Find the '837 Patent to be invalid for failing to satisfy the requirements of the Patent Act;
- C. Find for Plaintiff on all claims and award Plaintiff monetary damages;
- D. Order an accounting of Defendants' profits associated with their illegal activities and disgorge those profits to Plaintiff;
- E. Find Defendants acted with malice and award punitive damages against Defendants;
- F. Order Defendants to issue written letters of retraction to each of Defendants and Plaintiff's customers and order Defendants to run corrective advertisements to the same effect;
- G. Treble Plaintiff's damages pursuant to N.C. Gen. Stat. § 75-16;
- H. Find this case exceptional and award Plaintiff its reasonable attorneys' fees under the Patent Act, and/or award Plaintiff its reasonable attorneys' fees pursuant to N.C. Gen. Stat. § 75-16.1;
- I. Tax the costs of this action and prejudgment interests against Defendants;
- J. Order judgment holding that Defendants have engaged in false advertising and deceptive trade practices under 15 U.S.C. § 1125(a)(1)(A).
- K. Order a permanent injunction against Defendants to cease dissemination any further letters as depicted in Exhibit B to any person (customer or non-customer).

L. Order a permanent injunction against Defendants that Defendants engage in a program of corrective advertising to repair Plaintiff's standing and goodwill in the marketplace, but not limited to upon further discovery, the following corrective advertising program:

1. retracting all letters that have been sent to persons (customer or non-customer) disparaging Plaintiff's reputation;
2. sending corrective letters to each person (customer or non-customer) stating that (a) Defendants used non-public customer lists of Plaintiff to deliberately undermine Plaintiff's reputation in the marketplace, and (b) Defendants made false representations about Plaintiff—specifically, Defendants intentionally misrepresented that Plaintiff was a party to (i) misappropriation litigation, and (ii) owes more than \$3 million, when neither of these representations were true; and
3. Defendants file with the Court, and serve on Plaintiff within ten (10) days after issuance of the permanent injunction a report in writing, under oath, setting forth in detail the manner and form in which Defendants have complied with the permanent injunction directed towards corrective advertising with copies of all sent letters; and

M. Grant Plaintiff such other and further relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury be held on all issues so triable.

Respectfully submitted this the 25th day of March 2019.

By: /s/ Anthony J. Biller

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CERTIFICATE OF WORD COUNT

In compliance with Local Rule 7.3(d), this document contains 4,985 words according to Microsoft Word's word count feature.

Respectfully submitted, this the 25th day of March, 2019.

/s/ Anthony J. Biller

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CERTIFICATE OF SERVICE

I hereby certify that on this the 25th day of March, 2019 a copy of the foregoing **AMENDED COMPLAINT** is filed with the Clerk of Court using the CM/ECF system which will send electronic notification to opposing counsel at the following address:

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