

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN**

Myco Industries, Inc.,

Plaintiff/Counter-Defendant,

v.

Blephex, LLC,

Defendant/Counter-Plaintiff,

v.

John R. Choate,

Counter-Defendant.

**Case No. 2:19-cv-10645-GAD-EAS
Honorable Gershwin A. Drain
Mag. Judge Elizabeth A. Stafford**

JURY TRIAL DEMANDED

**THIRD AMENDED COMPLAINT FOR
DECLARATORY JUDGMENT AND DEMAND
FOR JURY TRIAL**

Pursuant to the Court's order dated June 16, 2020 (Dkt # 86), Plaintiff, Myco Industries, Inc. ("Myco"), files this Third Amended Complaint for Declaratory Judgment against Defendant, Blephex, LLC ("Blephex"), and alleges as follows:

I. NATURE OF THE ACTION

1. Myco seeks a judgment declaring that it does not infringe U.S. Patent No. 9,039,718 B2 (“the ‘718 patent”) (attached as Exhibit A) and that the ‘718 patent is invalid.

II. THE PARTIES

2. Plaintiff Myco is a corporation organized and existing under the laws of the State of Michigan, with a principal place of business at 510 Highland Avenue, Suite 332, Milford, Michigan 48381.

3. On information and belief, Defendant Blephex is a corporation organized under the laws of the State of Florida with a place of business at 119 SE Parkway Court, Suite 250, Franklin, TN 37064.

4. On information and belief, Blephex was formed in 2014 by the merger of, *inter alia*, Rysurg, LLC, a Michigan limited liability company.

III. JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this action pursuant to:

- a. 28 U.S.C. § 1331, relating to “federal question” jurisdiction;
- b. 28 U.S.C. § 1338(a), conferring jurisdiction over actions arising under federal patent laws;

c. 28 U.S.C. §§2201 and 2202, conferring jurisdiction over actions involving declaratory judgment.

6. On information and belief, this Court has personal jurisdiction over Blephex because it conducts business in the State of Michigan and within this district, including the advertising and sale of products to Michigan residents. Blephex has also threatened litigation against Myco, a Michigan resident.

7. Venue is proper in this judicial district under 28 U.S.C. §1391(c).

8. A case or controversy exists between the Myco and Blephex because Blephex has accused Myco and its customers of patent infringement and has threatened litigation.

IV. FACTS COMMON TO ALL COUNTS

9. Blepharitis is a common ocular condition characterized by, for example, inflammation, scaling, reddening, and crusting of the eyelid. Blepharitis can be anterior or posterior. Anterior blepharitis “affects the front edge of the eyelid, where the eyelashes join it”; posterior blepharitis “affects the inner edge of the eyelid, where it meets the eyeball.” (Exhibit B.)

The History of the ‘718 Patent Claims in the Patent Office

10. The ‘718 patent resulted from a patent application filed July 24, 2012, serial number 13/556,729 (“the ‘729 application”). The application as filed

contained claims to a method of blepharitis treatment as well as an electromechanical treatment device.

11. In response to a U.S. Patent and Trademark Office (“PTO”) restriction requirement, the patent owner elected to pursue the method claims.

12. The PTO rejected the method claims in the ‘729 application. In response, the patent owner amended the claims by adding to claim 1 the phrase “configured to access an inner edge portion of the eyelid margin.” In remarks accompanying the claim amendment, the patent owner confirmed that it added the new claim language to distinguish the claims from a prior art reference, U.S. Patent Pub. 2007/0060988, cited by the PTO.

13. When the patent owner amended claim 1, it also added two new independent claims, application claims 29 and 30. Claim 29 limited the treatment method to “contacting at least an inner edge portion of the eyelid margin” and in accompanying remarks, the patent owner emphasized that limiting language. In contrast, claim 30 did not include similar “inner eyelid” language.

14. After an interview with the PTO examiner, the patent owner agreed to cancel claim 30, the only claim that did not include the “inner eyelid” limitation. The patent owner also agreed to further amend claim 1 to add the phrase “between the eyelashes and the inner edge of the eyelid margin” to the treatment process to make clear that the claimed process requires treating specific parts of the eyelid

margin, not where anterior blepharitis occurs, namely, “the front edge of the eyelid, where the eyelashes join it.” (Exhibit B.)

15. Blephex’s ‘718 patent issued on May 26, 2015 with two independent method claims, claim 1 and 17 (former application claim 29). Both claims require treating specific parts of the eyelid margin, not where anterior blepharitis occurs, namely, “the front edge of the eyelid, where the eyelashes join it.” (Exhibit B.)

Myco’s AB Max Product

16. Myco makes and sells a product called AB Max for the treatment of anterior blepharitis. (*See, e.g.*, Exhibit C.) Myco does not use or sell AB Max for treatment of posterior blepharitis and has never promoted, endorsed, or encouraged such use.

Blephex’s Infringement Threats

17. On Thursday February 21, 2019, Blephex’s Chief Executive Officer (“CEO”), James Rynerson, approached Myco’s sales booth at SECO 2019 in New Orleans, LA. Rynerson told Myco’s Chairman, John Choate, that Myco’s AB Max product infringed Blephex’s patents and that Blephex would sue Myco and its customers. Rynerson made a video recording of his threats.

18. Choate denied Rynerson’s claims and provided Rynerson with AB Max promotional materials that expressly promote it for treatment of anterior blepharitis.

19. Nevertheless, Rynerson continued to accuse Myco of infringement throughout the SECO 2019 conference. Specifically, Rynerson told doctors and practitioners visiting the Blephex booth, who were actual and/or prospective Myco customers, that Myco's AB Max technology was "totally infringing on his [Blephex's] patents" and that he would "take action."

20. Given that the patent owner had to limit the claims of the '729 application to treatment of specific parts of the eyelid margin in order to get the '718 patent allowed, Rynerson knew or should have known that the '718 is not infringed by treatment of anterior blepharitis.

21. As Rynerson visited the Myco booth and received AB Max promotional materials that only promoted the AB Max for treatment of anterior blepharitis, Rynerson knew or should have known that Myco was using or promoting the AB Max for treatment of only anterior blepharitis, namely, "the front edge of the eyelid, where the eyelashes join it" (Exhibit B), at SECO 2019 and, consequently, that neither Myco nor the AB Max infringed the '718 patent.

22. In addition, medical practitioners who use AB Max to treat blepharitis are immune from claims that they infringe the '718 patent under 35 U.S.C. § 287(c) as Blephex and Rynerson know or should know.

23. Blephex is a litigious company as shown, for example, by its lawsuit against Pain Point Medical Systems Inc. pending in the Northern District of Texas, Case No. 3-16-cv-00410.

V. COUNT 1

DECLARATORY JUDGMENT OF NON-INFRINGEMENT

24. Myco incorporates the above allegations.

25. Because of the threats Blephex made against Myco and its customers alleging infringement of Blephex's '718 patent, an actual case or controversy exists with respect to the '718 method patent.

26. The '718 patent is not infringed if the device recited in the claims ("a swab operably connected to an electromechanical device") is used to treat anterior blepharitis on "the front edge of the eyelid, where the eyelashes join it." (Exhibit B.)

27. Myco has only used AB Max to treat anterior blepharitis and, therefore, has not directly infringed the '718 patent.

28. Myco has only promoted, encouraged, or induced others to use AB Max to treat anterior blepharitis, so, Myco has not actively induced infringement of the '718 patent.

29. AB Max has substantial non-infringing uses, namely, treatment of anterior blepharitis, so, Myco has not contributorily infringed the '718 patent.

30. Myco is entitled to a declaratory judgment that it has not infringed and is not infringing the '718 patent.

VI. COUNT 2

DECLARATORY JUDGMENT OF INVALIDITY

31. Myco incorporates the above allegations.

32. The claims of the '718 patent are invalid under 35 U.S.C. §§ 102, 103, and/or 112.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff Myco asks the Court to enter judgment against Blephex providing the following relief:

A. a declaration that Myco does not directly or indirectly infringe Blephex's patent rights;

B. a declaration that Blephex's '718 patent is invalid;

C. an assessment against Defendant of Myco's costs, attorney fees, and expenses; and

D. such other relief as the Court considers proper.

VIII. JURY DEMAND

Myco demands a trial by jury of all issues so triable.

Respectfully submitted,

BROOKS KUSHMAN P.C.

Dated: July 29, 2020

/s/ Rebecca J. Cantor

Thomas A. Lewry (P36399)

Chanille Carswell (P53754)

Christopher C. Smith (P73936)

Rebecca J. Cantor (P76826)

1000 Town Center, Twenty-Second Floor

Southfield, Michigan 48075

Tel: (248) 358-4400 / Fax: (248) 358-3351

Email: tlewry@brookskushman.com

ccarwell@brookskushman.com

csmith@brookskushman.com

rcantor@brookskushman.com

*Attorneys for Myco Industries, Inc.
and John R. Choate*