

**IN THE UNITED STATES DISTRICT
COURT WESTERN DISTRICT OF
KENTUCKY LOUISVILLE DIVISION**

ELECTRONICALLY FILED

**POLYLOK, INC. and PETER GAVIN
AND MICHAEL N. DELGASS, AS
TRUSTEES OF THE PETER GAVIN
SPRAY TRUST,**

Plaintiffs,

v.

**BEAR ONSITE, LLC, PROMOLD &
TOOL, LLC, MICHAEL JAY
HORNBACK, PREMIER PROMOLD &
TOOL, INC., and LIFETIME FILTER,
LLC,**

Defendants.

Civil Action No. 3:12-cv-535-CHB-CHL

FOURTH AMENDED COMPLAINT

Plaintiffs, Polylok, Inc. and The Peter Gavin Spray Trust, of which Peter Gavin and Michael N. Delgass are the Trustees, for their Fourth Amended Complaint against defendants Michael J. Hornback, Bear Onsite, LLC, Promold & Tool, LLC, Premier Promold & Tool, Inc., and Lifetime Filter LLC allege as follows:

1. This is an action for patent infringement, arising under the Patent Laws of the United States, 35 U.S.C. §§ 1 *et seq.*, in particular 35 U.S.C. §§ 271 and 281. This is also an action arising under the laws of Wisconsin and/or Kentucky for breach of contract, and under the laws of the Kentucky for common law unjust enrichment and unfair competition. This Court has subject matter jurisdiction under 35 U.S.C. § 281, and 28 U.S.C. §§ 1331, 1338(a), and 1367(a).

THE PARTIES AND VENUE

2. Polylok, Inc. (“Polylok”) is a Connecticut corporation with its principal place of business at 3 Fairfield Boulevard, Wallingford, Connecticut 06492.

3. The Peter Gavin Spray Trust, of which Peter Gavin and Michael N. Delgass are the trustees, is a Connecticut trust pursuant to an agreement dated May 26, 2004, by and between Norman W. Gavin as Grantor and Peter Gavin and Michael N. Delgass as trustees. Trustee Peter Gavin is a resident of Durham, Connecticut, and Trustee Michael N. Delgass is a resident of Weston, Connecticut.

4. Bear Onsite, LLC (“Bear Onsite”) is, on information and belief, a Tennessee limited liability company with its principal place of business at 55 Thompson Way, Somerville, Tennessee 38068.

5. Promold & Tool, LLC (“Promold”) is, on information and belief, a Kentucky limited liability company with its principal place of business at 1616 E. Rockford Lane, Louisville, Kentucky 40216.

6. Premier Promold & Tool, Inc. (“Premier”) is, on information and belief, a Kentucky corporation with its principal place of business at 146 Clifton Hall Court, Shepherdsville, Kentucky 40165.

7. Lifetime Filter LLC (“Lifetime”) is, on information and belief, a Kentucky limited liability company with its principal place of business at 146 Clifton Hall Court, Shepherdsville, Kentucky 40165.

8. Michael Jay Hornback (“Hornback”) is, on information and belief, a resident of Louisville, Kentucky and an owner and employee of Promold, Premier, and Lifetime; and his wife, Julia Hornback, is also an owner of Premier.

9. Venue is proper in this judicial district under 28 U.S.C. §§ 1400(b) and 1391(b)(2) because a substantial part of the events giving rise to Plaintiffs' claims occurred here.

10. Bear Onsite is a company subject to personal jurisdiction in this judicial district because Bear Onsite transacts business in this State or supplies infringing goods into this State, and committed tortious conduct in this State.

11. Promold is a company subject to personal jurisdiction in this judicial district because Promold is a resident of this State, has entered a contract to be performed in this State, solicited business in this State, and committed tortious conduct in this State.

12. Premier is a company subject to personal jurisdiction in this judicial district because Premier is a resident of this State, solicited business in this State, and committed tortious conduct in this State.

13. Lifetime is a company subject to personal jurisdiction in this judicial district because Lifetime is a resident of this State, solicited business in this State, and committed tortious conduct in this State.

14. Hornback is an individual subject to personal jurisdiction in this judicial district because he is a resident of this State, who regularly does business in this State, and who has committed a tortious act inside the State causing injury to Plaintiffs and should reasonably expect these acts to have consequences in this State.

FACTS

15. Polylok began 38 years ago in the business of precast, drainage and wastewater products. As a part of its product offerings, Polylok provides wastewater filters and water level control alert devices throughout the United States.

16. On October 10, 2000, the United States Patent and Trademark Office duly and lawfully issued U.S. Patent No. 6,129,837 (“the ‘837 patent”), entitled “Waste Water Treatment Filter Including Waste Water Level Control Alert Device.” A true and correct copy of the ‘837 patent is attached to this Complaint as Exhibit A. Through an assignment, recorded in the U.S. Patent and Trademark Office on April 17, 2006, at Reel 017480, Frame 0186, The Peter W. Gavin Spray Trust, owns all right, title and interest in and to the ‘837 patent, including the right to redress all past and present infringements of the ‘837 patent. During the events at issue here, the ‘837 patent was in full force and effect, with all necessary fees having been paid.

17. Through an Asset Purchase Agreement (“the APA”) entered on March 15, 2007, Polylok purchased the assets of Bluegrass Environmental Septic Technology, LLC’s (“B.E.S.T.”) high-quality effluent septic filter business. A true and correct copy of the Asset Purchase Agreement is attached to this Complaint as Exhibit B.

18. B.E.S.T. was a Wisconsin limited liability company whose members included Hornback.

19. Par. 13 of the APA included a covenant not to compete whereby the members of B.E.S.T., including Hornback, agreed:

For a period of five (5) years following the Effective Date, Seller and Michael J. Hornback . . . covenant and agree that they shall not, directly or indirectly, own, operate, or be employed by any business which manufactures or sells any effluent septic filter, the rights to which are owned by such business doing the manufacturing or selling, which effluent septic filter competes with the Filter within the United States.

20. As President of B.E.S.T., Hornback signed and agreed to the APA.

21. Individually and as a member of B.E.S.T., Hornback signed and agreed to Par.

13 of the APA, the covenant not to compete.

22. On January 1, 2007, Polylok also entered into a Consulting Agreement with Promold whereby Promold would assist and consult with Polylok regarding the effluent septic filter being purchased from B.E.S.T. A true and correct copy of the Consulting Agreement is attached to this Complaint as Exhibit C.

23. Hornback is President of and a member of Promold and signed the Consulting Agreement on behalf of Promold.

24. After consulting with Polylok and selling the effluent septic filter business to Polylok, and agreeing not to compete with Polylok, upon information and belief, Hornback, operating as Promold and/or Premier, continued to manufacture effluent septic filters and compete with Polylok. Those activities caused injury to Polylok.

25. Upon information and belief, Bear Onsite conducted business in and/or sold effluent septic filters and water level control alert devices through its website, www.bearonsite.com, and various distributors throughout the United States.

26. Upon information and belief, Bear Onsite's effluent septic filters and water level control alert devices were respectively marketed and sold under the names ML3-910, ML3-916, ML3-932, ML3-925, ML3-948 and ML3-964 effluent filters (collectively "ML3 Effluent Filters") and Vertical Reed Switch (VRS) alarms.

27. Upon information and belief, through various means, including its website and distributors, Bear Onsite sold and offered for sale in the United States its ML3 Effluent Filters and VRS alarms, the combination of which infringes the '837 patent. A true and correct copy of a Bear Onsite sales brochure is attached to this Complaint as Exhibit D.

28. Plaintiffs sent a cease and desist letter to Theo Terry, owner and operator of

Bear Onsite, on November 3, 2011 asserting that the combination of the ML3-916 filter and the VRS alarm infringed the '837 patent. Enclosed with the cease and desist letter was a copy of a Complaint filed by Polylok on November 3, 2011 in the U.S. District Court for the District of Connecticut alleging infringement of the '837 patent by Bear Onsite. Thus Bear Onsite had knowledge of the '837 patent no later than November 3, 2011.

29. Upon information and belief, Hornback, acting as and/or through Promold and/or Premier, manufactured the ML3 Effluent Filters sold by Bear Onsite.

30. Upon information and belief, Hornback, acting as and/or through Promold and/or Premier, placed instructions as to how to combine the ML3-type filters with VRS alarms in shipments made to customers of Bear Onsite.

31. Plaintiffs sent a cease and desist letter to Hornback on November 3, 2011 asserting that his manufacture of effluent filters for Bear Onsite breached the terms of the APA. Enclosed with the cease and desist letter to Hornback was a copy of the Complaint filed by Polylok on November 3, 2011 in the U.S. District Court for the District of Connecticut alleging infringement of the '837 patent by Bear Onsite.

32. Upon information and belief, to the extent that Hornback was not previously aware of the '837 patent, he, Promold, and Premier became aware of the '837 patent no later than November 3, 2011.

33. In any event, Plaintiffs alleged infringement of the '837 patent by Bear Onsite in their original complaint in this action filed August 29, 2012, to which Hornback and Promold were parties. The Hornback-related defendants thus had knowledge of '837 patent by no later than the date of service of the action on them.

34. Upon information and belief, Hornback, operating as Promold and/or

Premier, was aware of the '837 patent while supplying ML3 Effluent Filters to Bear Onsite.

35. Upon information and belief, Hornback, operating as Promold and/or Premier, was aware that the ML3 Effluent Filters infringe the '837 patent.

36. Upon information and belief, Hornback, operating as Promold and/or Premier, aided and instructed Bear Onsite in the use, combination and sale of the ML3 Effluent Filters with VRS alarms.

37. Upon information and belief, Hornback, operating as Lifetime, has marketed and sold effluent filters under the name Lifetime Filter, that both by themselves and when combined with VRS alarms, infringe the '837 patent.

38. Upon information and belief, Hornback, operating as Lifetime, was and is aware that the Lifetime Filters infringe the '837 patent.

39. Nonetheless, Hornback, operating as Lifetime, manufactured and/or used and/or offered for sale and/or sold Lifetime Filters, and also instructed and aided and instructs and aids customers in the combination of the Lifetime Filters with VRS alarms.

40. Customers have combined Lifetime filters with VRS alarms and thus infringed the '837 patent.

COUNT I – PATENT INFRINGEMENT AGAINST BEAR ONSITE

41. Plaintiffs incorporate paragraphs 1 through 40 as if fully set forth herein.

42. The ML3 Effluent Filter provides an effluent filter with integral mounting means for an accompanying alarm having locking lugs that interact therewith, in accordance with claim 1 of the '837 patent.

43. Bear Onsite, without Plaintiffs' authorization, engaged in this judicial

district and elsewhere in the United States in the manufacture and/or use and/or offering for sale and/or sale of the ML3 Effluent Filters and of a combination of the ML3 Effluent Filter and VRS alarm in infringement of claim 1 of the '837 patent, literally or in the alternative under the doctrine of equivalents.

44. Bear Onsite did so with knowledge of the '837 patent and that its activities involving the ML3 Effluent Filter and the combination of a ML3 Effluent Filter with a VRS alarm constituted infringement of the '837 patent.

45. Bear Onsite's infringing acts damaged Plaintiffs by misappropriating their intellectual property and making sales of patented products which otherwise would have been made by Plaintiffs, entitling Plaintiffs to damages under 35 U.S.C. § 284.

COUNT II – PATENT INFRINGEMENT AGAINST PROMOLD

46. Plaintiffs incorporate paragraphs 1 through 45 as if fully set forth herein.

47. The ML3 Effluent Filter provides an effluent filter with integral mounting means for an accompanying alarm having locking lugs that interact therewith, in accordance with claim 1 of the '837 patent.

48. Promold, without Plaintiffs' authorization, engaged in this judicial district and elsewhere in the United States in the manufacture and/or use and/or offering for sale and/or sale of the ML3 Effluent Filters in infringement of claim 1 of the '837 patent, literally or in the alternative under the doctrine of equivalents.

49. Promold did so with knowledge of the '837 patent and that its activities involving the ML3 Effluent Filter by itself and the combination of a ML3 Effluent Filter with a VRS alarm constituted infringement of the '837 patent.

50. Promold's infringing acts damaged Plaintiffs by misappropriating their

intellectual property and making sales of patented products which otherwise would have been made by Plaintiffs, entitling Plaintiffs to damages under 35 U.S.C. § 284.

COUNT III – PATENT INFRINGEMENT AGAINST PREMIER

51. Plaintiffs incorporate paragraphs 1 through 51 as if fully set forth herein.

52. The ML3 Effluent Filter provides an effluent filter with integral mounting means for an accompanying alarm having locking lugs that interact therewith, in accordance with claim 1 of the ‘837 patent.

53. Premier, without Plaintiffs’ authorization, engaged in this judicial district and elsewhere in the United States in the manufacture and/or use and/or offering for sale and/or sale of the ML3 Effluent Filters in infringement of claim 1 of the ‘837 patent, literally or in the alternative under the doctrine of equivalents.

54. Premier did so with knowledge of the ‘837 patent and that its activities involving the ML3 Effluent Filter by itself and the combination of a ML3 Effluent Filter with a VRS alarm constituted infringement of the ‘837 patent.

55. Premier’s infringing acts damaged Plaintiffs by misappropriating their intellectual property and making sales of patented products which otherwise would have been made by Plaintiffs, entitling Plaintiffs to damages under 35 U.S.C. § 284.

COUNT IV – PATENT INFRINGEMENT AGAINST LIFETIME

56. Plaintiffs incorporate paragraphs 1 through 55 as if fully set forth herein.

57. The Lifetime Filter provides an effluent filter with integral mounting means for an accompanying alarm having locking lugs that interact therewith, in accordance with claim 1 of the ‘837 patent, under the doctrine of equivalents.

58. Lifetime, without Plaintiffs’ authorization, engaged in this judicial district

and elsewhere in the United States in the manufacture and/or use and/or offering for sale and/or sale of the Lifetime Filters in infringement of claim 1 of the '837 patent, under the doctrine of equivalents.

59. Lifetime did so with knowledge of the '837 patent and that its activities involving the Lifetime Filter by itself and the combination of a Lifetime Filter with a VRS alarm constituted infringement of the '837 patent.

60. Lifetime's infringing acts damaged Plaintiffs by misappropriating their intellectual property and making sales of patented products which otherwise would have been made by Plaintiffs, entitling Plaintiffs to damages under 35 U.S.C. § 284.

COUNT V – INDUCEMENT OF PATENT INFRINGEMENT AGAINST PROMOLD

61. Plaintiffs incorporate paragraphs 1 through 60 as if fully set forth herein.

62. The ML3 Effluent Filter provides an effluent filter with integral mounting means for an accompanying alarm having locking lugs that interact therewith, in accordance with claim 1 of the '837 patent.

63. Promold, without Plaintiffs' authorization, is engaged in this judicial district and elsewhere in the United States in the manufacture and/or use and/or offering for sale and/or sale of effluent septic filters, including the ML3 Effluent Filters, with the specific intent of inducing others to engage in infringement of claim 1 of the '837 patent by using, selling, and/or offering to sell those filters, and/or combining those filters with VRS alarms.

64. Promold instructed customers as to how to use the ML3 Effluent Filters and how to accomplish such combination by inserting a VRS alarm into the ML3 Effluent Filters.

65. Promold did so with knowledge of the '837 patent, and also that using,

selling, and/or offering to sell those filters, and/or combining the ML3 Effluent Filters with VRS alarms constitutes infringement of the '837 patent.

66. Bear Onsite and/or other customers of Promold used, sold, and/or offered to sell and/or combined the ML3 Effluent Filters with VRS alarms in infringement of the '837 patent.

67. Promold's ongoing pattern of infringing acts has damaged, and is continuing to damage Plaintiffs, at least by making sales of products which otherwise would have been made by plaintiffs, and unless the Court preliminarily and permanently enjoins those acts, Promold will continue to cause Plaintiffs irreparable harm for which there is no adequate remedy at law, entitling Plaintiffs to injunctive relief under 35 U.S.C. § 283 and damages under 35 U.S.C. § 284.

COUNT VI – INDUCEMENT OF PATENT INFRINGEMENT AGAINST PREMIER

68. Plaintiffs incorporate paragraphs 1 through 67 as if fully set forth herein.

69. The ML3 Effluent Filter provides an effluent filter with integral mounting means for an accompanying alarm having locking lugs that interact therewith, in accordance with claim 1 of the '837 patent.

70. Premier, without Plaintiffs' authorization, is engaged in this judicial district and elsewhere in the United States in the manufacture and/or use and/or offering for sale and/or sale of effluent septic filters, including the ML3 Effluent Filters, with the specific intent of inducing others to engage in infringement of claim 1 of the '837 patent by using, selling, and/or offering to sell those filters, and/or combining those filters with VRS alarms.

71. Premier instructed customers as to how to use the ML3 Effluent Filters and how to accomplish such combination by inserting a VRS alarm into the ML3

Effluent Filters.

72. Premier did so with knowledge of the '837 patent, and also that using, selling, and/or offering to sell those filters, and/or combining the ML3 Effluent Filters with VRS alarms constitutes infringement of the '837 patent.

73. Bear Onsite and/or other customers of Premier used, sold, and/or offered to sell and/or combined the ML3 Effluent Filters with VRS alarms in infringement of the '837 patent.

74. Premier's ongoing pattern of infringing acts has damaged, and is continuing to damage Plaintiffs, at least by making sales of products which otherwise would have been made by plaintiffs, and unless the Court preliminarily and permanently enjoins those acts, Premier will continue to cause Plaintiffs irreparable harm for which there is no adequate remedy at law, entitling Plaintiffs to injunctive relief under 35 U.S.C. § 283 and damages under 35 U.S.C. § 284.

COUNT VII – INDUCEMENT OF PATENT INFRINGEMENT AGAINST LIFETIME

75. Plaintiffs incorporate paragraphs 1 through 74 as if fully set forth herein.

76. The Lifetime effluent filter provides an effluent filter with integral mounting means for an accompanying alarm having locking lugs that interact therewith, in accordance with claim 1 of the '837 patent, under the doctrine of equivalents.

77. Lifetime, without Plaintiffs' authorization, is engaged in this judicial district and elsewhere in the United States in the manufacture and/or use and/or offering for sale and/or sale of effluent septic filters, including the Lifetime Filters, with the specific intent of inducing others to engage in infringement of claim 1 of the '837 patent by using, selling, and/or offering to sell those filters, and/or combining those filters with VRS alarms.

78. Lifetime instructed customers as to how to use the Lifetime Filters and

how to accomplish such combination by inserting a VRS alarm into the Lifetime Filters.

79. Lifetime did so with knowledge of the '837 patent, and also that using, selling, and/or offering to sell those filters, and/or combining the Lifetime filters with VRS alarms constitutes infringement of the '837 patent.

80. Customers of Lifetime used, sold, and/or offered to sell and/or combined the Lifetime Filters with VRS alarms in infringement of the '837 patent.

81. Lifetime's ongoing pattern of infringing acts has damaged, and is continuing to damage Plaintiffs, at least by making sales of products which otherwise would have been made by plaintiffs, and unless the Court preliminarily and permanently enjoins those acts, Lifetime will continue to cause Plaintiffs irreparable harm for which there is no adequate remedy at law, entitling Plaintiffs to injunctive relief under 35 U.S.C. § 283 and damages under 35 U.S.C. § 284.

COUNT VIII – BREACH OF CONTRACT AGAINST HORNBACK

82. Plaintiffs incorporate paragraphs 1 through 81 as if fully set forth herein.

83. Hornback agreed not to compete with Polylok in the effluent septic filter business for a period of five years.

84. Hornback directly or indirectly owned, operated or was employed by Promold and/or Premier which manufactured or sold effluent septic filters which compete with Polylok's effluent septic filters during the non-compete period.

85. Polylok was damaged by Hornback's breach of contract.

COUNT IX – UNJUST ENRICHMENT AGAINST HORNBACK, PROMOLD AND PREMIER

86. Plaintiffs incorporate paragraphs 1 through 85 as if fully set forth herein.

87. Hornback, Promold and Premier have benefited from their unlawful use of Plaintiffs' intellectual property, know-how, and technology.

88. Hornback, Promold and Premier unjustly have not compensated Plaintiffs for this benefit to Plaintiffs' detriment.

89. As a direct result of these actions, Hornback, Promold and Premier have been unjustly enriched and have benefited to Plaintiffs' detriment in an amount not yet fully ascertained. In addition, Hornback's, Promold's and Premier's unjust enrichment has irreparably harmed and will continue to irreparably harm Plaintiffs in ways and extents that are not fully compensable in monetary damages.

COUNT X – COMMON LAW UNFAIR COMPETITION AGAINST BEAR ONSITE, HORNBACK, PROMOLD AND PREMIER

90. Plaintiffs incorporate paragraphs 1 through 89 as if fully set forth herein.

91. The aforementioned activities of Bear Onsite, Hornback, Promold and Premier constitute unfair competition in violation of the common law of the Commonwealth of Kentucky. Upon information and belief, Bear Onsite's, Hornback's, Promold's and Premier's, use of Plaintiffs' intellectual property, know-how, and technology was in bad faith and willful disregard of Plaintiffs' rights, with intent to divert customers and revenues from Plaintiffs.

92. The aforementioned actions and activities of Bear Onsite, Hornback, Promold and Premier have damaged Plaintiffs and caused and will continue to cause Plaintiffs irreparable harm unless and until such time as they are enjoined by this Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for this relief:

- A. A judgment that Bear Onsite, Promold, Premier, and Lifetime infringed the ‘837 patent;
- B. A judgment requiring Promold, Premier, and Lifetime to pay damages adequate to compensate Plaintiffs for their infringement of the ‘837 patent, pursuant to 35 U.S.C. § 284, including an accounting;
- C. A preliminary and permanent injunction barring Bear Onsite, Promold, Premier, and Lifetime and their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them, from further infringement of the ‘837 patent pursuant to 35 U.S.C. § 283;
- D. A preliminary and permanent injunction barring Hornback from further breaches of the Asset Purchase Agreement
- E. An award to Plaintiffs of damages caused by Hornback’s breach of the Asset Purchase Agreement;
- F. A preliminary and permanent injunction barring Hornback, Promold, and Premier from further acts of unfair competition;
- G. An award to Plaintiffs of damages caused by Hornback’s, Promold’s, and Premier’s acts of unfair competition;
- H. A preliminary and permanent injunction barring Defendants from the use of Plaintiffs’ intellectual property, know-how, and technology;
- I. An award to Plaintiffs of their costs in connection with this action;
- J. An award to Plaintiffs of pre-judgment and post-judgment interest on their damages;

K. An award to Plaintiffs of their reasonable attorney's fees in connection with this action; and

L. Such other and further relief as the Court deems just and proper.

/s/ Kevin M. Smith

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TRUST

CERTIFICATE OF SERVICE

I hereby certify that, on August 12, 2022, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Kevin M. Smith

Kevin M. Smith

COUNSEL FOR PLAINTIFFS