

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

<p>GP INDUSTRIES, LLC., a Nebraska Limited Liability Company, Plaintiff, vs. ERAN INDUSTRIES, INC., a Nebraska Corporation, and JAMES E. BACHMAN, an individual, Defendants.</p>	<p>Civil Action No: 8:06-CV-00050 Judge Joseph F. Bataillon Magistrate Judge Thomas D. Thalken AMENDED COMPLAINT</p>
<p>ERAN INDUSTRIES, INC., a Nebraska Corporation, Plaintiff, vs. GP INDUSTRIES, LLC., a Limited Liability Company, et al., Defendants.</p>	<p>No. 8:06-CV-00051</p>

COMES NOW the Plaintiff, GP Industries LLC., by and through its attorneys, and for its causes of action against the Defendants, Eran Industries, Inc. and James E. Bachman, state and allege as follows:

JURISDICTION, VENUE

1. This action arises under the patent laws of the United States. 35 U.S.C. § 1 et seq. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1338, 2201 and 2202. Supplemental jurisdiction over pendent state law claims for deceptive trade practices and

interference with a business relationship or expectancy arising from the same operative facts is conferred by 28 U.S.C. § 1367. Venue is proper in this District under 28 U.S.C. §§ 1391 and 1400.

PARTIES

2. Plaintiff, GP Industries, LLC., (“GP Industries”), is a Nebraska limited liability company organized and operating under the laws of the State of Nebraska with a principal place of business at 301 East Park Road, Elkhorn, Nebraska 68022. GP Industries is in the business of designing, developing, producing, manufacturing, marketing, selling and distributing rain gutter screening devices, equipment, accessories and services. GP Industries’ business is intended to be worldwide, including the State of Nebraska and this judicial District.

3. Upon information and belief, Defendant, Eran Industries, Inc. (“Eran”) is a Nebraska business entity having a principal place of business at 8702 S. 135th Street. LaVista, Nebraska 68138, and doing business in Nebraska and in this judicial district.

4. Upon information and belief, Defendant, James E. Bachman is an individual residing at 729 North 148th Avenue, Omaha, Nebraska 68154 and doing business in Nebraska and in this judicial district.

5. James Bachman and Eran Industries, Inc. shall be referred to collectively as “Defendants.” GENERAL ALLEGATIONS

6. On or about March 31, 1995 Gregory P. Albracht filed a patent application with the United States Patent Office (“PTO”) for Gutter Protection System.

7. United States Patent No. 5,557,891 (“ ‘891 Patent”) for Gutter Protection System issued September 24, 1996 to Albracht. Eran Industries manufactures and sells a rain gutter

screening product under the '891 Patent pursuant to an agreement between Eran Industries and Albracht.

8. In June 2005, GP Industries was formed to compete in the rain gutter screening business.

9. Since June 2005, GP Industries has been preparing to enter the market.

10. The principals of GP Industries and Eran Industries are involved in litigation in the District Court of Douglas County, Nebraska relating to the issues arising out of the employment and termination employment of those principals with Eran Industries.

11. In February 2006, Eran Industries, through counsel, began sending threatening letters to business contacts and potential customers of GP Industries ("Eran Threat Letters").

12. The Eran Threat Letters expressly mention GP Industries' planned entry into the market to manufacture and sell gutter covers.

13. The Eran Threat Letters allege infringement of the '891 Patent by GP Industries' intended device(s).

14. The Eran Threat Letters vow to "take all necessary steps to stop the infringement by GP Industries and anyone who purchases infringing gutter cover products from GP Industries."

15. The Eran Threat Letters threaten legal action against GP Industries: "Eran plans to focus its enforcement efforts against GP Industries and currently has no plans to sue any distributors or customers who cooperate with its efforts to stop GP Industries' infringement."

16. GP Industries did not know of an allegation of infringement the '891 Patent until GP Industries recently received a copy of the Eran Threat Letter.

17. After receiving the Eran Threat Letters, business contacts and potential customers of GP Industries have called GP Industries expressing concerns about doing business with GP Industries.

18. After receiving an Eran Threat Letter, at least one business contact of GP Industries has discontinued its business relationship with GP Industries.

19. The Eran Threat Letters have caused and will continue to cause damage and irreparable harm to GP Industries' business and business relations hips unless enjoined by this Court.

FIRST CLAIM FOR RELIEF

(Declaratory Judgment of Noninfringement -- 28 U.S.C. §§2201, et seq.)

20. GP Industries incorporates by reference paragraphs 1-19 of this Complaint as though set forth here in full.

21. There is a substantial and continuing justiciable controversy between Eran Industries and GP Industries as to the scope and infringement of the '891 Patent; namely, Eran's right to maintain suit against GP Industries for its claimed infringement and whether any of GP Industries' products actually infringe any valid claims of the '891 Patent.

22. The conduct of one or more of the Defendants in alleging patent infringement has been willful, in bad faith and/or in reckless disregard of the rights of GP Industries.

23. Pursuant to 35 U.S.C. 282, 28 U.S.C. §§2201 and 2202, GP Industries is entitled to a declaration that GP Industries' intended gutter cover device(s) does not infringe any claims of the '891 Patent.

SECOND CLAIM FOR RELIEF

(Declaratory Judgment of Invalidity of the '891 Patent)

24. GP Industries incorporates by reference paragraphs 1-23 of this Complaint as though set forth here in full.

25. GP Industries requests this Court to exercise its declaratory judgment powers and declare that the '891 Patent is invalid for failure to comply with the 35 U.S.C. §§ 102, 103 and 112 of the patent laws.

THIRD CLAIM FOR RELIEF

(Declaratory Judgment of Unenforceability of the '891 Patent)

26. GP Industries incorporates by reference paragraphs 1-25 of this Complaint as though set forth here in full.

27. Gregory P. Albracht, and his attorneys knew of the existence of the U.S. Patent No. 2,672,832 (“ ‘832 Patent”) as it was cited at least eight times in the prior art referenced by either U. S. Patent Office or the applicant, but never considered by the examiner.

28. Gregory P. Albracht, and his attorneys failed to disclose to the U.S. Patent and Trademark Office the '832 Patent which is material prior art known to Albracht and his attorneys during the prosecution of the '891 Patent, including but not limited to, the existence of the '832 Patent.

29. Albracht and his attorneys made the material omissions were made with the intent to mislead and/or deceive the Examiner.

30. The Examiner relied upon the material omission of the prior art by Albracht and his attorneys thus allowing the claims of the '832 Patent to issue, where the claims would have

otherwise remained rejected as unpatentable in the absence of the material misrepresentations and omissions.

31. GP Industries requests this Court to exercise its declaratory judgment powers and declare that pursuant to 37 C.F.R. § 1.56 the '891 Patent is unenforceable because of inequitable conduct practiced during the prosecution of the '891 Patent.

FOURTH CLAIM FOR RELIEF

(Tortious Interference with Business Relationship)

32. GP Industries incorporates by reference paragraphs 1-27 of this Complaint as though set forth here in full.

33. GP Industries has valid business relationships with third party vendors, customers and distributors.

34. Upon information or belief, the Defendants knew of the existing business relationships of GP Industries with third party vendors, customers and distributors.

35. Upon information or belief, the Defendants have actively searched out GP Industries existing business relationships with third party vendors, customers, and distributors.

36. Upon information or belief, the Defendants have interfered with the existing business relationships of GP Industries with third party vendors, customers and distributors by sending the Eran Threat Letters and by other statements and contacts.

37. Defendants interference was intentional and unjustified.

38. GP Industries has been damaged by such interference with existing business relationships.

39. GP Industries has been irreparably harmed by the unfair competition of one or more Defendants, and will continue to be irreparably harmed by one or more Defendants unless enjoined by this Court.

FIFTH CLAIM FOR RELIEF

(Tortious Interference with Business Expectancy)

40. GP Industries incorporates by reference paragraphs 1-35 of this Complaint as though set forth here in full.

41. GP Industries has valid business expectancy with third party vendors, customers and distributors.

42. Upon information or belief, the Defendants knew of the business expectancy of GP Industries with third party vendors, customers and distributors.

43. Upon information or belief, the Defendants have actively searched out GP Industries business expectancies with third party vendors, customers, and distributors.

44. Upon information or belief, the Defendants have interfered with the business expectancies of GP Industries with third party vendors, customers and distributors by sending the Eran Threat Letters and by other statements and contacts.

45. Defendants interference was intentional and unjustified.

46. GP Industries has been damaged by such interference with business expectancies.

SIXTH CLAIM FOR RELIEF

(Nebraska Deceptive Trade Practices Act)

47. GP Industries incorporates by reference paragraphs 1-42 of this Complaint as though set forth here in full.

48. In the Eran Threat Letters and through other statement and conduct, Defendants have disparaged the goods, services, and business of GP Industries by false and misleading representations of fact.

49. GP Industries has been irreparably harmed by the unfair trade practices of the Defendants and will continue to be irreparably harmed by Defendants unless enjoined by this Court.

SEVENTH CLAIM FOR RELIEF

(Tortious Interference with Economic Relations)

50. GPI by reference incorporates the preceding allegations of this counterclaim as though fully set forth herein.

51. Eran Industries has made representations and misrepresentations regarding the nature and quality of GPI's products and the scope and nature of at least one of their patents. Eran Industries' misrepresentations, which they have directed to GPI's current and potential franchisees has interfered with GPI's existing and perspective contractual and other economic relations with current and potential distributors and manufacturers.

52. Such communications are wrongful because they are not made in good faith, are made without proper investigation and knowing that Eran's '891 patent is invalid and/or does not cover the device being marketed and sold by Eran. As a result of such communications, GPI's contractual and/or other relations with its current and potential distributors and/or manufactures have been disrupted and GPI has been damaged thereby.

53. GPI has also suffered monetary damages and Eran Industries has been unjustly enriched by its improper conduct in an amount to be determined at trial.

54. The actions of Eran Industries, their agents, attorneys and/or employees have been willful and GPI is therefore also entitled to punitive damages in an amount to be determined at trial.

55. Wherefore, GPI requests relief as hereafter described in its prayer for relief.

EIGHTH CLAIM FOR RELIEF

(Injurious Falsehoods from Commercial Disparagements.)

56. GPI incorporates by reference the preceding allegations of this counterclaims as though fully set forth herein.

57. Eran Industries has made and published derogatory statements regarding GPI's products.

58. GPI is the publisher of these derogatory statements, either by its own statements or by the statements of its agents, including attorneys.

59. The statements made by GPI are provably false statements.

60. GPI has suffered pecuniary damages as a result of Eran's derogatory publications.

61. Wherefore, GPI requests relief as hereafter described in its prayer for relief.

NINTH CLAIM FOR RELIEF

(False Advertising and Unfair Competition Under the Lanham Act)

62. GPI incorporates by reference the preceding allegations of this counterclaims as though fully set forth herein.

63. Eran has made a false or misleading description of fact and/or misrepresentation in its advertisement about its own product and/or about GPI's product.

64. The misrepresentation is material to consumers and is likely to influence their purchasing decisions, and, in fact, has influenced purchasing decisions.

65. Eran's misrepresentations actually deceived or had a tendency to deceive a substantial segment of the audience.

66. Eran has placed the false and misleading statements in interstate commerce.

67. Eran's false or misleading statements are literally false. GPI has been injured as a result of Eran's misrepresentations.

68. Wherefore, GPI requests relief as hereafter described in its prayer for relief.

TENTH CLAIM FOR RELIEF

(Patent Mismarking and Misuse, 35 U.S.C. § 292)

69. GPI incorporates by reference the preceding allegations of this counterclaims as though fully set forth herein.

70. Eran Industries has misused at least one of its patents by publicly claiming patent protection for products and/or equipment that do not practice the invention as claimed in the '891 patent.

71. Eran Industries has advertised that certain products and/or equipment are patented by the '891 patent or other patents when they are not.

72. Eran's actions have materially benefited Eran, have been willful and/or intentional, and have been taken for the purpose of deceiving the public.

73. By such actions, Eran Industries has injured their competitors including GPI and misused their patent rights.

74. Eran Industries' conduct violates the provisions of 35 U.S.C. § 292.

75. Wherefore, GPI requests relief as hereafter described in its prayer for relief.

PRAAYER FOR RELIEF

Wherefore, defendant and counterclaimant GP Industries (“GPI”) prays for relief against plaintiffs Eran Industries as follows:

1. Entry of Judgment for HRI’s costs and reasonable attorneys’ fees, as may be allowed by law;
2. Permanent injunction against Defendants’ unlawful acts; and
3. For such other and further relief as the Court deems appropriate.

WHEREFORE, Plaintiff, GP Industries, prays for judgment as follows:

1. Declaratory Judgment that no devices of GP Industries infringe any asserted patent rights of Eran Industries or under which Eran Industries produces or markets any products.
2. Declaratory Judgment that the asserted claims of the ‘891 Patent are invalid.
3. Declaratory Judgment that the ‘891 Patent is unenforceable.
4. Judgment in favor of GP Industries finding that Defendants have tortiously interfered with GP Industries business relationships and expectancies.
5. Judgment in favor of GP Industries finding that Defendants have violated the Nebraska Deceptive Trade Practices Act.
6. For temporary or preliminary injunctive relief declaring that the gutter cover device(s) of GP Industries do not infringe the ‘891 Patent.

7. That, with respect to GPI's Fourth Claim for Tortious Interference, the Court order monetary damages in an amount to be determined at trial, along with punitive damages for Eran's tortious conduct;

8. That, with respect to GPI's Eighth Claim for Injurious Falsehood, the Court order monetary damages in an amount to be determined at trial, along with punitive damages;

9. That with respect to GPI's Ninth Claim for violations of the Lanham Act and Unfair Competition, the Court award damages pursuant to 15 U.S.C. §1117, as will be determined at trial;

10. That, with respect to GPI's Tenth Claim for False Mismarking and Misuse, for a \$500.00 fine for each and every violation of 35 U.S.C. §292, in an amount to be determined at trial;

11. An accounting for and an award of any and all ascertainable damages, to be determined at trial, related to the unlawful acts of one or more Defendants.

12. Corrective advertising.

13. . For reasonable attorney's fees.

14. For costs of suit incurred in his action.

15. For such further relief as the Court may deem proper.

REQUEST FOR TRIAL AND JURY DEMAND

Plaintiffs hereby request a trial in Omaha, Nebraska and a trial by jury on all claims.

Dated this 22nd day of May, 2006.

By: s/ Dax D. Anderson

Todd E. Zenger
Dax D. Anderson
KIRTON & MCCONKIE
1800 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
Phone: (801) 328-3600
Facsimile: (801) 321-4893
tzenger@kmclaw.com

Roger L. Schiffermiller
FRASER, STRYKER, MUESEY, OLSON,
BOYER & BLOCH, PC
500 Energy Plaza
409 So. 17th Street
Omaha, NE 68102
Phone: (402) 341-6000
Fax: (402) 341-8290
Email: rshiffermiller@fslf.com

Attorneys for Plaintiff
GP INDUSTRIES, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 22ND day of May, 2006, the foregoing AMENDED COMPLAINT was electronically filed with the Clerk of the Court, District of Nebraska, using the CM/ECF system, which sent notification of such filing to the following:

Paul R. Elofson
MCGILL GOTSDNIER,
WORKMAN & LEPP, PC, LLO
11404 West Dodge Road, Suite 500
Omaha, Nebraska 68154-2584

Michael B. Hurd
HOVEY WILLIAMS, LLP
2405 Grand Boulevard, Suite 400
Kansas City, Missouri 64108

s/ Margaret L. Carlson

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