

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

MODULAR CONCRETE DOCKS, L.L.C.,)
a Missouri limited liability company,)
)
Plaintiff,)
)
v.)
)
SHOREMASTER, INC.,)
a Minnesota corporation,)
)
)
Defendant.)

Case No. 07-4159-CV-C-NKL

**AMENDED COMPLAINT FOR DECLARATORY
JUDGMENT OF NONINFRINGEMENT**

COMES NOW plaintiff MODULAR CONCRETE DOCKS, L.L.C., a Missouri limited liability corporation, and for a declaratory judgment against defendant SHOREMASTER, INC., a Minnesota corporation, states and alleges as follows:

PARTIES, JURISDICTION AND VENUE

1. Modular Concrete Docks is a limited liability company formed under the laws of the State of Missouri having its principal place of business at 2 Allen Road, Eldon, Missouri 65026.
2. On information and belief, ShoreMaster, Inc. is a corporation formed under the laws of the State of Minnesota having its principal place of business at 215 South Cascade Street, Fergus Falls, Minnesota 56538.
3. This is an action for a judgment declaring that the claims of U. S. Patent No. 5,192,161 (“the ‘161 patent”) are not infringed and/or are invalid and/or are unenforceable,

pursuant to 35 U.S.C. §§ 102, 103, and 112 and that ShoreMaster, Inc. has engaged in unfair competition.

4. This Court has jurisdiction over the subject matter of this action because the claims arise from a patent infringement dispute, pursuant to 28 U.S.C. §§ 1331, 1338(a) and 1338(b). Modular Concrete Docks is in apprehension of suit by ShoreMaster against it or its customers and the Court has jurisdiction over this declaratory judgment action pursuant to 28 U.S.C. § 2201(a). The Court has supplemental jurisdiction as to Count III pursuant to § 1367.

5. ShoreMaster is subject to personal jurisdiction in Missouri under RSMO 506.500.1(1) and (3), and other subsections, because, as detailed below, ShoreMaster has transacted business, committed tortious acts, and/or caused damage to Modular Concrete Docks' business interests in the State of Missouri, such that ShoreMaster has sufficient, purposeful contacts therein.

6. Venue is proper under 28 U.S.C. §§ 1391(b), 1391(c).

ALLEGATIONS APPLICABLE TO ALL COUNTS

7. Modular Concrete Docks incorporates by reference the allegations set forth in the above paragraphs and states further:

8. Modular Concrete Docks, formed in 2003, specializes in the manufacture and sale of floating concrete modules which are used to assemble a variety of aquatic structures, including residential docks and wave breaks.

9. Jerry Mattson, President of Modular Concrete Docks, invented the above-referenced module technology ("the UniModule system") sold by Modular Concrete Docks.

10. Mr. Mattson obtained two patents relating to the UniModule System, U. S. Patent Nos. 6,199,502 (“the ‘502 patent”) and 6,971,327 (“the ‘327 patent”), which issued March 13, 2001 and December 6, 2005, respectively.

11. These patents disclose concrete modules with buoyant center cores which are interconnected with rods or cables to allow configuration in the form of docks and other floating structures.

12. On information and belief, ShoreMaster is an operating company of Otter Tail Corporation and an exclusive licensee of the ‘161 patent.

13. On information and belief, ShoreMaster specializes in the manufacture and sale of a variety of aquatic products, ranging from boat lifts and lift accessories to docks and dock accessories, marina systems and water toys.

14. On information and belief, the aquatic products sold by ShoreMaster utilize the technology disclosed in the ‘161 patent.

15. The ‘161 patent discloses floating structure units composed of reinforced concrete in box-like form, with wires interconnecting the units in a series suitable for use as a breakwater.

16. The ‘161 patent discloses recesses preferably extending a significant distance into each box unit and receiving a block or tube of polyurethane rubber, the middle portion of which bulges outward to function as a cushion between adjacent blocks.

17. The claims of the ‘161 patent include the limitation of recesses having a length between about 2 and 4 inches.

18. The aforementioned limitation was added to the claims of the ‘161 patent during its prosecution for the purposes of patentability.

19. The UniModule system, as disclosed in the '502 and '327 patents, does not include these limitations.

20. Nonetheless, on or about August 3, 2007, ShoreMaster sent correspondence to Modular Concrete Docks alleging infringement of the '161 patent by the UniModule system and demanding the cessation of further manufacture and sale of the UniModule system by Modular Concrete Docks.

21. Modular Concrete Docks denies infringement of the '161 patent and alleges the '161 patent is invalid. Modular Concrete Docks is in apprehension of suit by ShoreMaster against it or its customers. Accordingly, an actual case or controversy exists between Modular Concrete Docks and ShoreMaster.

22. Moreover, on or about August 3, 2007, ShoreMaster sent correspondence to Lake Management Enterprises, Inc., directed to the attention of Bridge Pointe Condominium, a customer of Modular Concrete Docks having its principal place of business in Missouri, concerning Bridge Pointe Condominium's ownership of a "wave attenuator" or wave break.

23. Upon information and belief, Lake Management Enterprises, Inc. is a corporation, with its principal place of business in Missouri, which manages business and property matters for various real estate enterprises in the Lake Ozark region.

24. The wave break is a product of Modular Concrete Docks, which was purchased by Bridge Pointe Condominium.

25. ShoreMaster's correspondence alleged that this product utilized the technology protected by the '161 patent, and that ShoreMaster, as the exclusive licensee of this patent, required written assurance within thirty (30) days of modification or disposal of the product in order to avoid infringement and thus avoid suit.

26. ShoreMaster's correspondence also provided that, in the alternative, Bridge Pointe Condominium would be permitted to negotiate a license fee with ShoreMaster in order to continue using the product.

27. On information and belief, ShoreMaster had no business relationship with BridgePointe Condominium prior to this correspondence.

28. On information and belief, ShoreMaster knew that Bridge Pointe Condominium was a customer of Modular Concrete Docks and sent the aforementioned correspondence with the intent to impair Modular Concrete Docks' existing contract with Bridge Pointe Condominium, as well as the intent to impair existing contracts and prospective business relations with other enterprises associated with Lake Management Enterprises, Inc.

COUNT I – NONINFRINGEMENT

29. Modular Concrete Docks incorporates by reference the allegations set forth in the above paragraphs and states further:

30. The UniModule System does not contain, literally or equivalently, each and every limitation of any individual claim of the '161 patent.

31. Modular Concrete Docks has not infringed any valid and enforceable claim of the '161 patent by any product they have made, used, sold or offered to sell, including the UniModule system, and therefore is entitled to a declaratory judgment of noninfringement.

32. Modular Concrete Docks is apprehensive of suit for infringement by ShoreMaster if plaintiff continues to make, use, sell or offer for sale the UniModule system.

COUNT II – INVALIDITY

33. Modular Concrete Docks incorporates by reference the allegations set forth in the above paragraphs and states further:

34. Each and every limitation of the claims of the '161 patent is anticipated and therefore invalid pursuant to 35 U.S.C. § 102.

35. The '161 patent's claimed invention would have been obvious to one skilled in the art at the time the invention was made, pursuant to 35 U.S.C. § 103.

36. The '161 patent fails to set forth the best mode contemplated by the inventor for carrying out the invention, pursuant to 35 U.S.C. § 112.

37. Therefore, the claims of the '161 patent are invalid under one or more provisions of 35 U.S.C. §§ 102, 103 and 112.

**COUNT III – UNFAIR COMPETITION IN VIOLATION OF
§ 32 OF THE LANHAM ACT, 15 U.S.C. § 1125(a)**

38. Modular Concrete Docks incorporates by reference the allegations set forth in the above paragraphs and states further:

39. ShoreMaster's representations alleging to plaintiff and its customers that the UniModule system infringes the '161 patent are false.

40. Upon information and belief, ShoreMaster made the aforementioned representations willfully and in bad faith, with knowledge or reckless disregard of their falsity.

41. Modular Concrete Docks has been or is likely to be damaged in an amount to be determined by the trier of fact as a direct or proximate result of ShoreMaster's aforementioned misconduct.

PRAYER FOR RELIEF

WHEREFORE, Modular Concrete Docks requests judgment in its favor and against ShoreMaster as follows:

(A) Declare United States Patent No. 5,192,161 has not been infringed by Modular Concrete Docks.

(B) Declare all claims of United States Patent No. 5,192,161 invalid.

(C) That preliminary and permanent injunctions issue enjoining ShoreMaster, their officers, directors, agents, employees, distributors, manufacturers and those in active concert or participation with them, from any further unfair competition;

(D) For Modular Concrete Docks' actual damages and ShoreMaster's profits in such amount as may be found for unfair competition;

(D) For prejudgment interest according to law;

(E) For Modular Concrete Docks' attorneys' fees, full costs, and disbursements in this action; and

(F) For such other and further relief as this Court deems just and proper.

DESIGNATION OF PLACE OF TRIAL

Plaintiff hereby designates Kansas City, Missouri as the place of trial of the above-styled matter.

Respectfully submitted,

/s/ James J. Kernell

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