

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

BIRD BRAIN, INC.,)	
a Michigan corporation,)	
)	
and)	
)	
PARASOL, LLC,)	
A Colorado corporation)	
)	
Plaintiffs,)	Civil Action No. 08-10502
)	
v.)	Hon. Patrick J. Duggan
)	
EVERGREEN ENTERPRISES, INC.,)	Mag. Judge Whalen
a Virginia corporation,)	
)	
)	
Defendant.)	JURY TRIAL DEMANDED
)	

Christopher A. Mitchell (P52734)
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Attorneys for Plaintiffs

FIRST AMENDED COMPLAINT

NOW COME Plaintiffs, BIRD BRAIN, INC. and PARASOL, LLC, by and through their counsel, to complain against Defendant EVERGREEN ENTERPRISES, INC. (hereafter "EVERGREEN") as follows:

THE PARTIES

1. Plaintiff BIRD BRAIN, INC. (hereafter "BBI"), is a corporation organized and existing under the laws of the State of Michigan, and having its principal place of business at 52 E. Cross Street, Ypsilanti, Michigan 48195.

2. Plaintiff PARASOL, LLC (hereafter "PARASOL"), is a corporation organized and existing under the laws of the State of Colorado, and having its principal place of business at 303 S. Broadway, #B390, Denver, Colorado 80209.

3. Upon information and belief, Defendant EVERGREEN is a Virginia corporation having its principal place of business at 5915 Midlothian Turnpike, Richmond, Virginia 23225. Upon information and belief, Defendant EVERGREEN is responsible for one or more of the manufacture/reproduction, importation into the United States, sale and/or offer for sale of certain products designated by it generally as "Hummingbird Feeders," and more particularly identified under Product Nos. 2HF021, 2HF022, 2HF023, 2HF024, 2HF025 and 2HF027, shown in attached Exhibit A (hereafter "the Accused Products"), which products are being actively sold in the United States, including within this judicial district.

JURISDICTION AND VENUE

4. This is an action for copyright infringement arising under the Copyright Act of 1976, 17 U.S.C. Section 101 *et. seq.*, and for patent infringement arising under the Patent Act, 35 U.S.C. Section 1 *et seq.*

5. Jurisdiction is founded upon 28 U.S.C. Sections 1331 and 1338, as this case arises under the federal Copyright and Patent Acts.

6. Venue in the Eastern District of Michigan is proper under 28 U.S.C. Sections 1391 and 1400, as Defendant “resides” in this judicial district.

GENERAL ALLEGATIONS

7. The allegations of Paragraphs 1 through 6 are incorporated herein by reference as if set forth in full.

8. Plaintiff BBI is in the business of manufacturing and selling to retailers nationwide unique and original products for lawn, garden and home. Among the said products of BBI are certain glass hummingbird feeders which BBI designates as the “Charisma” (hereafter referred to as “the Charisma Product”).

9. The Charisma Product comprises a copyrighted work which is, pursuant to the Copyright Act, 17 U.S.C. Section 101 *et seq.*, the subject of a copyright registration, Reg. No. VA 1-243-843, made with the United States Copyright Office and having an effective date of April 11, 2005 (hereafter the “Copyrighted Work”). A copy of this registration is attached as Exhibit B.

10. Plaintiff BBI is the owner of the Copyrighted Work.

11. Plaintiff BBI is the exclusive licensee of the invention claimed in United States Patent No. 6,672,249, entitled “Extended Hummingbird Feeder Tube” and issued January 6, 2004, in the name of Plaintiff Parasol, LLC, the present assignee (hereafter “the ‘249 patent). A copy of the ‘249 patent is attached as Exhibit C.

12. The ‘249 patent is valid and subsisting.

13. Plaintiff BBI is the exclusive licensee of the invention claimed in United States Patent No. 6,499,430, entitled “Extended Hummingbird Feeder Tube” and issued December 31, 2002, in the name of Plaintiff Parasol, LLC, the present

assignee (hereafter “the ‘430 patent). A copy of the ‘430 patent is attached as Exhibit D.

14. The ‘430 patent is valid and subsisting.

COUNT I
Copyright Infringement

15. The allegations of Paragraphs 1 through 14 are incorporated into this count by reference as if set forth in full.

16. Defendant EVERGREEN had access to the Charisma Product embodying the Copyrighted Work.

17. Subsequent to having seen and/or acquired the Charisma Product, Defendant EVERGREEN made, or had made for it, the Accused Products (Exhibit A), imported the Accused Products into this country, and is now actively displaying and selling the Accused Products in the United States, including within this judicial district.

18. The Accused Products were copied from BBI’s Charisma Product by Defendant EVERGREEN, or at its direction, without Plaintiff BBI’s consent or authorization, and are now being reproduced, imported into, displayed and distributed in this country by Defendant EVERGREEN and/or its agents, all in violation of Plaintiff BBI’s exclusive rights in the Copyrighted Work.

19. Defendant’s said infringement of Plaintiff BBI’s exclusive rights in the Copyrighted Work was and is willful and deliberate, being undertaken with full notice of the copyright in the BBI Charisma Product.

20. The aforesaid infringement of Plaintiff BBI's exclusive rights in the Copyrighted Work has deprived Plaintiff BBI of sales of its own products, including its Charisma Product, has in other respects caused irreparable harm to Plaintiff, and will continue to cause Plaintiff BBI added injury and loss of profits unless said infringement is enjoined by this Court. The true extent of Plaintiff BBI's harm by reason of the complained-of infringement cannot be adequately determined without an accounting.

COUNT II
Patent Infringement

21. The allegations of Paragraphs 1 through 20 are incorporated into this count by reference as if set forth in full.

22. Defendant EVERGREEN has infringed the '249 and/or '430 patents by engaging in one or more of the manufacture, importation into this country, offering for sale, and/or selling of the Accused Products (Exhibit A), which products infringe one or more claims of the '249 and/or '430 patents.

23. Defendant's said infringement of the '249 and/or '430 patents was and is willful and deliberate, being undertaken with full notice of the '249 and/or '430 patents.

24. The aforesaid infringement of the '249 and/or '430 patents has deprived Plaintiffs of sales of their own products, including BBI's Charisma Product, has in other respects caused irreparable harm to Plaintiffs, and will continue to cause Plaintiffs added injury and loss of profits unless said infringement is enjoined

by this Court. The true extent of Plaintiffs' harm by reason of the complained-of infringement cannot be adequately determined without an accounting.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand judgment against Defendant EVERGREEN, and request relief from the complained-of infringements as follows:

- A. That this Court adjudge the '249 and/or '430 patents valid and infringed by the Accused Products;
- B. That Defendant and its agents, servants, employees, officers, subsidiaries and affiliates, and all persons and organizations in active concert or in participation therewith, be preliminarily and/or permanently enjoined from infringing the Copyrighted Work, the '249 patent and/or the '430 patent;
- C. That Defendant be required to deliver upon oath, to be impounded during the pendency of this action, and to be destroyed or otherwise disposed of pursuant to judgment thereto, all copies of the Accused Products made in violation of Plaintiff BBI's exclusive rights in the Copyrighted Work, as well as all molds, plates, matrices, masters, or other means by which such copies of the Accused Products;
- D. That Defendant be required to account for all gains, profits and advantages derived from their complained-of acts of infringement, to compensate Plaintiffs for such damages as they have sustained from the complained-of infringement, to pay damages to Plaintiffs caused

by the infringement of the '249 and/or '430 patents as provided for in 35 U.S.C. Section 284, and to pay such other damages as to this Court shall appear proper in accordance with the law;

- E. That Defendant be directed to file with this Court and to serve upon counsel for Plaintiffs within thirty days after entry of any preliminary and/or permanent injunction a written report, under oath, setting forth in detail the manner in which Defendant has complied with the relief specified above;
- F. That Defendant pay to Plaintiffs the costs of this action, including attorneys' fees; and
- G. Such other relief as justice may require.

JURY TRIAL DEMANDED

Plaintiffs demand a trial by jury on all issues so triable.

Respectfully submitted,

s/ *Chris. Mitchell* 1

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Dated: 18 March 2008

CERTIFICATE OF SERVICE

I, Christopher A. Mitchell, hereby certify that on 18 March 2008 a copy of the foregoing First Amended Complaint was filed electronically with the Clerk of the Court using the ECF system, and was further served via First Class Mail on counsel for Defendant Evergreen at the following address:

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Signed,

s/ *Chris Mitchell*

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Dated: 18 March 2008