

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

MT INDUSTRIES, INC.,)	Civil Action No.: 1:11-cv-123
)	
Plaintiff,)	Judge:
)	
-vs-)	MT INDUSTRIES, INC.’S
)	COMPLAINT FOR DECLARATORY
ALLURE INSTITUTE, LLC,)	RELIEF
)	
Defendant.)	JURY TRIAL DEMANDED

Plaintiff MT Industries, Inc., for its Complaint for Declaratory Relief against Defendant Allure Institute, LLC, alleges as follows:

THE PARTIES

1. Plaintiff MT Industries, Inc. (“MT”) is a corporation organized under the laws of the state of Delaware with a principal place of business at 8909 S. Freeway Drive, Macedonia, OH 44056.

2. Upon information and belief, Defendant Allure Institute, LLC (“Allure”) is a limited liability company organized under the laws of Ohio with a principal place of business at 9348 Mercantile Drive, Mentor, Ohio 44060.

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction of this action under 28 U.S.C. § § 1331, 1338(b), 2201 and 2202, and the Patent Laws of the United States, 35 U.S.C. § § 271 *et seq.*

4. This Court further has jurisdiction pursuant to 28 U.S.C. § 1338(b) and § 1367(a) for state law claims.

5. This Court has personal jurisdiction over Defendant by virtue of the transaction of and solicitation of business within the State of Ohio, within this judicial district and elsewhere.

6. Venue is proper in this judicial district under 28 U.S.C. §§ 1391 and 1400(b).

BACKGROUND FACTS

7. MT is a leader in the development, manufacture, and marketing of sunless tanning products and equipment, including among others, its VersaSpa® system.

8. On information and belief, Defendant markets a line of sunless tanning equipment called Runway Tan.

9. On August 4, 2009, the United States Patent & Trademark Office issued U.S. Patent No. 7,569,037 (the '037 Patent) entitled "Atomizing Spray Apparatus and Method." Ex. A (attached). The '037 Patent, which generally relates to sunless tanning equipment, names Paul Spivak as sole inventor. On information and belief, Defendant is a company directly or indirectly affiliated with Mr. Spivak and owns the '037 Patent by assignment from Mr. Spivak.

10. On August 19, 2010, Defendant filed a Complaint against MT in the Cuyahoga Court of Common Pleas in Cleveland, Ohio. Defendant filed an Amended Complaint on October 27, 2010. The case (No. CV 10-734672) is assigned to Judge Steven J. Terry (hereafter "the State Court Action").

11. Among other allegations in the State Court Action, Defendant asserts that MT infringes the '037 Patent by marketing MT's VersaSpa® system. On information and belief,

these allegations were made without investigation and without comparing the claims of the '037 Patent to the VersaSpa® system.

12. Defendant also asserts in the State Court Action that MT falsely marked directly or in advertisements the VersaSpa® system as patented in violation of U.S. patent laws, despite Defendant's awareness that MT is and has been a licensee of third party patents covering the VersaSpa® system.

13. Patent infringement and false marking are not justiciable in the State Court Action as they are matters over which federal courts have exclusive jurisdiction.

14. Since filing the State Court Action, Mr. Spivak has contacted at least one of MT's customers (Infinity Sun Corp., a distributor of the VersaSpa® system) multiple times in November and/or December 2010 and has made threats of litigation and knowingly false and misleading statements concerning MT and/or its products with the intent of interfering with MT's contracts and business relationships, including statements to the effect that MT's products were not developed by it and/or are copies of Mr. Spivak's designs. On information and belief, Mr. Spivak had knowledge of the relationship between MT and Infinity Sun Corp. at the time the statements were made.

15. On information and belief, Mr. Spivak has also contacted other customers of MT on behalf of Allure and, with knowledge of MT's relationships, made similar threats of litigation and knowingly false and misleading statements concerning MT and/or its products with the intent of interfering with MT's contracts and business relationships with such customers.

16. Mr. Spivak's actions were improper inasmuch as Allure had no justification, privilege, or cause to interfere with MT's business and relationships.

COUNT I
(Declaratory Judgment Of Non-Infringement)

17. All the above paragraphs are incorporated herein by reference.

18. There is an actual and justiciable controversy between the parties regarding the alleged infringement of the '037 Patent.

19. Plaintiff has not infringed, and is not now infringing, any valid claim of the '037 Patent by making, using, offering for sale, or selling the VersaSpa® system.

COUNT II
(Declaratory Judgment Of Invalidity)

20. All the above paragraphs are incorporated herein by reference.

21. There is an actual and justiciable controversy between the parties regarding the validity of one or more claims of the '037 Patent.

22. One or more claims of the '037 Patent is invalid under the relevant patent statutes and regulations, including at least under 35 U.S.C. § 103(a) as a combination of elements known in the prior art that would have been obvious to a person of ordinary skill in the art.

COUNT III
(Declaratory Judgment Of No False Patent Marking)

23. All the above paragraphs are incorporated herein by reference.

24. There is an actual and justiciable controversy between the parties regarding MT's alleged false marking of the VersaSpa® system directly or in advertisements.

25. Plaintiff has not violated 35 U.S.C. § 292 in its advertisements for the VersaSpa® system or through patent identifications on the VersaSpa® system itself because the VersaSpa® system is covered by a claim or claims of patents licensed to Plaintiff and/or because any use of the word "patent" was not for the purpose of deceiving the public.

COUNT IV

(Tortious Interference With Contracts And Business Relationships)

26. All the above paragraphs are incorporated herein by reference.

27. Allure, through Mr. Spivak, contacted Infinity Sun multiple times in November 2010 and/or December 2010.

28. In one or more of his communications with Infinity Sun in November 2010 and/or December 2010, Mr. Spivak made threats of litigation and knowingly made false and misleading statements concerning MT and/or its products with the intent of interfering with MT's contracts and business relationships, including statements to the effect that MT's products were not developed by it and/or are copies of Mr. Spivak's designs.

29. MT suffered harm as a result of Mr. Spivak's communications with Infinity Sun in November 2010 and/or December 2010.

30. On information and belief, Allure has knowledge of the relationship between MT and Infinity Sun.

31. On information and belief, Mr. Spivak has knowledge of the relationship between MT and Infinity Sun.

32. Mr. Spivak had knowledge of the relationship between MT and Infinity Sun when Mr. Spivak communicated with Infinity Sun in November 2010 and/or December 2010, as described above.

33. As a result of Allure's wrongful conduct, MT is suffering and will continue to suffer immediate and irreparable harm for which there is no adequate remedy at law unless Allure is enjoined.

COUNT V
(Violation of Ohio Deceptive Trade Practices Act)

34. All the above paragraphs are incorporated herein by reference.

35. Allure's false and misleading statements concerning MT and/or its products constitute unfair or deceptive trade practices or acts within the meaning of the Ohio Deceptive Trade Practices Act, codified at Ohio Revised Code § 4165.02(A)(10) because Allure has disparaged the goods and business of MT by Allure's false representations of fact.

36. MT has been injured as a result of Allure's unlawful and unauthorized deceptive trade practices by lessening of the goodwill that MT's products and business have with the buying public.

37. As a result of Allure's unlawful and unauthorized deceptive trade practices, Allure has caused and will continue to cause substantial and irreparable harm to MT and to the public for which there is no adequate remedy at law. Allure has unjustifiably benefited from said unlawful acts and will continue to carry out such unlawful conduct and be unjustly enriched unless enjoined by this Court.

COUNT VI
(Unfair Competition)

38. All the above paragraphs are incorporated herein by reference.

39. The aforesaid conduct of Allure constitutes unfair competition under the common law of the State of Ohio.

40. On information and belief, Allure's acts of unfair competition have been willful.

41. MT has been injured as a result of the foregoing acts by causing MT to lose sales or by lessening of the goodwill that MT products enjoy with the buying public.

42. As a result of Allure's acts of unfair competition, Allure has caused and will continue to cause substantial and irreparable harm to MT and to the public for which there is no adequate remedy at law. Allure has unjustifiably benefited from said unlawful acts and will continue to carry out such unlawful conduct and be unjustly enriched unless enjoined by this Court.

**COUNT VII
(Slander Of Title / Trade Libel)**

43. All the above paragraphs are incorporated herein by reference.

44. Allure's allegations of patent infringement and false patent marking, Allure's false and misleading statements communicated to Infinity Sun, and, on information and belief, Allure's false and misleading statements communicated to other customers of MT, were, on information and belief, uninvestigated and/or known by Allure to be false or misleading when alleged or made.

45. Allure's intentional activities constitute acts of slander of title and trade libel under the common law of the State of Ohio.

46. As a result of Allure's slander of title and trade libel, Allure has caused and will continue to cause substantial and irreparable harm to MT, for which there is no adequate remedy at law. Allure has unjustifiably benefited from said unlawful acts and will continue to carry out such unlawful conduct unless enjoined by this Court.

47. Allure's conduct has been wanton, reckless, malicious, and/or oppressive, entitling MT to an award of punitive damages.

PRAYER FOR RELIEF

WHEREFORE, MT prays that the Court:

- A. Declare that MT has not infringed, and is not now infringing, any valid claim of the '037 Patent by making, using, offering for sale, or selling the VersaSpa® system;
- B. Declare that one or more of the claims of the '037 Patent is invalid;
- C. Declare that MT has not violated 35 U.S.C. § 292 in its advertisements for the VersaSpa® system or through patent identifications on the VersaSpa® system;
- D. Enter judgment that Defendant has wrongfully interfered with MT's contracts and business relationships and enjoin Defendant from continuing same;
- E. Enter judgment that Defendant has violated O.R.C. § 4165.02 (Deceptive Trade Practices) and enjoin Defendant from continuing same;
- F. Enter judgment that Defendant engaged in unfair competition under Ohio law and enjoin Defendant from continuing same;
- G. Enter judgment that Defendant committed actionable slander of title and trade libel against MT and enjoin Defendant from continuing same;
- H. Award all actual damages, and punitive and exemplary damages as allowed by law;
- I. Award MT the costs of this action with pre-judgment interest, and MT's attorneys' fees; and
- J. Order such other and further relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury of all issues so triable in this action.

Dated: January 19, 2011

Respectfully submitted,

/s/ Bryan A. Schwartz

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