

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
WACO DIVISION**

**CLARKE PRODUCTS, INC.**

**Plaintiff,**

**v.**

**THE MONILISA COLLECTION, INC.,  
AND LISA ARDEN,**

**Defendants.**

**CIVIL ACTION NO. 6-11-cv-00055**

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**ORIGINAL COMPLAINT FOR DECLARATORY JUDGMENT**

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Clarke Products, Inc. (“Clarke”) files this suit against The MoniLisa Collection, Inc. (“MoniLisa”) and Lisa Arden (“Arden”) (MoniLisa and Arden are collectively referred to as the “Defendants”), and shows as follows:

**I.  
PARTIES**

1. Clarke is a corporation organized under the laws of the State of Texas with its principal place of business in the State of Texas.

2. MoniLisa is a corporation organized under the laws of the State of Florida and has its principal place of business and home office at 5416 Trimble Park Road, Mount Dora, Florida 32757. MoniLisa engages in business in Texas but has not designated or maintained an agent for service of process as required by statute. Accordingly, pursuant to Texas Civil Practice & Remedies Code, Section 17.044, MoniLisa may be served through the Texas Secretary of State.

**TO THE TEXAS SECRETARY OF STATE:** In accordance with Texas Civil Practice & Remedies Code §§17.044 and 17.045, you are directed to serve process on the nonresident

defendant under the Texas Long-Arm Statute at the home office address provided above. Please return a Whitney certificate to Plaintiff's counsel following service.

3. Arden is an individual who resides at 5416 Trimble Park Road, Mount Dora, Florida 32757. Arden engages in business in Texas but has not designated or maintained an agent for service of process as required by statute. Accordingly, pursuant to Texas Civil Practice & Remedies Code, Section 17.044, Arden may be served through the Texas Secretary of State.

TO THE TEXAS SECRETARY OF STATE: In accordance with Texas Civil Practice & Remedies Code §§17.044 and 17.045, you are directed to serve process on the nonresident defendant under the Texas Long-Arm Statute at the home office address provided above. Please return a Whitney certificate to Plaintiff's counsel following service.

## **II.** **JURISDICTION AND VENUE**

4. This Court has personal jurisdiction over each of MoniLisa and Arden because each of the Defendants have regularly and continuously conducted business in and from Texas, they have purposefully availed themselves of the benefits and protections offered by the State of Texas, and they have otherwise directed their tortious activities towards Clarke in Texas with the purpose of harming Clarke in Texas.

5. This Court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1338 as this is an action arising, in part, under the patent laws of the United States, Title 35 of the United States Code.

6. Additionally, an actual and justiciable controversy exists between Clarke and Defendants concerning Clarke's non-infringement of the claims in an alleged patent. The Court therefore has subject matter jurisdiction under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

7. The Court also has subject matter jurisdiction over this lawsuit pursuant to 28 U.S.C. § 1332. Clarke is a citizen of the State of Texas by reason of the fact that it is organized under the laws of the State of Texas, and its principal place of business is located in Texas. MoniLisa is a citizen of Florida by reason of the fact that it is a corporation which is organized under the laws of the State of Florida and which has its principal place of business in Florida. Arden is a citizen of the State of Florida by reason of the fact that she is an individual who resides in the State of Florida. Accordingly, there is complete diversity of citizenship between the parties to this suit. Additionally, the amount in controversy exceeds \$75,000.00, exclusive of interests and costs. The court therefore has subject matter jurisdiction over this lawsuit pursuant to 28 U.S.C. § 1332(a)(1).

8. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claim alleged herein occurred in this District.

### **III.** **FACTUAL BACKGROUND**

9. Clarke is in the business of designing and manufacturing a wide selection of acrylic composite whirlpool, air massage, total massage and soaker bathtubs, as well as acrylic composite showers and acrylic kitchen, bath and laundry sinks. Clarke manufactures these products at its plant in Waco, Texas.

10. Among the different types of bathtubs Clarke designs and manufactures are walk-in bathtubs. Very generally, a walk-in bathtub is a bathtub designed with a door in the side that allows the bather to walk-into the tub rather than having to raise his or her legs to climb over the side of the tub. Though not limited to such, walk-in bathtubs are especially beneficial to those who have an inability or difficulty getting into and out of regular bathtubs without assistance.

11. Since approximately 2006, Clarke has manufactured walk-in bathtubs as an original equipment manufacturer, or “OEM.” Clarke also began selling eight (8) different models of its own walk-in bathtubs in 2008, each of which it markets under the brand name Passages™. One of Clarke’s Passages™ walk-in bathtubs is depicted in the photograph here:



12. In January 2010, well after Clarke had first designed, manufactured and sold its first walk-in bathtub, the Defendants approached Clarke regarding the possibility of manufacturing a walk-in bathtub. The Defendants advised that they would be calling the bathtub they wanted Clarke to manufacture the “Olivia.”

13. The Defendants presented Clarke with drawings for a gel coated walk-in bathtub they called the “Alexander.” The Defendants represented to Clarke that they owned the exclusive rights to two elements found in the “Alexander” – an approximately 5° upward angle, or rise, at the front edge of the tub seat (the “Seat Lip”), and an approximately 1” deep by 1” wide drain trough on each side of the tub seat (the “Seat Drain”). The Defendants also represented that the Seat Lip and the Seat Drain were registered, thereby indicating that they had patents on these elements of the bathtub.

14. Defendants claimed to have paid another manufacturer over \$50,000 to make the tooling required to manufacture the “Alexander” bathtub, and further claimed that such manufacturer failed to provide any tooling or any product for the payment made.

15. Clarke reviewed the drawings Defendants had for the “Alexander” bathtub and advised Defendants that certain elements of the “Alexander” branded bathtubs could not be duplicated using the acrylic plastics and the vacuum forming process utilized by Clarke. Defendants then asked Clarke to prepare drawings for a walk-in bathtub that could be manufactured using acrylic plastics and the vacuum forming process. In doing so, the only two elements of the “Alexander” branded bathtubs that Defendants specifically asked to be retained on the bathtubs to be branded as “Olivias” were the Seat Lip and the Seat Drain.

16. In February 2010, Clarke and MoniLisa entered into a written agreement whereby Clarke agreed to manufacture and MoniLisa agreed to purchase bathtubs that would be branded as “Olivia” bathtubs. The agreement also provided that MoniLisa would purchase Clarke’s Passages™ bathtubs.

17. The contract incorporated the representations from Defendants the “Olivia” brand bathtub was registered, indicating that there were existing patents on it, and that MoniLisa was the exclusive owner of such registrations. Based on these representations from the Defendants, a provision was put into the contract acknowledging MoniLisa’s alleged exclusive ownership of the Seat Lip and Seat Drain elements of the “Olivia” branded bathtub.

18. Defendants agreed to pay Clarke for its costs to obtain the tooling that would be used to manufacture the “Olivia” branded bathtubs and which would contain the allegedly proprietary Seat Lip and Seat Drain elements. Clarke thereafter obtained the tooling needed to

manufacture the “Olivia” branded bathtubs. The cost to Clarke for the tooling was \$44,893.10. Clarke invoiced MoniLisa for these costs as agreed upon.

19. Subsequently, Clarke determined that the manufacturing process would be unable to consistently form the Seat Drain. Clarke and MoniLisa accordingly agreed that the “Olivia” branded bathtubs would be manufactured without the Seat Drain, and the tooling was thereafter modified to take out the Seat Drain. The modifications for the Seat Drain were made at no additional charge to Defendants.

20. By April 2010, the amounts MoniLisa owed to Clarke for the tooling had become seriously past due. Accordingly, the parties modified their agreement by entering into amended written contract. MoniLisa acknowledge in the amended contract that it owed past due amounts to Clarke, and agreed to pay Clarke an additional \$1,000 for each bathtub it ordered in the future from Clarke, until the past due amount was paid in full. That amended written agreement was signed by Clarke and MoniLisa on or about April 26, 2010.

21. Subsequent to the signing of the amended contract, Clarke manufactured only four (4) “Olivia” branded bathtubs. The first of these bathtubs was provided to The International Association of Plumbing and Mechanical Officials (“IAPMO”), an organization which certifies that the production process, among other things, bathtubs, passes its standards. This certification was necessary for the “Olivia” branded bathtubs to be generally marketable. IAPMO tested the bathtub and destroyed it as part of its testing process. IAPMO then certified that the manufacturing process for that bathtub passed its standards.

22. The second of the four “Olivia” branded bathtubs was used in an Allied Building show, and was then shipped back to Clarke’s plant in Waco where it currently remains. The third bathtub was sold and shipped by MoniLisa to a customer. Defendants subsequently took

that bathtub back from the customer and re-sold and shipped it to a company called Zon Walk-in Baths, LLC (“Zon”). The fourth bathtub was shipped by Clarke, at its sole expense, to a man in Canada diagnosed with cancer, after MoniLisa’s sales agent refused to send in the money that the customer had paid for the purchase of an “Olivia” branded bathtub. Clarke never received payment from Defendants, Defendants’ sales agent, or anyone else for the fourth bathtub. Indeed, Clarke never received payment for any of the three “Olivia” branded bathtubs that it manufactured after the bathtub passed IAPMO’s standards. The total amount owed by MoniLisa to Clarke for these three bathtubs is \$6,870.00.

23. Additionally, MoniLisa ordered and Clarke sold multiple “Passages™” walk-in bathtubs to MoniLisa. Upon information and belief, MoniLisa received payment for these bathtubs from its customers. However, MoniLisa never paid Clarke for any of the Passages™ bathtubs it received. The amount due from MoniLisa for these bathtubs is \$9,012.05.

24. For several months following the initial production of the “Olivia” branded bathtubs, Defendants marketed the “Olivia” branded bathtubs. Such marketing included a website located at the Domain [www.walkinbathtubs.com](http://www.walkinbathtubs.com), which Domain is owned by Arden. Among the representations made by Defendants regarding the “Olivia” branded bathtubs was that Defendants had a patent application pending before the United States Patent and Trademark Office. Defendants went so far as to make the following express representation - “The Comfort Seat: Patent Pending #3792958.” This was an identical representation that Defendants had been also been making regarding the “Alexander” branded bathtub.

25. In reality, neither of the Defendants owned any patents on any element of the “Olivia” branded bathtubs, the “Alexander” branded bathtubs, or on any bathtub. On information and belief, prior to mid-February 2011, neither had ever even filed a patent

application on the Seat Lip, the Seat Drain or on any other aspect of the “Olivia” branded bathtub, the “Alexander” branded bathtub, or on any other bathtub. Indeed, the serial number quoted by the Defendants as applying to the “Olivia” branded bathtubs and to the “Alexander” branded bathtubs does not and cannot exist as a patent pending number under the USPTO’s patent application numbering system. While a patent does exist with the number used by the Defendants, that patent was issued in 1974, and is for “an apparatus for operating a combustion device,” clearly not applying to any bathtub.

26. The number being used by the Defendants was a made up number. Defendants were falsely and fraudulently representing to Clarke, the public, and others that they had a patent and/or a patent pending on the Seat Lip and Seat Drain, all in an effort to preclude Clarke and others from incorporating an element into their bathtubs that was identical to or similar to the Seat Lip and/or Seat Drain, and to otherwise mislead the public that the “Olivia” branded bathtubs and the “Alexander” branded bathtubs had some quality or characteristic that no other bathtub had or would have in the near future.

27. As additional time passed following the signing of the amended contract, it became increasingly obvious to Clarke that MoniLisa did not have the financial capability to order the quantity of bathtubs that MoniLisa represented it would purchase from Clarke. Indeed, at one point MoniLisa forwarded information to Clarke which advised that the price Defendants were asking for the “Olivia” branded bathtub was clearly too high to be appealing to the ordinary market for walk-in bathtubs. The source of the information even advised Defendants that he was giving them “a reality check” regarding the ability to sell the “Olivia” branded bathtubs.

28. On information and belief, in September 2010 Defendants began discussing a transaction involving the sale of MoniLisa or certain of its assets to Zon. Clarke cooperated with



requests from MoniLisa to provide information to Zon and to allow Zon to view Clarke's manufacturing process. MoniLisa also advised Clarke that if the transaction concluded, Zon would pay the amounts MoniLisa owed to Clarke. Such a prospect was clearly appealing to Clarke. Not only would it be paid the amount that had long been outstanding from Defendants, MoniLisa would have a better source of capital from which to purchase bathtubs. However, Clarke later learned that the transaction between MoniLisa and Zon was not consummated. The amounts due from MoniLisa accordingly were not paid.

29. When the transaction between MoniLisa and Zon did not close, what had been a concern of Clarke became an alarm – that MoniLisa would not be able to pay the amounts due to Clarke in any reasonable time frame. Additionally, throughout the term of the relationship between Clarke and Defendants, Clarke came to see that Arden's behavior was increasingly erratic, often unprofessional and generally inconsistent with the ability to run a viable business. Clarke accordingly became very concerned about the viability and organizational stability of MoniLisa.

30. Accordingly, on October 15, 2010, Clarke made written demand upon MoniLisa to pay, or to make arrangements with Clarke to pay, the amounts due. The amount stated in the demand was \$53,905.15. However, that amount did not include the sums owed by MoniLisa on the three "Olivia" branded bathtubs ordered by but never paid for by MoniLisa. Accordingly, the total amount due from MoniLisa under the written contract, excluding interest and attorneys' fees, is \$60,775.15 (the "Debt").

31. MoniLisa made no effort thereafter to pay or to make suitable arrangements to pay any of the money owed to Clarke. Accordingly, on November 5, 2010, Clarke advised MoniLisa that it was terminating its contract with MoniLisa, as allowed by their contract. The Debt

remains due and owing as of today, together with accrued but unpaid interest at the contractually agreed upon rate of 12% per annum since April 26, 2010.

32. Not long after Clarke terminated the contract, Defendants began stating as a fact that Clarke caused Zon not further pursue the transaction between MoniLisa and Zon, despite the fact that such transaction would have benefited Clarke. Defendants further immediately began a course of action to cause harm to Clarke by defaming it, its products and its employees. Among other things, Defendants began posting written statements on MoniLisa's website located at the Domain owned by Arden which are false and which were designed to damage and have damaged Clarke's reputation.

33. On February 14, 2011, Defendants' counsel sent correspondence to Clarke (the "Demand Letter") in which he continued Defendants' claim that MoniLisa had a registered patent on the "Olivia" branded bathtub, though he failed to identify the patent or any specific element covered by the alleged patent. Defendants' counsel otherwise claimed that Defendants were the exclusive owners of the "Olivia" branded bathtub, though still failing to identify any specific element that was exclusively owned by Defendants. No information on the alleged registered patent was provided in the letter.

34. The letter also claimed, without reference to any facts based in reality, that Clarke had sold "countless" bathtubs to Zon, and that such sales allegedly constituted "infringement of MoniLisa's intellectual property rights." Again, the allegations failed to identify with any specificity what alleged intellectual property rights were being infringed upon. The letter further claimed that MoniLisa had causes of action for, among others, "intellectual property infringement" against Clarke for selling bathtubs to Zon, and then demanded the payment of \$1,000,000 from Clarke to settle the Defendants' alleged claims against Clarke.

35. Clarke responded to the Demand Letter, through their counsel, advising that it could find no patent issued to Arden, no assignment of any patent to MoniLisa, nor any pending patent application. Clarke invited Defendants to provide on what they were claiming as being proprietary.

36. Instead of providing any information on the alleged proprietary element(s) of the “Olivia” branded bathtubs, Defendants’ counsel instead advised that Clarke’s counsel’s research methods were “flawed,” and stated specifically that a patent application had been filed for “the Comfort Seat,” presumably referring to the Seat Lip and Seat Drain elements of the “Olivia” branded bathtubs. Clarke has since learned that Defendants represented to Zon that an alleged patent application has been filed and assigned a number. Such number, if it is accurate, appears to be a provisional patent application filed sometime during the second half of February 2011.

**IV.**  
**CAUSES OF ACTION**

**FIRST CAUSE OF ACTION**  
**(Declaratory Judgment of the Non-Existence, Invalidity and/or Unenforceability of the Unknown Patent)**

37. Clarke repeats and realleges the foregoing paragraphs, as if fully set forth herein.

38. Defendants have at various times represented, expressly and/or impliedly, that a patent exists on one or more elements of the “Olivia” branded bathtub, without identifying what element(s) are allegedly covered by such patent (the “Unknown Patent”). Defendants now claim, expressly and impliedly, that bathtubs sold by Clarke to Zon infringe on the Unknown Patent.

39. Despite reasonable diligence, Clarke has been unable to locate any patent relating to the “Olivia” branded bathtub, or which is otherwise owned, exclusively or otherwise, by either of the Defendants. Clarke accordingly seeks a judicial declaration that no patent exists on the

“Olivia” branded bathtubs, on the Seat Lip or Seat Drain, or any other element of the “Olivia” branded bathtub, and that Clarke therefore has not and cannot infringe on the Unknown Patent.

40. To the extent that a patent exists and is owned by either of the Defendants, a justifiable case and controversy exists between Clarke and the Defendants as to whether such patent is valid and enforceable. Clarke accordingly seeks a judicial declaration that the Unknown Patent is invalid, void and/or unenforceable.

41. The judicial declarations sought by Clarke herein are necessary and appropriate so that Clarke may ascertain its rights as they may relate to the Unknown Patent. Clarke seeks a judicial declaration that the Unknown Patent is invalid, void and/or unenforceable for failure to comply with the conditions of patentability specified in Title 35 of the United States Code, including, but not limited to Sections 101, 102, 103, 111, 112, 116, 132 and/or 251 thereof.

42. There exists, therefore, an actual case in controversy between Clarke and Defendants as to whether the Unknown Patent is invalid.

43. As the result of the Defendants’ erroneous implied accusations of patent infringement and other wrongdoing, to the extent a patent exists, Defendants have misused the Unknown Patent. It was necessary for Clarke to file this lawsuit and seek a declaratory judgment from the Court to protect Clarke’s rights. Accordingly, Clarke is entitled to recover from Defendant reasonable and necessary attorney’s fees and expenses incurred by the Plaintiff in this action.

**SECOND CAUSE OF ACTION**  
**(Declaratory Judgment of Non-Infringement of Unknown Patent)**

44. Clarke repeats and realleges the foregoing paragraphs, as if fully set forth herein.

45. Defendants allege that they own all right, title, and interest in and to the Unknown Patent. Defendants, by their letters and words, have charged Clarke with infringement of the Unknown Patent.

46. Though Clarke does not know what claims may be made in the Unknown Patent, it appears to Clarke that the Unknown Patent, if it exists, relates to the Seat Lip and/or Seat Drain. In that event, Clarke denies any infringement of the Unknown Patent. Clarke further denies that it has or is contributorily infringing or inducing others to infringe the Unknown Patent.

47. A judicial declaration is necessary and appropriate so that Clarke may ascertain its rights as they may relate to the Unknown Patent. Clarke seeks a judicial declaration that it does not infringe, contributorily infringe, or induce infringement, directly or indirectly, willfully or otherwise, any valid and enforceable claim of the Unknown Patent.

48. There exists, therefore, an actual controversy between Clarke and Defendants with respect to the Unknown Patent.

49. As the result of Defendant's erroneous accusation of patent infringement and other wrongdoing, it was necessary for Clarke to file this lawsuit and seek a declaratory judgment from the Court to protect Clarke's rights. Accordingly, Clarke is entitled to recover from Defendant reasonable and necessary attorney's fees and expenses incurred by it in this action.

**THIRD CAUSE OF ACTION**  
**(Declaratory Judgment of the Non-Breach of Contract and of Clarke's Rights Under the Contract)**

50. Clarke repeats and realleges the foregoing paragraphs, as if fully set forth herein.

51. MoniLisa alleges that Clarke has breached the written contract between it and MoniLisa by manufacturing and selling walk-in bathtubs allegedly “using the Olivia’s design,” and that such bathtubs are otherwise allegedly “a ‘knock off’ version of the “Olivia” branded bathtubs.

52. Under any reasonably imaginable scenario, MoniLisa does not have the right to preclude Clarke from manufacturing all types and designs of walk-in bathtubs. However, Defendants allegations and demands do not specify what elements of the bathtubs sold to Zon constitute an alleged breach of the contract between Clarke and MoniLisa. Accordingly, substantial uncertainty exists and will continue to exist for Clarke as to what its rights are under the contract with MoniLisa. Clarke therefore requests that the Court declare the parties’ rights under the contract, including in particular, what element of the “Olivia” branded bathtub, if any, Clarke may be precluded from utilizing on other walk-in bathtubs.

53. Additionally, Defendants misrepresented to Clarke the extent of their ownership of the Seat Lip and Seat Drain, as well as the fact that there were registered patents on the “Olivia” branded bathtub. Accordingly, MoniLisa gained Clarke’s acquiescence to certain agreements in the written contract with MoniLisa through fraud. Had MoniLisa advised Clarke of the truth – that it did not own any proprietary rights in or to any element of the design of the “Alexander” branded bathtubs or the “Olivia” branded bathtubs, Clarke would not have made the agreements it made regarding MoniLisa’s alleged ownership of such alleged proprietary rights.

54. Clarke accordingly requests that the Court declare that agreement of Clarke regarding MoniLisa’s alleged ownership of the proprietary rights in any element of the “Olivia” branded bathtubs is void due to Defendants’ fraudulent misrepresentations of fact.

**FOURTH CAUSE OF ACTION**  
**(False Marking)**

55. Clarke repeats and realleges the foregoing paragraphs, as if fully set forth herein

56. Defendants have, in violation of 35 U.S.C. §292, falsely claimed in their advertising and in direct representations to Clarke that the “Olivia” branded bathtubs are registered, covered by a patent and/or covered by a pending patent application. Defendants have further falsely made the following specific claim in their advertising relating to both the “Alexander” branded bathtub and the “Olivia” branded bathtub - “The Comfort Seat: Patent Pending #3792958.”

57. Clarke’s Passages™ brand of bathtubs compete with other walk-in bathtubs, including the “Alexandria” branded bathtubs and the “Olivia” branded bathtubs. Accordingly, the false advertising to the public and the specific representations to Clarke has harmed and will continue to harm Clarke and others who wish to compete with Defendants. Accordingly, Clarke requests that the Court enter an injunction against Defendants’ continued use of any false marking on their products and any false representations of fact regarding any patents or patents pending in their advertising relating to walk-in bathtubs. Clarke also seeks, on its own behalf and on behalf of the United States, an award of the maximum amount of monetary damages allowed by 35 U.S.C. § 292(a) for each of Defendant’s violations of such statute.

**FOURTH CAUSE OF ACTION**  
**(Declaration of Exceptional Case)**

58. Clarke repeats and realleges the foregoing paragraphs, as if fully set forth herein.

59. This is an exceptional case because Defendants know or should know that they do not own any patent covering the “Olivia” branded bathtub, because there is no patent pending with the number they have been using as a patent pending number, that there was no patent

pending before mid-February 2011 on any element of the “Olivia” branded bathtub, and because Clarke cannot reasonably be said to infringe any valid, enforceable and properly construed claim of the Unknown Patent.

60. Further, upon information and belief, Defendants has acted in bad faith with regard to its statements and representations to the United States Patent Office with respect to its apparently recently filed provisional patent application, used inequitable conduct to in procuring or attempting to procure a patent, and misused any patent or patentable rights they may have to any elements of the “Olivia” branded bathtub. Yet Defendants have maintained that Clarke has infringement on their non-existent patents.

61. As such, Clarke is entitled to, among other things, enhanced damages and its reasonable and necessary attorneys’ fees.

**FIFTH CAUSE OF ACTION**  
**(Tortious Interference with Contracts and Prospective Business Relations)**

62. Clarke repeats and realleges the foregoing paragraphs, as if fully set forth herein.

63. Defendants interfered with Clarke’s actual contracts and prospective business relations with Zon by sending a letter to Zon suggesting that Clarke’s products were infringing one or more patents or patent pending applications. Such letter was sent to induce Zon to refrain from purchasing products from Clarke. By doing such, Defendants intentionally interfered and attempted to induce Zon to discontinue doing business with Clarke.

64. Clarke had a reasonable expectation of economic gain resulting from such relationship(s) and others. Defendants’ conduct, as alleged herein, had an adverse effect upon the relationship with Zon.

65. Defendants intended to cause harm to and the destruction of such relationship.

66. Defendants’ conduct was not privileged or justified.



67. Defendant's conduct was the proximate cause of the harm to the relationship with Zon. Such injury occurred, in part, to Clarke in the Western District of Texas, Waco Division.

68. Defendants' tortiously interfered with Clarke's business relationships with Zon.

69. Defendant's actions were conducted with malice and intent to cause damage to Clarke, and it was foreseeable that such damages would occur in Texas.

70. Defendants had no legal right, or good faith claim to a colorable legal right, to take the actions described above.

**SIXTH CAUSE OF ACTION**  
**(Unfair Competition)**

71. Clarke repeats and realleges the foregoing paragraphs, as if fully set forth herein.

72. Defendants' oral and written statements about Clarke constitute unfair competition and state unfair competition laws.

73. The statements made by Defendants are false and were made with knowledge of their incorrectness or falsity, or with disregard to their incorrectness or falsity, and were therefore made in bad faith.

74. The statements made by Defendants constitute false or misleading descriptions or representations of fact in connection with Clarke's business that are likely to cause confusion, or to cause mistake, or to deceive Clarke's customers regarding Clarke and that misrepresent the nature, characteristics, and qualities of Clarke's in violation of state unfair competition laws and § 43 of the Lanham Act.

75. Defendants' statements have interfered with Clarke's ability to conduct business.

76. Defendants' statements have disparaged Clarke and its products in the marketplace, have interfered with contractual relations and/or prospective contractual relations and/or prospective economic advantage, and constitute unfair competition under state law.

77. The bad faith statements made by Defendants have caused damage to Clarke. Such damages have occurred, in part, in the Western District of Texas, Waco Division.

78. Clarke is entitled to a judgment that Defendants' actions constitute unfair competition under Texas unfair competition laws.

**SEVENTH CAUSE OF ACTION**  
**(Business Disparagement)**

79. Clarke repeats and realleges the foregoing paragraphs, as if fully set forth herein.

80. Defendant has published disparaging words about Clarke, its products and/or its economic interests. The published statements were false, were published with malice and were published without privilege. As such, Clarke has been damaged and that damage occurred, among other places, in the Western District of Texas, Waco Division. Clarke's damages in the state of Texas were foreseeable to Defendants.

**EIGHTH CAUSE OF ACTION**  
**(Breach of Contract)**

81. MoniLisa agreed to reimburse Clarke for its costs to prepare drawings for the "Olivia" branded bathtubs, to procure patterns and tooling, and obtain IAMPO and other certifications. Each of these actions were necessary to properly manufacture the "Olivia" branded bathtub. Clarke performed as agreed and invoiced MoniLisa for these expenses, such amount being \$44,893.10. MoniLisa admitted in the amended contract with Clarke that it owed such amount to Clarke and that such amount was past due.

82. Additionally, MoniLisa ordered and Clarke manufactured three (3) "Olivia" branded bathtubs for MoniLisa. Despite MoniLisa's agreement to pay for these bathtubs in the amount of \$6,830.00, MoniLisa has failed and refused to pay for these bathtubs.

83. Further, MoniLisa order multiple Passages™ bathtubs from Clarke. Despite MoniLisa's agreement to pay for these bathtubs in the amount of \$9,012.05, MoniLisa has failed and refused to make any payment for these bathtubs.

84. Demand has been made upon MoniLisa for payment of the Debt. However, despite such demand, MoniLisa has failed and refused to pay the Debt.

85. MoniLisa has accordingly breached its contract with Clarke. As a result, Clarke has been damaged in an amount not less than \$60,775.15.

86. Additionally, Clarke is entitled to recover from MoniLisa its reasonable and necessary attorneys' fees pursuant to Chapter 38 of the Texas Civil Practice and Remedies Code resulting from MoniLisa's breach of its contract.

**V.**  
**CONDITIONS PRECEDENT**

87. Any conditions precedent to the filing of this suit and to the recovery of the damages sought herein have occurred or been waived.

**VI.**  
**JURY DEMAND**

88. Clarke respectfully demands a jury.

**VII.**  
**PRAYER FOR RELIEF**

WHEREFORE, Clarke respectfully prays for judgment against Defendants as follows:

1. Declaring that the Unknown Patent does not exist;
2. Declaring that the Unknown Patent, if it exist, is invalid, unenforceable, and/or void;
3. Declaring that Clarke does not infringe directly, (e.g., contributorily infringe, or induce infringement) or indirectly on any claim of the Unknown Patent;

4. Declaring that this is an exceptional case under 35 U.S.C. § 285, and that Clarke is entitled to enhanced damages and its attorneys' fees;
5. Declaring that Clarke has not breached the contract with MoniLisa by selling bathtubs to Zon;
6. Declaring the rights of Clarke and MoniLisa with respect to the contract between them;
7. Enter a judgment that Defendant's actions constitute unfair competition under federal law, including the Lanham Act and award Clarke damages for such actions;
8. Enter a judgment that Defendant's actions constitute unfair competition under Texas state law and award Clarke damages for such actions;
9. Enter a judgment against Defendants for business disparagement and award Clarke damages for such actions;
10. Enter a judgment against Defendants for exemplary damages;
11. Enter a judgment against Defendants for the reasonable and necessary attorneys' fees, expenses and court costs incurred by Clarke;
12. Award Clarke such other and further relief, at law and in equity, to which Clarke may show itself justly entitled.

March 4, 2011

Respectfully submitted,

*/s/ Bryan Haynes*

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