

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

TRUSEAL TECHNOLOGIES, INC.)
6880 Parkland Boulevard)
Solon, Ohio 44139)

Plaintiff,

Civil Action No. 3-08CV01836-N

v.

GGK DISTRIBUTION, LLC)
4014 Cullaton Cir.)
Laredo, Texas 78045)

GREG A. BENNETT)
2966 Peninsula Drive)
Grapevine, Texas 76051)

Defendants.

**FIRST AMENDED COMPLAINT FOR PATENT INFRINGEMENT,
FOR TRADE DRESS INFRINGEMENT UNDER THE LANHAM ACT
AND FOR TORTIOUS INTERFERENCE**

(Jury Demand)

For its First Amended Complaint against GGK Distribution, LLC and Greg A. Bennett, Plaintiff Truseal Technologies, Inc. states as follows:

JURISDICTION AND VENUE

1. Count I of this action arises under the Patent Laws of the United States, Title 35, United States Code. This Court has jurisdiction over Count I under 28 U.S.C. § 1338(a).
2. Count II of this action arises under the Lanham Act, Title 15, United States Code. This Court has jurisdiction over Count II under 28 U.S.C. §§ 1331(a) and 1338(b).

3. Count III of this action arises under Texas common law. This Court has supplemental jurisdiction over Count III pursuant to 28 U.S.C. § 1367(a) in that Count III is so related to the other counts as to form part of the same case or controversy, and under 28 U.S.C. § 1338(b) in that Count III alleges a form of unfair competition that is related to a claim for patent infringement.

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

THE PARTIES

5. Plaintiff Truseal Technologies, Inc. (“Truseal”) is a corporation organized and existing under the laws of the State of Delaware, and has a principal place of business located at 6880 Parkland Boulevard, Solon, Ohio 44139. Truseal regularly does business in this judicial district including selling, advertising and marketing its products within this district. Truseal is a wholly-owned subsidiary of Quanex Building Products, Inc. (“Quanex”). Quanex’s headquarters is located in Houston, Texas. Truseal is in the business of designing, developing and manufacturing spacer products.

6. Truseal is the owner of U.S. Patent No. 6,355,328 (“the ‘328 Patent”) and the trade dress associated with its Edgetherm product line in the United States of America.

7. Defendant GGK Distribution, LLC (“GGK”) is a corporation organized and existing under the laws of the state of Texas, having, on information and belief, its headquarters at 4014 Cullaton Cir., Laredo, Texas 78045 and a distribution center at 6900 Alamo Drive Parkway, Suite 132, San Antonio, Texas 78238. Upon information and belief, GGK is registered to do business throughout the state of Texas and regularly does business in this judicial district by selling and offering products for sale in this district and advertising its products for sale in this district through its agent Greg A. Bennett.

8. Defendant Greg A. Bennett (“Bennett”) is a citizen of Texas who, on information and belief, resides in this district at 2966 Peninsula Drive, Grapevine, Texas 76051. On information and belief, Bennett is an employee and agent of GGK and regularly does business in this judicial district by selling and offering GGK’s products for sale in this district, advertising GGK’s products for sale in this district and distributing GGK’s products in this district.

FACTUAL BACKGROUND

9. Plaintiff Truseal is one of the world’s leading developers and manufacturers of insulating glass sealant spacer systems for windows and doors. Among its product offerings, Truseal developed the revolutionary insulating glass sealant spacer known as “Edgetherm,” patented technology that allows window manufacturers to reduce production time, cut labor costs and most importantly, deliver improved thermal performance in each and every window. Edgetherm is a warm edge sealant spacer system. As a leading provider in the insulating glass market for more than 40 years, Truseal is a preferred supplier to the majority of the largest window producers in North America. Today, Truseal’s products and technologies are used by more than 800 world-wide manufacturers of insulating glass.

10. Truseal has established its place in the market by investing in research, obtaining protection for its intellectual property, requiring a rigorous quality assurance program, having the foremost warranty program in the industry and ensuring continuous customer service. Truseal not only provides its customers with market and technology information, but also works directly with its customer base at their sites to train and educate its customers in its processes.

11. Truseal and its Edgetherm product line are recognized throughout the industry as a leading sealant/spacer system. Truseal has been selling Edgetherm for almost a decade. In one iteration, Edgetherm has a unique and arbitrary color scheme that includes a black core and a gray sightline in an all-in-one (unitary) construction. Edgetherm is easily recognized by customers due to its distinctive color scheme in a unitary construction.

12. The black core and gray sightline color scheme is the foundation for Truseal's entire family of sealant/spacer system products. When window manufacturers see the unitary black and gray flexible spacer/sealant system, they immediately recognize it as being a Truseal product. Truseal also uses this distinctive black and gray color combination in its DuraSeal and DuraLite products.

13. Truseal's customers, as well as the entire market, know that Truseal is synonymous with products of the highest quality backed by a strong warranty. Truseal backs all of its products with the best warranty available in the industry. The distinctive gray and black color scheme does not simply signal a Truseal product—it also carries the hallmark of Truseal's outstanding customer service. Truseal has won industry awards for its customer service as well its innovation. Therefore, Truseal's color scheme is uniquely intertwined with its marketing, service and reputation. Accordingly, when a window manufacturer sees a gray and black warm edge sealant/spacer system, the customer knows that the product is a high quality, well constructed system from a single source—Truseal. Unfortunately, this means that any time customers have a black core/gray sightline sealant/spacer system that fails in the field, they will automatically assume it is a Truseal product based solely on its appearance.

14. Many of Truseal's customers are repeat customers that purchase Truseal's Edgetherm products pursuant to contractual purchase orders periodically and on a repeat basis. One such repeat customer is Maritech Window, located in Carrollton, Texas.

15. Truseal employed Bennett for approximately 9 years from about March 25, 1999 until his departure on February 8, 2008. At the time Bennett left Truseal, he was Truseal's Director of Western Sales, responsible for sales in the Western United States, including this district. As the Director of Western Sales, Bennett had access to Truseal's financial and technical information, sales information, customer lists, advertising information, and other information relating to Truseal's business in the Edgetherm product line.

16. Since becoming employed by GGK, Bennett has contacted Truseal's customers to sell and offer for sale products that compete with Truseal's Edgetherm product line.

17. GGK is a distributor for a third party, Beijing Huali Architecture Decoration Co., Ltd ("Huali"). Huali has attempted to co-opt Truseal's technology and reputation for its own benefit, and is the subject of a related lawsuit filed on October 6, 2008 in the Federal District Court for the District of Nevada: *Truseal Technologies, Inc. v. Beijing Huali Architecture Decoration Co., Ltd.*, Case No. 2-08-cv-01338-JCM-GWF.

18. GGK distributes, sells, offers for sale, advertises, and otherwise promotes Huali's products that employ Truseal's technology and design. In addition, as part of his employment at GGK, Bennett has participated in distributing, selling, offering for sale, advertising, and otherwise promoting Huali's products that employ Truseal's technology and design.

19. At the September 2007 GlassBuild show in Atlanta, Georgia, Truseal first discovered Huali's efforts to sell an infringing product. At that show, Huali was calling the product both HualiSeal and Swiggle, Swiggle being Truseal's well-known former name for Edgetherm. At its booth, Huali freely distributed samples of HualiSeal—its Edgetherm knock-off. The sample comprised two-paned windows using the HualiSeal sealant/spacer system. By all outward appearances, HualiSeal had simply copied Truseal's patented Edgetherm product and its distinctive color scheme. In response, Truseal informed Huali at the show that it was infringing Truseal's intellectual property and requested immediate cessation.

20. In September 2008, however, Huali and its infringing product resurfaced, this time being sold under the name "EdgeMax Seal." In September 2008, Truseal learned that Bennett had teamed up with Texas-based GGK to sell the Huali product to Truseal's customers. Truseal obtained an EdgeMax Seal sample and took pictures of a Huali box.

21. EdgeMax Seal, being distributed by GGK and Bennett, is exactly the same as HualiSeal—just renamed. Truseal tested the samples in September 2008. Specifically, Truseal tested the September 2008 samples to determine if EdgeMax Seal contained each of the (1) metal spacer, (2) core and (3) longitudinal adhesive claimed in the '328 Patent. Using a standard thermogravimetric analysis and a visual inspection, Truseal discovered that EdgeMax Seal incorporates the above three components.

22. EdgeMax Seal is constructed from materials of a lesser quality than the industry norms. Windows made by a former Edgetherm customer using EdgeMax Seal—Maritech Window—quickly experienced adhesion problems and failed. In addition, on or about October 6, 2008, Truseal obtained samples of Huali's EdgeMax Seal at the Las Vegas

GlassBuild Show. Just like the other samples, this new sample clearly has: (1) an undulating metal spacer, (2) a core and (3) a longitudinal adhesive. Indeed, a side-by-side comparison of Edgetherm and HualiSeal/EdgeMax Seal demonstrates that they are visually indistinguishable—except that Huali’s products, being distributed by Bennett and GGK, are of lower quality.

COUNT I: INFRINGEMENT OF THE ‘328 PATENT

23. Truseal incorporates by reference herein the allegations of Paragraphs 1-22 of this Amended Complaint.

24. Truseal is the owner by assignment of the ‘328 Patent entitled PREFORMED FLEXIBLE LAMINATE. The ‘328 Patent was duly and legally issued by the United States Patent and Trademark Office (“USPTO”) on March 12, 2002. The ‘328 Patent is still in force and effect and is presumed valid under the U.S. patent laws. A copy of the ‘328 Patent is attached as Exhibit A.

25. GGK and Bennett have been and still are directly infringing the ‘328 Patent under 35 U.S.C. § 271(a) by making, using, and/or selling insulated glass windows that embody one or more claims of the ‘328 Patent. GGK and Bennett will continue to infringe unless enjoined by this Court.

26. GGK and Bennett have been and still are indirectly infringing the ‘328 Patent under 35 U.S.C. § 271(b) by actively inducing direct infringement by other persons who manufacture and use products that embody one or more of the claims of the ‘328 Patent while GGK and Bennett had knowledge of the ‘328 Patent and knew or should have known that their actions would induce direct infringement by others and intended that their actions would

induce direct infringement by others. GGK and Bennett will continue to infringe unless enjoined by this Court.

27. GGK and Bennett have been and still are indirectly infringing the '328 Patent under 35 U.S.C. § 271(c) by contributory infringement by providing non-staple articles of commerce to others for use in an infringing system with knowledge of the '328 Patent and knowledge that these non-staple articles of commerce are used as a material part of the claimed inventions of the '328 Patent. GGK and Bennett will continue to infringe unless enjoined by this Court.

28. GGK and Bennett have knowingly and willfully infringed the '328 Patent.

29. As a result of GGK's and Bennett's infringement of the '328 Patent, Truseal has suffered monetary damages in an amount not yet determined, and will continue to suffer irreparable harm in the future unless GGK's and Bennett's infringing activities are enjoined by this Court.

30. Truseal will be greatly and irreparably harmed unless a temporary restraining order and preliminary and permanent injunctions are issued enjoining GGK, Bennett and their agents, servants, employees, attorneys, representatives, and all others acting on their behalf from infringing the '328 Patent.

**COUNT II: FALSE DESIGNATION OF ORIGIN UNDER SECTION 43(a) OF THE
LANHAM ACT BY VIRTUE OF THE USE OF A MISLEADING IMITATION OF
TRUSEAL'S TRADE DRESS**

31. Truseal incorporates by reference herein the allegations of Paragraphs 1-30 of this Amended Complaint.

32. For approximately ten years, Truseal has been selling its Edgetherm product. Since its introduction, Edgetherm has continuously provided a unique undulating spacer element and aesthetically-pleasing gray sightline, as opposed to the more common black sightline provided by other products.

33. Edgetherm's unique and arbitrary combination of a black core and a gray sightline in a warm edge all-in-one sealant/spacer system has acquired a "secondary meaning" or has become distinctive in the minds of purchasers of sealant/spacer systems as being associated exclusively with Truseal.

34. GGK and Bennett are advertising and selling Huali's EdgeMax Seal and HualiSeal products (collectively the "Huali Products") bearing the trade dress of Truseal's Edgetherm product lines. The Huali Products bear a striking resemblance to, and indeed imitate Truseal's distinctive Edgetherm products. Specifically, the Huali Products utilize Truseal's characteristic undulating spacer combined with a black core and gray sightline, just like Edgetherm, to provide the immediate commercial impression that the Huali Products are associated with and emanate from the same source as Edgetherm—Truseal.

35. GGK's and Bennett's use of the black core and gray sightline in the Huali Products in the United States constitutes a false designation of origin in violation of Section 43(a) of the Lanham Act, 35 U.S.C. §§ 114 and 1125 and is intentionally designed to deceive and has deceived customers and prospective customers into believing that the Huali Products are manufactured by Truseal and, as a consequence, is likely to divert and has diverted customers away from Truseal.

COUNT III: TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS

36. Truseal incorporates by reference herein the allegations of Paragraphs 1-35 of this Amended Complaint.

37. By virtue of Bennett's prior employment with Truseal, Bennett and GGK have Truseal's financial and technical information, sales information, customer lists, advertising information, and other information relating to Truseal's business in the Edgetherm product line. Upon information and belief, GGK and Bennett have used this information to their unfair advantage, and have contacted Truseal's customers, including without limitation Maritech Window and at least 10 other customers of Truseal, to advertise and sell the Huali Products that infringe Truseal's '328 Patent and trade dress.

38. Many of Truseal's existing customers are repeat customers who purchase Truseal's Edgetherm products pursuant to contractual purchase orders periodically and on a repeat basis. Accordingly, there is a reasonable probability that but for the conduct of GGK and Bennett, Truseal would have entered into contractual relations with its customers, including without limitation Maritech Window, for the purchase of its Edgetherm products.

39. GGK and Bennett have engaged in independently tortious and unlawful acts that prevented contractual relationships from occurring between Truseal and its customers, including without limitation Maritech Window. GGK's and Bennett's independently tortious and unlawful acts include infringement of the '328 Patent in violation of 35 U.S.C. § 271(a)-(c), and infringement of Truseal's trade dress in violation of Section 43(a) of the Lanham Act, 35 U.S.C. §§ 114 and 1125.

40. In view of the information obtained by Bennett by virtue of his employment with Truseal, GGK and Bennett have acted with a conscious desire to prevent such contractual relationships from occurring between Truseal and its customers, and with knowledge that the interference was certain or substantially certain to occur as a result of their conduct.

41. Truseal has suffered damages as a result of the interference, including lost business opportunities with customers, including without limitation Maritech Window, who have bought infringing Huali Products tortiously and unlawfully distributed by GGK and Bennett.

PRAYER FOR RELIEF

Plaintiff Truseal prays for the following relief:

- (a) A judgment that GGK and Bennett have directly infringed and continue to infringe the '328 Patent;
- (b) A judgment that GGK and Bennett have indirectly infringed by contributory infringement and/or inducement, and continue to infringe the '328 Patent;
- (c) A judgment that GGK's and Bennett's infringement of the '328 Patent has been willful;
- (d) A judgment against GGK and Bennett awarding Truseal damages suffered by Truseal pursuant to 35 U.S.C. § 284 on account of GGK's and Bennett's infringement of the '328 Patent;
- (e) A judgment that Truseal's damages be trebled pursuant to 35 U.S.C. § 284 and that punitive damages be assessed against GGK and Bennett;

- (f) Preliminary and permanent injunctions against GGK and Bennett, and any entity acting in concert with GGK or Bennett, pursuant to 35 U.S.C. § 283, preventing GGK and Bennett and any such entity, from infringing the '328 Patent;
- (g) A judgment that GGK and Bennett have violated section 43(a) of the Lanham Act, 15 U.S.C. §§ 1114 and 1125, by imitating Truseal's trade dress;
- (h) A judgment against GGK and Bennett awarding Truseal damages suffered by Truseal pursuant to 15 U.S.C. § 1117 on account of GGK's and Bennett's infringement of Truseal's trade dress and that damages be trebled;
- (i) A judgment that GGK and Bennett have engaged in tortious interference with Truseal's prospective business relations under Texas common law;
- (j) A judgment against GGK and Bennett awarding Truseal damages suffered by Truseal on account of GGK's and Bennett's tortious interference with Truseal's prospective business relations under Texas common law;
- (k) A judgment against GGK and Bennett awarding Truseal punitive damages on account of GGK's and Bennett's tortious interference with Truseal's prospective business relations under Texas common law;
- (l) Preliminary and permanent injunctions, pursuant to 15 U.S.C. § 1116 and Texas common law, against GGK and Bennett, and any entity acting in concert with GGK or Bennett, preventing GGK and Bennett and any such entity from selling products that infringe Truseal's trade dress, and preventing GGK and Bennett and any such entity from tortiously interfering with Truseal's prospective business relations;
- (m) A judgment that this is an exceptional case and that Truseal be awarded reasonable attorney fees pursuant to 35 U.S.C. § 285, 15 U.S.C. § 1117 and Texas common law;

- (n) A judgment that GGK and Bennett be directed to pay Truseal its costs incurred herein; and
- (o) Such other and further relief as the Court deems just and equitable.

**TRUSEAL TECHNOLOGIES, INC. RESPECTFULLY DEMANDS
TRIAL BY JURY ON ALL ISSUES SO TRIABLE.**

Respectfully submitted this 8th day of December, 2008.

s/Todd R. Tucker

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CERTIFICATE OF SERVICE

On December 8, 2008, I electronically filed the foregoing FIRST AMENDED COMPLAINT FOR PATENT INFRINGEMENT, FOR TRADE DRESS INFRINGEMENT UNDER THE LANHAM ACT AND FOR TORTIOUS INTERFERENCE with the clerk of the Court using the ECF system, which will send notification of such filing to the following:

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