

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

Ready Containment, LLC,)
)
Plaintiff,)
)
v.)
)
Basic Concepts, Inc., and)
Edward W. Van Romer,)
)
Defendants.)

COMPLAINT

(Jury Trial Demanded)

**COMPLAINT
DECLARATORY AND INJUNCTIVE RELIEF REQUESTED**

Plaintiff, Ready Containment, LLC, by its attorneys, Fowler White Boggs P.A., for its complaint against defendants Basic Concepts, Inc. and Edward W. Van Romer, alleges as follows:

INTRODUCTION

1. This is an action for a declaratory judgment that the claims of United States Patent No. 5,762,233 (“the '233 Patent”), a copy of which is attached as Exhibit A, are invalid and that the '233 Patent is unenforceable and that no valid and enforceable claims of the '233 Patent are infringed by Ready Containment, LLC, either directly or as an inducing or contributory infringer.

THE PARTIES

2. Ready Containment, LLC is a Florida limited liability company having an address and principal place of business at 3925 Sawyer Road, Sarasota, Florida 34233.

3. Upon information and belief, Basic Concepts, Inc., is a South Carolina corporation, having its principal place of business at 1310 Harris Bridge Road, Anderson, South Carolina 29621-3410

4. Edward W. Van Romer is an individual residing in the State of South Carolina and is the owner of the '233 Patent.

5. Defendant Basic Concepts, Inc. is wholly owned by Defendant Edward W. Van Romer.

JURISDICTION AND VENUE

6. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1338, 2201 and 2202.

7. This Court has personal jurisdiction over Basic Concepts, Inc., by virtue of the fact that, upon information and belief, Basic Concepts, Inc. has regularly solicited business in this state, and sales and use of Basic Concepts, Inc.'s berms protected by the claims of the '233 Patent have been made to this state, and Basic Concepts, Inc. and/or its licensees and agents have threatened patent litigation against Plaintiff, Ready Containment, LLC over manufacture and sales of berms allegedly infringing the claims of the '233 Patent.

8. This Court has jurisdiction over Edward W. Van Romer, because Edward W. Van Romer is the owner of the '233 Patent, has licensed the '233 Patent to Basic Concepts, Inc., owns and controls Basic Concepts, Inc., and has threatened by and through his agents to bring a patent infringement lawsuit against Plaintiff, Ready Containment, LLC, and has actually filed a patent infringement lawsuit over the '233 Patent against a customer of Ready Containment, LLC over sales by the customer, Interstate Products, Inc., for sales of one of Ready Containment, LLC's berms.

9. Venue is proper in this district pursuant to 28 U.S.C. § 1391(d).

FACTS COMMON TO THE COUNTS

10. Ready Containment, LLC manufactures, offers for sale and sells berms for containment of leaks and spills, including *inter alia* the Ready Berm™ at its Florida location.

11. U.S. Pat. Appl. No. 08/852,840, entitled “Foldable Spill Collector Container” is the U.S. patent application that issued as the '233 Patent.

12. U.S. Pat. Appl. No. 08/852,840 was filed on May 7, 1997.

13. Upon information and belief, U.S. Pat. Appl. No. 08/852,840 does not claim priority to any other applications, domestic or foreign.

14. Upon information and belief, the '233 Patent is owned by Edward W. Van Romer.

15. Upon information and belief, Edward W. Van Romer was the applicant for the '233 Patent (the “Applicant”).

16. Upon information and belief, Defendant Basic Concepts, Inc. is an exclusive licensee of certain rights and interests in the '233 Patent.

17. On June 9, 1998, U.S. Patent No. 5,762,233, entitled, “Foldable Spill Collector Container,” (“the '233 Patent,” Exhibit A hereto) was issued to Edward W. Van Romer.

18. Defendant, Basic Concepts, Inc., is acknowledged by Edward W. Van Romer in a declaration, attached as Exhibit B, to be the exclusive licensee of the '233 Patent with authority to commence litigation alleging infringement of the '233 Patent.

19. Defendants have claimed Plaintiff's Ready Berm™ as infringing of the '233 Patent by filing and maintaining a lawsuit against Interstate Products, Inc., in case no. 6:06-EV-02867-HFF, filed October 10, 2006, in the district court of the District of South Carolina.

20. This action is an exceptional case that supports the award of attorneys fees, costs, and expenses for Plaintiff against Defendants pursuant to Title 35 U.S.C § 285.

FOR A FIRST CAUSE OF ACTION
DECLARATORY JUDGMENT OF NON-INFRINGEMENT

21. The preceding allegations hereinabove are incorporated herein as fully as if repeated verbatim.

22. Plaintiff has not infringed and does not infringe any unexpired, valid and enforceable claims of the '233 Patent, either literally or under the doctrine of equivalents, whether directly, contributorily, or by inducement.

23. As a consequence of the foregoing, there exists between the parties an actual, substantial, and continuing justiciable controversy as to infringement of the '233 Patent by Plaintiff's products.

24. Plaintiff is entitled to the decree and declaration of this Court that its Ready Berm™ products do not infringe the '233 Patent.

FOR A SECOND CAUSE OF ACTION
DECLARATORY JUDGMENT OF PATENT CLAIM INVALIDITY

25. The preceding allegations hereinabove are incorporated herein as fully as if repeated verbatim.

26. Some or all of the claims of the '233 Patent are invalid for failure to meet the conditions for patentability specified in 35 U.S.C. § 1 *et seq.*, including but not limited to 35 U.S.C. §§ 102, 103, and/or 112.

27. As a consequence of the foregoing, there exists between the parties an actual, substantial, and continuing justiciable controversy as to the validity of Claims 1, 2, 9, and 16 of the '233 Patent.

28. Plaintiff is entitled to the decree and declaration of this Court that at least Claims 1, 2, 9, and 16 of the '233 Patent are invalid as anticipated and all of the claims of the '233 Patent are invalid as anticipated and/or obvious over the prior art.

FOR A THIRD CAUSE OF ACTION
DECLARATORY JUDGMENT OF PATENT UNENFORCEABILITY

29. The preceding allegations hereinabove are incorporated herein as fully as if repeated verbatim.

30. In early 1997, Defendant Edward W. Van Romer and Basic Concepts' employee Kurt Johnson, along with others, began development of the product to which the '233 Patent would later be directed (the "Prototype").

31. During early 1997 or earlier, Defendants, Basic Concepts, Inc. and Edward W. Van Romer, became aware of a berm manufactured by Seattle Tarp Company.

32. No later than, February 3, 1997, Defendants came into possession of a berm manufactured and sold by Seattle Tarp Berm.

33. Both Defendant Edward W. Van Romer and Kurt Johnson, an employee of Basic Concepts, Inc., physically inspected the Seattle Tarp berm, themselves.

34. The Seattle Tarp berm was obtained by Defendant Basic Concepts, Inc. for comparison purposes to a prototype of the device described and recited in the claims of the '233 Patent.

35. Defendants ordered the Seattle Tarp berm through a third party.

36. Defendants did not want the Seattle Tarp Company to know that the Defendants were ordering a Seattle Tarp berm for inspection and comparison.

37. Cort Flint, patent counsel to Defendants, prepared a declaration under penalty of perjury on December 3, 2009, (Attached as Exhibit C), declaring that he “had no knowledge of the Seattle Tarp berm” during the prosecution of the ‘233 Patent.

38. Cort Flint, patent counsel for Defendants, prepared a declaration under penalty of perjury on February 10, 2010, (Attached as Exhibit D), declaring that he “first examined the Seattle Tarp berm prior to filing the patent application” that eventually issued as the ‘233 Patent.

39. Cort Flint knew that the Seattle Tarp berm was publicly known in this country by employees of Basic Concepts, Inc., by the Seattle Tarp Company, and by others in this country, prior to the date of filing of the application that eventually issued as the ‘233 Patent.

40. The Seattle Tarp berm contains all of the features claimed in Claims 1, 2, 9, and 16 of the ‘233 Patent, anticipating at least these claims of the ‘233 Patent under Title 35 U.S.C. § 102 and rendering other claims of the ‘233 Patent obvious under Title 35 U.S.C. § 103.

41. After acquiring and inspecting the Seattle Tarp berm, Defendant Edward W. Van Romer and others employed by Defendant Basic Concepts continued the development of their prototype, and Edward W. Van Romer, by and through his patent counsel, Cort Flint, eventually filed on May 7, 1997, application Ser. No. 08/852,840 which would issue as the ‘233 Patent on June 9, 1998.

42. The application that eventually issued as the ‘233 Patent was only completed and filed after Defendants came into possession of the Seattle Tarp berm and after Edward W. Van Romer, Cort Flint and Kurt Johnson examined the Seattle Tarp berm.

43. During prosecution of application Ser. No. 08/852,840, Edward W. Van Romer, his licensees, Cort Flint, and every other individual associated with the filing and prosecution of application Ser. No. 08/852,840 had a duty of candor and good faith in dealing with the United States Patent and Trademark Office (“USPTO”), which included a duty to disclose to the USPTO all information known to that individual to be material to examination, which duty existed not only as to Defendant Edward W. Van Romer as the listed “inventor” on the application, but also to anyone else employed or in agency with Edward W. Van Romer, or Basic Concepts, Inc., his licensee, including without limitation, Cort Flint, who was an experienced patent attorney and former patent examiner with the USPTO.

44. Any information that establishes *prima facie* evidence of unpatentability is considered especially highly material to examination.

45. During prosecution, a *prima facie* evidence of unpatentability is established before the USPTO when information before the Examiner anticipates or renders obvious any claim of a patent application, giving each term in the claim its broadest reasonable interpretation consistent with the specification, before any consideration is given to any evidence which may be submitted in an attempt to establish a contrary conclusion.

46. The existence of the Seattle Tarp berm prior to the date of filing of application Ser. No. 08/852,840 establishes *prima facie* evidence of unpatentability under Title 35 U.S.C. §102(a) for at least claims 1, 2, 9, and 16 of the ‘233 Patent, because the Seattle Tarp berm was known or used by others in this country prior to the filing date of application Ser. No. 08/852,840, May 7, 1997, and the Seattle Tarp berm anticipates each and every feature recited in claims 1, 2, 9, and 16 of ‘233 Patent, both as filed and as issued.

47. Edward W. Van Romer, Cort Flint, and others working for Edward W. Van Romer and/or Basic Concepts, Inc. knew that the Seattle Tarp berm was known and used by others in this country prior to the date of filing of application Ser. No. 08/852,840, including, without limitation, the third party that ordered the Seattle Tarp berm on behalf of Defendants.

48. In addition, the Seattle Tarp berm was on sale in this country more than one year prior to May 7, 1997, the filing date of application Ser. No. 08/852,840, raising a statutory bar under Title 35 U.S.C. § 102(b) against the patentability of at least one of the claims of the '233 Patent.

49. The Seattle Tarp berm rendered all of the claims of application Ser. No. 08/852,840 obvious under Title 35 U.S.C. § 103, because differences between the features of the Seattle Tarp Berm and the limitations of the claims were such that the subject matter as a whole would have been obvious on the date that Defendant Edward W. Van Romer first filed application Ser. No. 08/852,840 to a hypothetical person having ordinary skill in the art.

50. The Seattle Tarp berm was of a design that was not cumulative to the information already of record in the prosecution of application ser. no. 08/852,840.

51. Neither Defendant Edward W. Van Romer nor the attorneys and agents who prepared or prosecuted application ser. no. 08/852,840 or any other person who was substantively involved in the preparation or prosecution and who was associated with Defendant Edward W. Van Romer and/or Basic Concepts, Inc. disclosed to the USPTO the existence of the Seattle Tarp berm during the prosecution of application ser. no. 08/852,840.

52. Defendant Edward W. Van Romer and his patent counsel, Cort Flint, intentionally withheld disclosure of the Seattle Tarp Berm from the USPTO, even though both Edward W.

Van Romer and Cort Flint personally examined the Seattle Tarp berm and considered the Seattle Tarp berm, at the time, as infringing the pending claims of application Ser. No. 08/852,840.

53. Upon information and belief, the attorneys and agents who prepared or prosecuted application ser. no. 08/852,840 or other persons substantively involved in the preparation or prosecution of application ser. no. 08/852,840 informed Edward W. Van Romer of his duty to disclose to the USPTO any information material to the examination of application ser. no. 08/852,840.

54. Defendant Edward W. Van Romer had specific intent to deceive the USPTO, as shown at least by the following:

- a. At the time Application number 08/852,840 was filed, Defendant Van Romer had already prosecuted at least two prior patent applications that had led to the issuance of two prior patents, and thereby knew of the duty of candor and good faith in dealing with USPTO from those experiences and that this duty of candor and good faith extended to others in his employ and his attorneys and agents; and
- b. Defendant Van Romer or his attorneys and agents on his behalf made a disclosure of certain prior art patents to the USPTO during the prosecution of Application Ser. No. 08/852,840, characterized by the following: “may be pertinent to the examination of this application;” and
- c. The patent attorney who prosecuted Application Ser. No. 08/852,840 was a registered patent attorney with a long career and extensive experience in the prosecution of patent applications, and was, in fact, formerly a patent examiner employed by the USPTO; and

- d. The Seattle Tarp Company, purveyor of the Seattle Tarp berm was a direct competitor to Defendant Basic Concepts, Inc.; and
- e. After Application Ser. No. 08/852,840 issued as the '233 Patent, Defendant Edward W. Van Romer, in his role as President of Defendant Basic Concepts, Inc., sent a letter to Seattle Tarp Company accusing it of infringing the '233 Patent by selling infringing berms:

We have examined and compared your product design to our U.S. patent #5,762,233 with our patent attorney, and have concluded that your containment product infringes this patent. We ask that you immediately cease and desist in the manufacture, sales, and/or use of that design and any other infringing designs. We will be notifying buyers and potential buyers, including the United States Departments of Defense and Energy, of this infringement.

- f. Upon information and belief, the Seattle Tarp berm is the only berm of the Seattle Tarp Company that was "examined and compared" to U.S. Pat. No. 5,762,233.

55. Defendants and Cort Flint made every effort not to disclose the Seattle Tarp berm to Interstate Products, Inc. in case no. 6:06-EV-02867-HFF filed in the district court of the District of South Carolina.

56. The foregoing is clear and convincing evidence of fraud on the USPTO by Defendants and their patent counsel, Cort Flint.

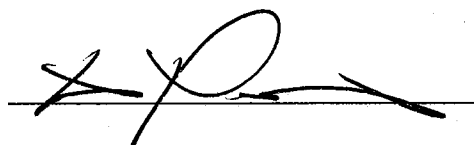
PRAYER FOR RELIEF

WHEREFORE, Plaintiff Ready Containment, LLC prays that the Court enter judgment in its favor and against the Defendants Basic Concepts, Inc., and Edward W. Van Romer:

- a. Decreeing and declaring that Plaintiff has not infringed and does not infringe the claims of U.S. Patent No. 5,762,233, either literally or under the doctrine of equivalents, and either directly, contributorily, or by inducement; and
- b. Decreeing and declaring that making, use, offering for sale, and sale in the United States of Plaintiff's Ready Berm™ product does not infringe U.S. Patent No. 5,762,233; and
- c. Decreeing and declaring that U.S. Patent No. 5,762,233 is invalid and/or void in law; and
- d. Decreeing and declaring that Defendants are without right or authority to threaten or to maintain suit against Plaintiff and/or any of their customers, dealers, agents, servants, or employees, or any perspective or present sellers, dealers, or users of Plaintiff's Ready Berm™ product, for alleged infringement of U.S. Patent No. 5,762,233; and
- e. Permanently enjoining Defendants and its, or their, as the case may be, officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with it who receive actual notice thereof, from initiating and/or maintaining infringement litigation and from threatening Plaintiff and/or any of its customers, dealers, agents, servants, or employees, or any perspective or present sellers, dealers, or users of Plaintiff's Ready Berm™, with infringement litigation or charging any of them verbally or in writing with infringement of U.S. Patent No. 5,762,233 arising out of the Ready Berm™ made, imported, offered for sale, or sold by Plaintiff; and

- f. Declaring, under 35 U.S.C. § 285, that this is an exceptional case and therefore awarding Plaintiff its reasonable attorneys' fees incurred in prosecuting this action; and
- g. Providing such other and further relief as the Court may deem just and proper.

DATED: February 17, 2010



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