

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

STEPHEN KEEN, an individual,

Plaintiff,

v.

THOMAS E. MAREK, an individual; MARY
B. MAREK, an individual; TEXAS
HYDROPONICS & ORGANICS, L.P., a
Texas corporation; LIQUID LUMENS, L.P., a
Texas limited partnership; GLOBAL
GARDEN SUPPLY, LLC, f/k/a MAREKEEN
MANAGEMENT, LLC, a Texas limited
liability company,

Defendants.

Civil Action No: 1:11-cv-01016

DEMAND FOR JURY TRIAL

COMPLAINT FOR PATENT INFRINGEMENT

Plaintiff Stephen B. Keen, ("Keen") an individual residing in Austin Texas, by and through its undersigned attorneys alleges as follows:

The Parties

1. Plaintiff Keen is an individual residing in Bastrop County, Texas.
2. Plaintiff is informed and believes that defendant Thomas E. Marek ("T. Marek") is an individual residing in Travis County, Texas.
3. Plaintiff is informed and believes that defendant Mary B. Marek ("M. Marek") is an individual residing in Travis County, Texas.
4. Plaintiff is informed and believes and thereon alleges that defendant Texas Hydroponics & Organics, L.P. ("Texas Hydro") is a corporation duly organized under the laws of the State of Texas, with its principal place of business at 6002 Hood Hollow, Austin, TX 78731.

5. Plaintiff is informed and believes and thereon alleges that defendant Liquid Lumens, L.P. (“Liquid Lumens”) is a limited partnership duly organized under the laws of the state of Texas, with its principal place of business at 6002 Hood Hollow, Austin, TX 78731.

6. Plaintiff is informed and believes and thereon alleges that defendant Global Garden Supply, LLC f/k/a Marekeen Management, LLC (“Global Garden”), is a limited liability company duly organized under the laws of the State of Texas with its principal place of business at 6002 Hood Hollow, Austin, TX 78731.

7. Defendants T. Marek, M. Marek, Liquid Lumens, Global Garden and Texas Hydro are collectively referred to herein as “Defendants.”

Nature of Claims, Jurisdiction, and Venue

8. This action arises under the Patent Laws of the United States under 35 U.S.C. §§ 271 *et seq.*, as well as the Lanham Act, 15 U.S.C. § 1125 *et seq.* and related claims and seeks damages, injunctive relief and attorneys’ fees under 35 U.S.C. §§ 283, 284, and 285. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338, 35 U.S.C. §§ 101 *et seq.* and pursuant to the doctrine of supplemental and pendent jurisdiction.

9. This Court has personal jurisdiction over Defendants because Defendants are incorporated in this district and/or because Defendants do business in this judicial district, have purposely availed themselves of the privileges and benefits of the laws of the State of Texas, have directed continuous and systematic activities at this judicial district, and have, on information and belief, committed acts of patent infringement during the course of their business within this judicial district.

10. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391 and 1400(b).

FIRST CAUSE OF ACTION

(Patent Infringement, Contributory Infringement & Inducement To Infringe ‘915 Patent)

11. Plaintiff Keen incorporates and alleges paragraphs 1-10 above as if fully set forth herein.

12. On October 28, 2008, United States Letters Patent No. 7,441,915 (the “’915 Patent”) was duly and properly issued for an invention entitled “Water Cooled Horticultural Growing Light.” The ‘915 Patent was duly and legally assigned to Keen, by inventor and owner Levi Shouse. A copy of the ‘915 Patent is attached hereto as Exhibit “A.”

13. The ‘915 Patent has a priority date of August 23, 2006.

14. Plaintiff is the assignee of exclusive rights to enforce of the ‘915 Patent and has all legal and equitable rights to enforce the ‘915 Patent, to bring and maintain this action, and to make, have made, use, import, offer or sell products or services covered by the ‘915 Patent.

15. The ‘915 Patent is now, and at all relevant times since its date of issuance has been, valid and enforceable.

16. Despite the fact that Plaintiff has exclusive rights in the inventions of the ‘915 Patent, Defendants have infringed, have contributed to the infringement of, and/or have induced infringement of, literally or under the doctrine of equivalents in violation of 35 U.S.C. §271, the ‘915 Patent by making, using, offering to sell, and/or selling water cooled growing lights and systems sold under the brand name Liquid Lumens (“water cooled lights”). These infringing water cooled lights and systems comprise two glass tubes, a light source, two end plates with channels, water connections and an electrical socket which infringe or contribute to, or induce others to infringe at least claim 8, 9, 11, 12 and 13 of the ‘915 Patent. These infringing systems and services comprise at least the following products: *Liquid Lumens* vessel only, *Liquid Lumens* with wings, *Liquid Lumens Hydroreflector* and end cap-nozzle side. It is believed that Defendants will continue to infringe, contributorily infringe, and/or induce infringement of, the ‘915 Patent unless enjoined by this Court. Defendants’ infringement and other actions have caused substantial injury to Plaintiff.

17. On information and belief, Defendants’ acts were committed knowingly and intentionally. Defendants made a visit to San Diego in the summer of 2006 where they were shown the water cooled light which is protected by the ‘915 Patent. Defendants requested the visit to view the new product under their false representation that they wanted to act as a

distributor of the product. After seeing the product defendants commenced acts to manufacture infringing products.

18. Prior to the filing of the lawsuit Defendants knew of the existence of the '915 Patent. The inventors of the '915 Patent notified Defendants' that they were infringing upon this patent by sending numerous cease and desist letters to Defendants Thomas E. Marek and Texas Hydroponics & Organics L.P.

19. As a result of Defendants' infringement, Plaintiff has, and will suffer, monetary damages and irreparable injury. Plaintiff's monetary damages include, without limitation, lost profits, or at a minimum, the right to recover a reasonable royalty. Furthermore, unless Defendants are enjoined by this Court from continuing its infringement of the '915 Patent, Plaintiff has, and will suffer, additional irreparable damages and impairment of the value of its patent rights. Thus, an injunction against further infringement is appropriate.

SECOND CAUSE OF ACTION

(Patent Infringement, Contributory Infringement & Inducement To Infringe '982 Patent)

20. Plaintiff Keen incorporates and alleges paragraphs 1-19 above as if fully set forth herein.

21. On Jun 7, 2011, United States Letters Patent No. 7,954,982 B2 (the "'982 Patent'") was duly and properly issued for an invention entitled "High Intensity Light Reflector Apparatus." The '982 Patent is owned by its inventor Stephen B. Keen. A copy of the '982 Patent is attached hereto as Exhibit "B."

22. The '982 Patent has a priority date of May 8, 2008.

23. The '982 Patent is now, and at all relevant times since its date of issuance has been, valid and enforceable.

24. Despite the fact that Plaintiff has exclusive rights in the inventions of the '982 Patent, Defendants have infringed, have contributed to the infringement of, and/or have induced infringement of, literally or under the doctrine of equivalents in violation of 35 U.S.C. §271, the '982 Patent by making, using, offering to sell, and/or selling a insulating cover for

the high intensity light reflector apparatus (“insulating cover”). These infringing insulating covers comprise a radiant-barrier insulating cover, which infringe or contribute to, or induce others to infringe at least one or more claims of the ‘982 Patent. These infringing insulating covers comprise at least the following product sold by Defendants: *Heat Shield*. It is believed that Defendants will continue to infringe, contributorily infringe, and/or induce infringement of, the ‘982 Patent unless enjoined by this Court. Defendants’ infringement and other actions have caused substantial injury to Plaintiff.

25. On information and belief, Defendants’ acts were committed knowingly and intentionally. Defendants were previous business partners of Plaintiff and had knowledge that Plaintiff had a patent on this product. Defendants are intentionally manufacturing and selling infringing products.

26. As a result of Defendants’ infringement, Plaintiff has, and will suffer, monetary damages and irreparable injury. Plaintiff’s monetary damages include, without limitation, lost profits, or at a minimum, the right to recover a reasonable royalty. Furthermore, unless Defendants are enjoined by this Court from continuing its infringement of the ‘982 Patent, Plaintiff has, and will suffer, additional irreparable damages and impairment of the value of its patent rights. Thus, an injunction against further infringement is appropriate.

THIRD CAUSE OF ACTION

(Unfair Competition Under Lanham Act [15 U.S.C. § 1125(a)])

27. Plaintiff Keen incorporates and alleges paragraphs 1-26 above as if fully set forth herein

28. Plaintiff produces high quality horticultural and gardening products.

29. Defendants provide the exact same products, and utilize the Trademark “HEAT SHIELD” to obtain customers and drive website traffic. The products which are provided by Defendants using the Trademarks will confuse and deceive the public into thinking that the products sold by Defendants are Plaintiff’s Products.

30. Defendants also provide water cooled light products which infringe Plaintiff's Patent. These water cooled lights and all past rights to these water cooled lights have been assigned to Plaintiff. Defendants have made representations to consumers that they should not purchase the water cooled lights owned by Plaintiff and assignor as they are inferior to Defendants. Defendants have further advised consumers that if they purchase lights from Defendants they are not entitled to purchase water cooled lights from Plaintiff and assignor.

31. Defendants are selling infringing products which include water cooled lights and insulating covers. (hereinafter, "Infringing Products")

32. Defendants have placed Infringing Goods and services in interstate commerce.

33. As a result of Defendants' acts, Plaintiff will suffer harm as they have and will experience a loss of income from the sale of their products and they did not and will not benefit from the sale of Defendants' products. Further, Plaintiff will lose goodwill since the potential poor quality of the products produced and advertisements designed for Defendants' infringing products may be far below Plaintiff's standards which could reflect negatively on Plaintiff's products, thus harming Plaintiff's business reputation. As a direct and proximate result of Defendants' unlawful conduct Plaintiff will be damaged, and is thus entitled to relief in an amount to be determined according to proof at the time of trial.

FOURTH CAUSE OF ACTION

(Unfair Competition and Trade Name Infringement)

34. Plaintiff Keen incorporates and alleges paragraphs 1-33 above as if fully set forth herein.

35. While continuously using the trademark "Heat Shield" in the United States for four years, Plaintiff has built up valuable goodwill in this Trademark and it has come to be associated exclusively with Plaintiff's product by the public generally throughout the United States.

36. At all times herein mentioned Defendants had actual knowledge of the existence of Plaintiff's use of its Trademark. Based on information and belief Defendant started using Plaintiff's mark in commerce less than a year ago.

37. Defendants are using this trademark on their infringing products. The use of Plaintiff's Trademark as a product name and in product advertising by Defendants, tends, has tended and will continue to tend to cause the public, perspective customers, creditors, suppliers and others to confuse Plaintiff with Defendants and vice versa. Defendants will continue to use these names unless enjoined by this Court.

38. Defendant is the original user and owner of the Trademark "HEAT SHIELD" for promotions and product sales and the name has definitely acquired, in the minds of the public, a secondary meaning apart from its primary and generic significance, and has become a distinctive trade name denoting to the eye and mind of the public, care, skill, industry, reliability, and individuality resulting in a reputation for excellence and high quality throughout the United States. Due to such reputation and public awareness, Plaintiff has established considerable goodwill in connection with the Trademark "HEAT SHIELD".

39. Defendants are attempting to sell the same products as Plaintiff. Defendants' use of that name create a likelihood that Plaintiff's current customers, potential customers, and the public generally will be confused or mislead as to the source of goods or service in that they are likely to believe that Defendants' business is identical to or affiliated with that of Plaintiff.

40. Defendants' acts as described herein constitute unfair competition and violate Texas common law prohibiting trademark infringement and unfair competition.

41. Defendants threaten to, and unless restrained will, continue to use the Trademark as a result of which the public generally will be mislead and deceived into believing that Defendants' product is identical or affiliated with that of Plaintiff, all to the irreparable injury of Plaintiff's business and goodwill and to the unjust enrichment of Defendants. Plaintiff has no adequate remedy at law in that it is extremely difficult to ascertain the amount of damages proximately caused to Plaintiff's business and goodwill.

FIFTH CAUSE OF ACTION

(Tortious Interference with Contract)

42. Plaintiff Keen incorporates and alleges paragraphs 1-41 above as if fully set forth herein.

43. Defendants obtained business and interfered with Plaintiff's business by misrepresenting the superiority of their products and patent rights.

44. Defendants advised customers that if they purchased Plaintiff's Fresca Sol products they could not purchase Defendants' products and that such a purchase would affect the business of the consumers and distributors.

45. By engaging in the aforesaid conduct, the Defendants intentionally and tortiously interfered with the contractual relations between Plaintiff and its suppliers, distributors and customers.

46. Defendants have advised consumers and distributors that if they sell Defendants' products they may not sell Plaintiff's products. Defendants are aware that Plaintiff had contracts with many other consumers and have intentionally interfered with these contracts.

47. Defendants have acted willfully and wantonly in so doing, with the intention and expectation that Plaintiff would be damaged by his actions.

48. Plaintiff has been damaged as a result of Defendants' conduct and is entitled to collect compensatory, exemplary and punitive damages.

SIXTH CAUSE OF ACTION

(Tortious Interference with Prospective Business Advantage)

49. Plaintiff Keen incorporates and alleges paragraphs 1-46 above as if fully set forth herein.

50. Defendants obtained business and interfered with Plaintiff's business by misrepresenting the superiority of their products and patent rights.

51. Defendants advised customers that if they purchased Plaintiff's Fresca Sol products they could not purchase Defendants' products and that such a purchase would affect the business of the consumers and distributors.

52. By engaging in the aforesaid conduct, the Defendants intentionally and tortiously interfered with the prospective business advantage that Plaintiff enjoyed with its suppliers, distributors and customers.

53. Defendants have acted willfully and wantonly in so doing, with the intention and expectation that Plaintiff would be damaged by their actions.

54. Plaintiff has been damaged as a result of Defendants' conduct and is entitled to collect compensatory, exemplary and punitive damages.

SEVENTH CAUSE OF ACTION

(Declaratory Judgment of Invalidity)

55. Plaintiff Keen incorporates and alleges paragraphs 1-50 above as if fully set forth herein.

56. Defendant Thomas E. Marek owns Patent No. 7,982,376 for "Apparatus and method for Removing Heat from High Intensity Light Bulbs".

57. The '376 Patent is invalid because, inter alia:

- a. The alleged inventions are not novel, but rather are anticipated by the prior art, as defined by 35 U.S.C. section 102.
- b. The alleged inventions would have been obvious to persons of ordinary skill in the art at the time of the alleged invention within the meaning of 35 U.S.C. section 103; and
- c. The specification and claims of the '376 Patent fail to comply with the requirements of 35 U.S.C. section 112.

58. Defendants desire a judicial determination that the '376 Patent is invalid.

59. Plaintiffs' conduct as alleged herein is also malicious, reckless and/or grossly negligent, warranting a declaration that this is an exceptional case, pursuant to 35 U.S.C. section 285, and an award to Defendants of their attorneys fees and costs.

REQUESTED RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendants, and each of them, as follows:

ON THE FIRST AND SECOND CAUSE OF ACTION:

- I. That judgment be entered against Defendants concluding that Defendants are willfully infringing Plaintiff United States Letters Patent Nos. 7,441,915 and 7,954,982;
- II. That Defendants, their agents, servants, employees, successors and assignors, and all those acting under the authority of, or in privity or concert with it, and each of them, be permanently enjoined from directly or indirectly infringing United States Letters Patent Nos. 7,441,915 and 7,954,982;
- III. That judgment be entered for damages, together with prejudgment interest, to compensate Plaintiff for Defendants' infringement of United States Letters Patent Nos. 7,441,915 and 7,954,982;
- IV. That judgment be entered for treble damages pursuant to 35 U.S.C. § 284;
- V. That judgment be entered that this case is an exceptional case within the meaning of 35 U.S.C. § 285, and for an award of reasonable attorneys' fees to Plaintiff;
- VI. That judgment be entered for costs to be awarded to Plaintiff; and
- VII. For such other and further relief as the Court may deem just and proper under the circumstances.

ON THE THIRD CAUSE OF ACTION:

- I. That the Plaintiff's Trademarks have been infringed and/or diluted by Defendants under 15 U.S.C. § 1114, 15 U.S.C. § 1123(c)(1) and Federal Common Law;
- II. That Defendants have unfairly competed with Plaintiff in violation of Texas common law;

III. That Plaintiff recover damages from Defendants for Defendants' acts of federal trademark infringement, dilution and unfair competition, and that these damages be trebled under 15 U.S.C. § 1117(b) because Defendants' acts had been willful, and

IV. that Plaintiff be awarded its reasonable attorneys' fees;

V. That Defendants, its officers, shareholders, directors, agents, servants, employees, attorneys, parent company, confederate and all persons in active concert or participation with them, be enjoined:

a. From using any combination, reproduction, counterfeit, copy or colorable imitation of the Trademarks in connection with advertising, offering for sale, or sale of goods or services the same or similar of those offered by Plaintiff, are likely to be confused with those of Plaintiff, or likely to injure Plaintiff's business reputation or reputation of the Trademarks;

b. From using any combination, reproduction, counterfeit, copy or colorable imitation of the Trademarks in any manner likely to cause confusion, to cause mistake or to deceive;

c. From selling, offering for sale, advertising, promoting, or passing off, inducing or enabling others to sell offer to sell, advertise, promote, or pass off any goods or services similar to the goods and services provided by Plaintiff utilizing the trademarks;

d. From committing any acts calculated to cause purchasers to believe that Defendants goods and services are the goods and services of Plaintiff in whole or in part; and

e. From otherwise competing unfairly with Plaintiff in any manner, including, but not limited to, infringing the least of Plaintiff's Trademarks or any confusingly similar marks;

VI. KEEN further requests such other and additional relief to which it may be entitled.

ON THE FOURTH CAUSE OF ACTION:

I. For compensatory, exemplary, special and punitive damages in a sum according to proof at trial;

- II. For an award of damages equal to the profit realized from Defendants' conduct, as alleged;
- III. For prejudgment interest thereon according to law;
- IV. That judgment be entered for costs to be awarded to Plaintiff; and
- V. For such other and further relief as the Court may deem just and proper under the circumstances.

ON THE FIFTH AND SIXTH CAUSES OF ACTION:

- I. For compensatory, exemplary, special and punitive damages in a sum according to proof at trial;
- II. For an award of damages equal to the profit realized from Defendants' conduct, as alleged;
- III. For the return of Plaintiff's Trade-Secrets and other confidential and proprietary information of Plaintiff;
- IV. For prejudgment interest thereon according to law;
- V. That judgment be entered for costs to be awarded to Plaintiff; and
- VI. For such other and further relief as the Court may deem just and proper under the circumstances.

ON THE SEVENTH CAUSE OF ACTION

- I. A Declaration that the '376 patent is invalid;
- II. A Declaration that the '376 patent is unenforceable;
- III. A judgment that this action is an "exceptional case," within the meaning of 35 U.S.C. section 285, and an award to Plaintiffs of their costs and reasonable attorneys' fees;

JURY DEMAND

Plaintiff respectfully requests a jury trial on all issues triable to a jury.

SLATER KENNON & PUGH, LLP

A handwritten signature in black ink that reads "Adam Pugh". The signature is written in a cursive style and is positioned above a horizontal line.

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