

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No.: 11-CV-24170-MIDDLEBROOKS**

SUNLESS, INC.

Plaintiff,

-vs-

BEAUTYXPERT, LLC,

Defendant

**FIRST AMENDED COMPLAINT FOR PATENT
INFRINGEMENT AND DEMAND FOR JURY TRIAL**

Plaintiff Sunless, Inc., for its Amended Complaint against Defendant Beautyxpert, LLC,
alleges as follows:

THE PARTIES

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

2. Defendant Beautyxpert, LLC (“Beautyxpert”) is a limited liability corporation organized and existing under the laws of the state of Florida with a principal place of business at 12555 Biscayne Blvd. #461, North Miami Florida 33181, within this judicial district. On December 1, 2011 the original complaint was properly and duly served upon Beautyxpert through its registered agent, Patrick Danciu at 1092 NE 94 Street, Miami, Florida 33138, the address listed with the Florida Department of State.

JURISDICTION AND VENUE

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

4. This Court has personal jurisdiction over Beautyxpert by virtue of Beautyxpert residing in this district, transacting and soliciting business within the State of Florida and within this judicial district.

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

BACKGROUND FACTS

6. Sunless is a leader in the development, manufacture, and marketing of sunless tanning products, including equipment and solutions.

7. On May 14, 2002, the United States Patent and Trademark Office (“USPTO”) duly and legally granted U.S. Patent No. 6,387,081 for an invention entitled “Misting apparatus for application of coating materials to skin surface” (“the ‘081 patent”). A true and correct copy of the ‘081 patent is attached hereto as Exhibit A.

8. Sunless is the owner of the entire right, title, and interest in and to the ‘081 patent by assignment from its predecessors, MT Industries, Inc. and Mystic Tan, Inc. Sunless has commercialized the ‘081 patent by making and selling its own products, which are covered by one or more claims of the ‘081 patent, including the Mystic HD and Mystic 8500 models and formerly the MyMyst, MT3000, and Innovation models.

9. Sunless placed the required statutory notice on substantially all products sold under the ‘081 patent from at least December 2003 until about January of 2011.

10. Beautyxpert has imported, offered for sale, sold and used in the United States an electrostatic tanning booth, identified as the TS765-A Autobronzer Autospray.

11. Upon information and belief, an Italian entity identified as Quadra Medical SRL, also known as Quadra Group, (collectively, “QMed”) is making and has made the TS765-A Autobronzer Autospray and supplies this product to Beautyxpert.

12. QMed had knowledge of the ‘081 patent since at least 2006.

13. In 2009 QMed, through counsel, sought to obtain a license under the ‘081 patent from Sunless or its predecessors. Sunless declined to extend a license to QMed.

14. Upon further information and belief, Beautyxpert is affiliated with QMed.

15. Beautyxpert actively promotes the sale of the TS765-A Autobronzer Autospray in the United States. In fact, Beautyxpert promotes the TS765-A Autobronzer Autospray as “[t]he only Mystic Tan alternative.”

16. Beautyxpert has directly infringed and is now infringing the ‘081 patent by using the TS765-A Autobronzer Autospray in the United States to perform a method claimed in the ‘081 patent.

17. Beautyxpert sells the TS765-A Autobronzer Autospray in the United States to third-party distributors who, in turn, resell the TS765-A Autobronzer Autospray to purchasers, including tanning salons and consumers who operate the product (collectively, “the Purchasers”). Beautyxpert actively promotes the resale and use of the TS765-A Autobronzer Autospray.

18. On August 30, 2011, Plaintiff, through counsel, sent a cease and desist letter by mail, postage pre-paid and return receipt requested to the address listed with the Florida Department of State for Beautyxpert demanding that it cease infringing the ‘081 patent. In a letter dated October 12, 2011 Beautyxpert, through counsel, replied and denied that the TS765-A

Autobronzer Autospray infringed any claim of the '081 patent and refused to cease offering for sale and selling the accused product.

19. Upon further information and belief, Beautyxpert's distributors have infringed the '081 patent by using the TS765-A Autobronzer in the United States to perform a method claimed in the '081 patent and Beautyxpert has actively promoted this infringing use.

20. Upon further information and belief, the Purchasers of the TS765-A Autobronzer Autospray have infringed and are now infringing the '081 patent by using this product in the United States to perform a method claimed in the '081 patent.

21. Despite constructive and actual knowledge of the '081 patent, Beautyxpert has actively induced its distributors and the Purchasers of the TS765-A Autobronzer Autospray to procure and use the product, in violation of Sunless' rights under the '081 patent. Beautyxpert intended to cause these acts that it knew or should have known would directly infringe one or more claims of the '081 patent.

22. In fact, Beautyxpert actively and knowingly aided and abetted its distributors and the Purchasers to use the TS765-A Autobronzer Autospray product to perform a method claimed in the '081 patent.

COUNT I
(Infringement of U.S. Patent No. 6,387,081)

23. Paragraphs 1-22 are re-alleged and restated as if fully set forth herein.

24. By using the TS765-A Autobronzer Autospray product in the United States, Beautyxpert has directly infringed one or more claims of the '081 patent, in violation of 35 U.S.C. § 271(a).

25. Beautyxpert has imported, offered for sale and sold the TS765-A Autobronzer Autospray product in the United States to distributors. Beautyxpert has also actively aided and

abetted distributors and the Purchasers to use the TS765-A Autobronzer Autospray product, with knowledge of the '081 patent and, upon information and belief, specific intent to induce infringement. Beautyxpert intended to cause these acts that it knew or should have known would directly infringe one or more claims of the '081 patent.

26. By actively and knowingly aiding and abetting distributors and the Purchasers to use the TS765-A Autobronzer Autospray product, Beautyxpert has indirectly infringed one or more claims of the '081 patent, in violation of 35 U.S.C. § 271(b).

27. Beautyxpert's actions as described above demonstrate a deliberate and conscious decision to infringe the '081 patent, or at the very least, a reckless disregard of Sunless' patent rights.

28. The infringement of the '081 patent by Beautyxpert was and is willful and deliberate, and will continue unless enjoined by this Court.

29. As a result of the infringement of the '081 patent by Beautyxpert, Sunless has suffered, and continues to suffer, damages in an amount to be established at trial. Furthermore, Sunless has suffered, and continues to suffer, irreparable harm for which there is no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Sunless prays that the Court:

A. Preliminarily and permanently enjoin Defendant, and its officers, employees, servants, and agents, and all persons in active concert with any of them, against any further acts of direct infringement or inducement under 35 U.S.C. § 283, including without limitation importing, using, offering for sale, and/or selling the TS765-A Autobronzer Autospray.

- B. Order Defendant to pay, in accordance with 35 U.S.C. § 284, damages adequate to compensate for the patent infringement, but in no event less than a reasonable royalty for the use made of the invention, together with interest and taxable costs.
- C. Find the infringement by Defendant to be willful, and order it to pay three (3) times the amount of damages found or assessed, under 35 U.S.C. § 284.
- D. Find this to be an exceptional case under 35 U.S.C. § 285, and order Defendant to pay Plaintiffs attorneys' fees, expenses and costs in this action.
- E. Grant Plaintiff such other and further relief as the Court may deem proper and just under the circumstances.

DEMAND FOR JURY TRIAL

Plaintiff Sunless, Inc. hereby makes demand for a trial by jury pursuant to Rule 38 of the Federal Rules of Civil Procedure as to all issues of this lawsuit.

Dated: January 6, 2012

Respectfully submitted,

/s/ Charles M. Rosenberg

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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Aaron Weiss

Aaron Weiss

Service List

Sunless, Inc. v. Beautyexpert
Case No. 11-24170-CV-MIDDLEBROOKS
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