

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
NEWARK DIVISION**

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EPB-0778
NJK-6122

*Attorneys for the Plaintiff:
Tristar Products, Inc.*

TRISTAR PRODUCTS, INC.)
(a Pennsylvania corporation),)

Plaintiff,)

v.)

NATIONAL EXPRESS, INC.)
(a Connecticut corporation),)

E. MISHAN AND SONS INC.)
(a New York corporation),)

DAP Brands Co.,)

(a Delaware corporation), and)
Blue Gentian, LLC)

(a Florida corporation))
Defendants.)

CIVIL ACTION FILE NUMBER:

Document filed Electronically

**COMPLAINT FOR DECLARATORY JUDGMENT OF PATENT NONINFRINGEMENT
AND DEMAND FOR JURY TRIAL**

This is an action brought under the Declaratory Judgment Act by Plaintiff, Tristar Products, Inc., a Pennsylvania corporation (hereinafter “Tristar Products” or “Plaintiff”), against Defendants National Express, Inc. a Connecticut corporation, (hereinafter “National Express” or “Defendant”), E. Mishan and Sons Inc., a New York corporation, (hereinafter “EMSON” or

“Defendant”), DAP Brands Co., a Delaware corporation, (hereinafter “DAP” or “Defendant”), and Blue Gentian, LLC, a Florida corporation, (hereinafter “Blue Gentian” or “Defendant”), (National Express, EMSON, DAP and Blue Gentian hereinafter collectively “Defendants”).

Upon actual knowledge with respect to itself and its own acts, and upon information and belief as to all other matters, Plaintiff alleges as follows:

THE PARTIES

1. Plaintiff Tristar Products is a Pennsylvania corporation having its corporate headquarters at 492 Route 46 East, Fairfield, New Jersey 07004.
2. Upon information and belief, Defendant National Express is a Connecticut corporation having a place of business at 2 Morgan Avenue, Norwalk, Connecticut 06851.
3. Upon information and belief, Defendant EMSON is a New York corporation having its corporate headquarters at 230 Fifth Avenue, Suite 800, New York, New York 10001.
4. Upon information and belief, Defendant DAP is a Delaware corporation having its corporate headquarters at 2400 Boston Street, Suite 200, Baltimore, Maryland 21224.
5. Upon information and belief, Defendant Blue Gentian is a Florida corporation having its principle place of business at 223 Skylark Point, Jupiter, Florida, 33458.

JURISDICTION AND VENUE

6. This is a civil action for declaratory judgment brought under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, and arises under the patent laws of the United States, Title 35 of the United States Code (35 U.S.C. §§ 1 et seq.). The Court has subject matter jurisdiction over the action pursuant to 28 U.S.C § 1331 and 28 U.S.C. §1338(a), as it involves substantial claims arising under the Patent Laws of the United States together with related claims for patent infringement.

7. Upon information and belief, personal jurisdiction is proper in this Court as to Defendant National Express because National Express solicits business and conducts business within the State of New Jersey, including but not limited to maintaining a website with access in New Jersey, marketing to customers in the State of New Jersey, and having commercial and residential sales in the State of New Jersey through its website and its authorized retailers. A copy of printouts from the website www.nationalexpresstv.com depicting a web-based offer for sale (attached as Exhibit A) demonstrate that National Express' products are marketed to customers within the state of New Jersey. Therefore the Court has personal jurisdiction over National Express pursuant to N.J. Ct. R. 4:4-4 and venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b), 28 U.S.C. §1391(c), and 28 U.S.C. §1400(b).

8. Upon information and belief, personal jurisdiction is proper in this Court as to Defendant EMSON because EMSON solicits business and conducts business within the State of New Jersey, including but not limited to maintaining a website with access in New Jersey, marketing to customers in the State of New Jersey, and having commercial and residential sales in the State of New Jersey through its website and its authorized retailers. A copy of printouts from the website www.emsoninc.com depicting a web-based offer for sale (attached as Exhibit B) demonstrate that EMSON's products are marketed to customers within the state of New Jersey. Therefore the Court has personal jurisdiction over EMSON pursuant to N.J. Ct. R. 4:4-4 and venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b), 28 U.S.C. §1391(c), and 28 U.S.C. §1400(b).

9. Upon information and belief, personal jurisdiction is proper in this Court as to Defendant DAP because DAP solicits business and conducts business within the State of New Jersey, including but not limited to maintaining a website with access in New Jersey, marketing to customers in the State of New Jersey, and having commercial and residential sales in the State of

New Jersey through its website and its authorized retailers. A copy of a printout from the website www.xhose.com depicting a web-based offer for sale (attached as Exhibit C) demonstrate that DAP's products are marketed to customers within the state of New Jersey. Therefore the Court has personal jurisdiction over DAP pursuant to N.J. Ct. R. 4:4-4 and venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b), 28 U.S.C. §1391(c), and 28 U.S.C. §1400(b).

10. Upon information and belief, personal jurisdiction is proper in this Court as to Defendant Blue Gentian because Blue Gentian solicits business and conducts business within the State of New Jersey through authorized retailers having commercial and residential sales in the State of New Jersey. In addition, upon information and belief, Blue Gentian has licensed rights in its intellectual property to other Defendants for exploitation within the State of New Jersey. The Court has personal jurisdiction over Blue Gentian pursuant to N.J. Ct. R. 4:4-4 and venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b), 28 U.S.C. §1391(c), and 28 U.S.C. §1400(b).

11. Tristar Products is alleged by Defendants to have committed acts of patent infringement in this district as it is a resident of this district and conducts its allegedly infringing activities within this district.

BACKGROUND

12. Tristar Products is a developer, manufacturer, and marketer of various consumer products including, but not limited to, home appliances, fitness equipment, health and beauty articles, and hardware.

13. Among the products sold by Tristar Products is the FLEX-ABLE HOSE™ (hereinafter the “Accused Product”).

14. Upon information and belief, National Express, EMSON, DAP, and Blue Gentian collectively market and offer for sale a DAP-branded expandable hose product named the “XHOSE.”
15. Upon information and belief, on March 26, 2012, a trademark application for the standard character mark “XHOSE” (U.S. Trademark Application No. 85,579,457) was filed by Berardi Productions, LLC, a Florida Corporation located at 223 Skylark Point, Jupiter, Florida, 33458, in International Class 017 for “garden hoses.”
16. Upon information and belief, on July 23, 2012, a trademark application for the design for a blue “stylized coiled hose” (U.S. Trademark Application No. 85,684,030) was filed by Blue Gentian, LLC, a Florida Corporation located at 223 Skylark Point, Jupiter, Florida, 33458, in International Class 017 for “air hoses; garden equipment, hoses; hose (tubing).”
17. Upon information and belief, on July 23, 2012, a trademark application for the design for a “stylized coiled hose” (U.S. Trademark Application No. 85,684,012) was filed by Blue Gentian, LLC, a Florida Corporation located at 223 Skylark Point, Jupiter, Florida, 33458, in International Class 017 for “air hoses; garden equipment, hoses; hose (tubing).”
18. Upon information and belief, on November 04, 2011, an individual by the name of Michael Berardi with a residence located at 223 Skylark Point, Jupiter, Florida, 33458 filed, through his attorney, a utility patent application entitled “Expandable and Contractible Hose” which was assigned U.S. Application No. 13/289,447 (hereinafter the “447 Application”).
19. Upon information and belief, on June 05, 2012, an individual by the name of Michael Berardi with a residence located at 223 Skylark Point, Jupiter, Florida, 33458 filed, through his attorney, a divisional utility patent application entitled “Expandable Hose Assembly” which was assigned U.S. Application No. 13/488,515 (hereinafter the “515 Application”). The '515 Application claimed priority to the '447 Application.

20. Upon information and belief, the '515 Application was published on September 20, 2012 as Berardi U.S. Publication No. 20120234425.

21. Upon information and belief, the '447 Application and the '515 Application issued on October 23, 2012 as Berardi U.S. Patent No. 8,291,941 entitled “Expandable and Contractible Hose” and Berardi U.S. Patent No. 8,291,942 entitled “Expandable Hose Assembly” (hereinafter, collectively the “Patents”).

22. Upon information and belief, the Patents were assigned by the applicant, Michael Berardi, to Blue Gentian, LLC, a company with the same office of incorporation as the residence of Michael Berardi – 223 Skylark Point, Jupiter, Florida, 33458.

23. Upon information and belief, Defendants are the owners and/or licensees, with the ability to enforce, the Patents.

THE CONFLICT

24. During the period of September 11, 12, and 13, 2012 Plaintiff attended the Electronic Retailing Annual D2C Conference in Las Vegas, Nevada (the “trade show”) and displayed, among other items, the Accused Device.

25. During the trade show, Plaintiff’s customers informed Plaintiff that Defendant EMSON represented that a patent relating to the XHOSE product would be issuing, and threatened Plaintiff’ customers by indicating that upon issuance of that patent it would file suit against any perceived infringers of its patents, including, but not limited to Plaintiff and its customers.

26. Upon information and belief, the patents relating to the XHOSE referenced by Defendant EMSON were Berardi U.S. Patent No. 8,291,941 and Berardi U.S. Patent No. 8,291,942, as both received a Notice of Allowance (and therefore pending issuance) prior to the trade show but were neither published nor publicly available for inspection at the time of the trade show.

27. Upon information and belief, Defendant EMSON notified Plaintiff's customers that the Accused Product infringed the patents that were pending issuance based on Plaintiff's offer for the sale of the Accused Product. As a result of Defendant EMSON's threats, during and since the trade show, Plaintiff has been approached by several customers stating that if they elected to purchase and resell the Accused Product, each feared that it would be the subject of a patent lawsuit initiated by Defendants.

28. As a result of the threats by Defendant EMSON, Plaintiff's activities have been significantly impaired, including potential customers refusing to purchase the Accused Product without assurances in the form of indemnification against Defendants' threatened litigation.

29. Defendants, through their actions, have impeded the activities of Plaintiff and under the circumstances, there is a substantial controversy over infringement of the Patents by the Accused Product, between Tristar Products and the Defendants, parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

FIRST CLAIM FOR RELIEF
Declaration of Noninfringement

30. Tristar Products realleges and incorporates the allegations set forth in Paragraph 1 through Paragraph 29 herein.

31. By virtue of at least the aforesaid acts of Defendants asserting rights under the Patents based on Tristar Products' ongoing and planned activities attendant to its Accused Product, a United States Constitution Article III case or controversy has arisen such that Tristar Products need not risk a suit for infringement by Defendants based on the aforesaid acts before seeking a declaration of its legal rights.

32. By virtue of the aforementioned actions by Defendants, under all of the circumstances, there is a substantial, actual, and justiciable controversy between Tristar Products and Defendants, of sufficient immediacy and reality as to infringement of the Patents, such that a justiciable Article III controversy exists.

33. Tristar Products does not infringe, induce infringement of, and/or contributorily infringe, and has not infringed, induced infringement of, and/or contributorily infringed any valid and enforceable claim of the Patents.

34. Without declaratory relief, Tristar Products will be irreparably harmed and damaged.

SECOND CLAIM FOR RELIEF
Declaration of Invalidity

35. Tristar Products realleges and incorporates the allegations set forth in Paragraph 1 through Paragraph 34 herein.

36. Tristar Products believes that the Patents are invalid and void for failure to comply with one or more sections of Title 35 of the United States Code, including, without limitation, 35 U.S.C. §§ 101, 102, 103, and/or 112, and/or for failure to comply with 37 C.F.R. § 1.56.

37. An actual controversy exists between Tristar Products and Defendants regarding whether or not each claim of the Patents are valid.

38. Without declaratory relief, Tristar Products will be irreparably harmed and damaged.

39. Tristar Products is entitled to a judgment declaring that each claim of the Patents is invalid for failure to satisfy one or more conditions of patentability set forth in 35 U.S.C. §§ 101, 102, 103, and/or 112.

THIRD CLAIM FOR RELIEF
Declaration of Unenforceability

40. Tristar Products realleges and incorporates the allegations set forth in Paragraph 1 through Paragraph 39 herein.

41. An actual controversy exists between Tristar Products and Defendants regarding whether or not each claim of the Patents are enforceable.

42. Tristar Products is entitled to judgment declaring that each claim of the Patents are unenforceable.

PRAYER FOR RELIEF

WHEREFORE, Tristar Products prays that the Court enter judgment against Defendants, National Express, EMSON, DAP, and Blue Gentian as follows:

A. A declaration that Tristar Products has not infringed, induced infringement of, or contributorily infringed, and does not infringe, induce infringement of, and/or contributorily infringe, any valid or enforceable claim of Berardi U.S. Patent No. 8,291,941 and Berardi U.S. Patent No. 8,291,942.

B. A declaration that Berardi U.S. Patent No. 8,291,941 and Berardi U.S. Patent No. 8,291,942 are unenforceable and/or invalid and void for failure to comply with one or more sections of Title 35 of the United States Code, including, without limitation, 35 U.S.C. §§ 101, 102,103, and/or 112, and/or for failure to comply with 37 C.F.R. § 1.56.

C. A declaration that this case is "exceptional" within the meaning of 35 U.S.C. § 285;

D. An award to Tristar Products of its costs, attorney fees, and expenses pursuant to 35 U.S.C. § 285; and

E. That Tristar Products be awarded such other and further relief as this Court deems proper and just.

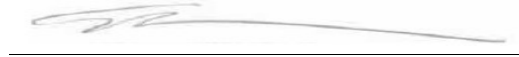
DEMAND FOR JURY TRIAL

Tristar Products demands a trial by jury of all issues properly triable to a jury in this case.

Respectfully submitted this 23rd day of OCTOBER 2012,

Bakos & Kritzer

*Attorneys for the Plaintiff:
Tristar Products, Inc.*



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CERTIFICATION PURSUANT TO LOCAL CIVIL RULE 11.2

Tristar Products, Inc. by its undersigned counsel, hereby certifies pursuant to Local Civil Rule 11.2 that the matters in controversy are not the subject of any other action pending in any other court or of any other pending arbitration or administrative proceeding.

Respectfully submitted this 23rd day of OCTOBER 2012,

Bakos & Kritzer

*Attorneys for the Plaintiff:
Tristar Products, Inc.*



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