

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN**

Myco Industries, Inc.,

Plaintiff,

v.

Blephex, LLC,

Defendant.

Case No. 2:19-cv-10645-GAD-EAS

JURY TRIAL DEMANDED

**FIRST AMENDED COMPLAINT FOR
DECLARATORY JUDGMENT AND DEMAND
FOR JURY TRIAL**

Plaintiff, Myco Industries, Inc. (“Myco”), files this First Amended Complaint for Declaratory Judgment against Defendant, Blephex, LLC (“Blephex”), and alleges as follows:

I. NATURE OF THE ACTION

1. Myco seeks a judgment declaring that it does not infringe U.S. Patent No. 9,039,718 B2 (“the ‘718 patent) (attached as Exhibit A), that the ‘718 patent is invalid, and that Blephex engaged in unfair competition. Myco also seeks an order preliminarily and permanently enjoining Blephex from making threats against Myco

and its customers and from initiating or maintaining litigation or other actions against Myco and its customers.

II. THE PARTIES

2. Plaintiff Myco is a corporation organized and existing under the laws of the State of Michigan, with a principal place of business at 510 Highland Avenue, Suite 332, Milford, Michigan 48381.

3. On information and belief, Defendant Blephex is a corporation organized under the laws of the State of Florida with a place of business at 119 SE Parkway Court, Suite 250, Franklin, TN 37064.

4. On information and belief, Blephex was formed in 2014 by the merger of, *inter alia*, Rysurg, LLC, a Michigan limited liability company.

III. JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this action pursuant to:
- a. 28 U.S.C. § 1331, relating to “federal question” jurisdiction;
 - b. 28 U.S.C. § 1338(a), conferring jurisdiction over actions arising under federal patent laws;
 - c. 28 U.S.C. §§2201 and 2202, conferring jurisdiction over actions involving declaratory judgment.

6. On information and belief, this Court has personal jurisdiction over Blephex because it conducts business in the State of Michigan and within this district, including the advertising and sale of products to Michigan residents. Blephex has also threatened litigation against Myco, a Michigan resident.

7. Venue is proper in this judicial district under 28 U.S.C. §1391(c).

8. A case or controversy exists between the Myco and Blephex because Blephex has accused Myco and its customers of patent infringement and has threatened litigation.

IV. FACTS COMMON TO ALL COUNTS

9. Blepharitis is a common ocular condition characterized by, for example, inflammation, scaling, reddening, and crusting of the eyelid. Blepharitis can be anterior or posterior. Anterior blepharitis affects the front edge of the eyelid, where the eyelashes join it. Posterior blepharitis affects the inner edge of the eyelid.

The History of the '718 Patent Claims in the Patent Office

10. The '718 patent resulted from a patent application filed July 24, 2012, serial number 13/556,729 ("the '729 application"). The application as filed contained claims to a method of blepharitis treatment as well as an electromechanical treatment device.

11. In response to a U.S. Patent and Trademark Office ("PTO") restriction requirement, the patent owner elected to pursue the method claims.

12. The PTO rejected the method claims in the '729 application. In response, the patent owner amended the claims by adding to claim 1 the phrase "configured to access an inner edge portion of the eyelid margin." In remarks accompanying the claim amendment, the patent owner confirmed that it added the new claim language to distinguish the claims from a prior art reference, U.S. Patent Pub. 2007/0060988, cited by the PTO.

13. When the patent owner amended claim 1, it also added two new independent claims, application claims 29 and 30. Claim 29 limited the treatment method to "contacting at least an inner edge portion of the eyelid margin" and in accompanying remarks, the patent owner emphasized that limiting language. In contrast, claim 30 did not include similar "inner eyelid" language.

14. After an interview with the PTO examiner, the patent owner agreed to cancel claim 30, the only claim that did not include the "inner eyelid" limitation. The patent owner also agreed to further amend claim 1 to add the phrase "between the eyelashes and the inner edge of the eyelid margin" to the treatment process to make clear that the claimed process requires treating the inner edge of the eyelid.

15. Blephex's '718 patent issued on May 26, 2015 with two independent method claims, claim 1 and 17 (former application claim 29). Both claims require treating the inner edge of the eyelid, namely posterior blepharitis.

Myco's AB Max Product

16. Myco makes and sells a product called AB Max for the treatment of anterior blepharitis. (*See, e.g.*, Exhibit B.) Myco does not use or sell AB Max for treatment of posterior blepharitis and has never promoted, endorsed, or encouraged such use.

Blephex's Infringement Threats

17. On Thursday February 21, 2019, Blephex's Chief Executive Officer ("CEO"), James Rynerson, approached Myco's sales booth at SECO 2019 in New Orleans, LA. Rynerson told Myco's Chairman, John Choate, that Myco's AB Max product infringed Blephex's patents and that Blephex would sue Myco and its customers. Rynerson made a video recording of his threats.

18. Choate denied Rynerson's claims and provided Rynerson with AB Max promotional materials that expressly promote it for treatment of anterior blepharitis.

19. Nevertheless, Rynerson continued to accuse Myco of infringement throughout the SECO 2019 conference. Specifically, Rynerson told doctors and practitioners visiting the Blephex booth, who were actual and/or prospective Myco customers, that Myco's AB Max technology was "totally infringing on his [Blephex's] patents" and that he would "take action."

20. Given that the patent owner had to limit the claims of the '729 application to treatment of posterior blepharitis only in order to get the '718 patent

allowed, Rynerson knew or should have known that the '718 is infringed only by treatment of posterior Blepharitis.

21. As Rynerson visited the Myco booth and received AB Max promotional materials that only promoted the AB Max for treatment of anterior blepharitis, Rynerson knew or should have known that Myco was not using or promoting the AB Max for treatment of posterior blepharitis at SECO 2019 and, consequently, that neither Myco nor the AB Max infringed the '718 patent.

22. In addition, medical practitioners who use AB Max to treat blepharitis are immune from claims that they infringe the '718 patent under 35 U.S.C. § 287(c) as Blephex and Rynerson know or should know.

23. Myco and Blephex are direct competitors and, on information and belief, the AB Max retails for about one-third the retail price of the Blephex.

24. Blephex is a litigious company as shown, for example, by its lawsuit against Pain Point Medical Systems Inc. pending in the Northern District of Texas, Case No. 3-16-cv-00410.

V. COUNT 1

DECLARATORY JUDGMENT OF NON-INFRINGEMENT

25. Myco incorporates the above allegations.

26. Because of the threats Blephex made against Myco and its customers alleging infringement of Blephex's '718 patent, an actual case or controversy exists

with respect to the '718 method patent.

27. The '718 patent is infringed only if the device recited in the claims (“a swab operably connected to an electromechanical device”) is used to treat posterior blepharitis.

28. Myco has not used AB Max to treat posterior blepharitis and, therefore, has not directly infringed the '718 patent.

29. Myco has not promoted, encouraged, or induced others to use AB Max to treat posterior blepharitis, so, Myco has not actively induced infringement of the '718 patent.

30. AB Max has substantial non-infringing uses, namely, treatment of anterior blepharitis, so, Myco has not contributorily infringed the '718 patent.

31. Myco is entitled to a declaratory judgment that it has not infringed and is not infringing the '718 patent.

VI. COUNT 2

DECLARATORY JUDGMENT OF INVALIDITY

32. Myco incorporates the above allegations.

33. The claims of the '718 patent are invalid under 35 U.S.C. §§ 102, 103, and/or 112.

VII. COUNT 3

FEDERAL UNFAIR COMPETITION

34. Myco incorporates the above allegations.

35. Rynerson, CEO of Blephex, knew or should have known that the '718 patent is only infringed by a method that treats posterior blepharitis.

36. At SECO 2019, Rynerson observed that Myco promoted the AB Max solely for treatment of anterior blepharitis, and never saw MYCO use AB Max on patients but, nevertheless, accused Myco of infringing the '718 patent and represented the same to actual and/or prospective Myco customers.

37. Given that the '718 patent is only infringed by a method that treats posterior blepharitis, Rynerson's claim that AB Max infringes the '718 patent was false, objectively baseless, and made in bad faith.

38. Rynerson's false statements were made in interstate commerce and actually deceived and/or was likely to deceive a substantial segment of the intended audience, namely optometric and ophthalmic medical professionals.

39. Rynerson's false statements did and/or were likely to influence actual and/or prospective Myco customers not to purchase the AB Max.

40. Blephex's conduct constitutes unfair competition in violation of §43(a) of the Lanham Act, 15 U.S.C. §1125(a).

41. As a direct and proximate result of Blephex's actions, Myco has suffered and will continue to suffer irreparable harm to its business, goodwill, reputation and profits. Myco will continue to be irreparably harmed unless Blephex is restrained from making threats against Myco and/or its customers and from initiating or maintaining litigation or other actions against Myco and/or its customers.

42. An award of monetary damages alone cannot fully compensate Myco for its injuries, and Myco lacks an adequate remedy at law.

43. The foregoing conduct by Blephex has been and continues to be deliberate, willful, and wanton, making this an exceptional case within the meaning of 15 U.S.C. §1117.

44. Myco is entitled to a permanent injunction against Blephex, as well as all other remedies available under the Lanham Act, including but not limited to, compensatory damages, treble damages, disgorgement of profits and costs and attorney's fees.

VIII. COUNT 4

COMMON LAW UNFAIR COMPETITION

45. Myco incorporates the above allegations.

46. By its acts alleged herein, Blephex has engaged in unfair competition under the common law of the State of Michigan.

47. Upon information and belief, the aforesaid acts were undertaken willfully and with the intention of misleading relevant consumers and interfering with and harming Myco's business, goodwill, reputation, and profits.

48. As a direct and proximate result of Blephex's actions, Myco has suffered and will continue to suffer irreparable harm to its business, goodwill, reputation, and profits in an amount to be proved at trial. Myco will continue to be irreparably harmed unless Blephex is restrained from making threats against Myco and/or its customers and from initiating or maintaining litigation or other actions against Myco and/or its customers.

49. An award of monetary damages alone cannot fully compensate Myco for its injuries, and Myco lacks an adequate remedy at law.

IX. PRAYER FOR RELIEF

WHEREFORE, Plaintiff Myco asks the Court to enter judgment against Blephex providing the following relief:

A. a declaration that Myco does not directly or indirectly infringe Blephex's patent rights;

B. a declaration that Blephex's '718 patent is invalid;

C. a determination that Blephex has violated 15 U.S.C. §1125(a), that Myco has been damage by such violations, and that Blephex is liable to Myco for such violations;

D. a determination that Blephex has committed common law unfair competition, that Myco has been damage by such unfair competition, and that Blephex is liable to Myco for common law unfair competition;

E. a determination that the actions complained of herein were willful and intentional;

F. a determination that this case is “exceptional,” under 15 U.S.C. §1117;

C. recovery of damages adequate to compensate Myco for Blephex’s spurious allegations of patent infringement and threats of litigation;

D. an assessment against Defendant of Myco’s costs, attorney fees, and expenses;

E. an order preliminarily and permanently enjoining Blephex from making threats against Myco and its customers and from initiating or maintaining litigation or other actions against Myco and its customers; and

F. such other relief as the Court considers proper.

X. JURY DEMAND

Myco demands a trial by jury of all issues so triable.

Respectfully submitted,

BROOKS KUSHMAN P.C.

Dated: March 14, 2019

/s/ Thomas A. Lewry
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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on March 14, 2019, I electronically filed the foregoing with the Clerk of the Court for the Eastern District of Michigan using the ECF System which will send notification to the following registered participants of the ECF System as listed on the Court's Notice of Electronic Filing: : Dean W. Amburn and Lina A. Asmar.

BROOKS KUSHMAN P.C.

/s/ Thomas A. Lewry
Thomas A. Lewry (P36399)