

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.

Otter Products, LLC,
a Colorado limited liability company,

Plaintiff,

v.

Defender Industries, Inc.,
a Connecticut corporation,

Defendant.

COMPLAINT FOR DECLARATORY JUDGMENT

COMES NOW the Plaintiff, Otter Products, LLC, by and through its counsel, Erik G. Fischer, P.C., and asserts the following Complaint against the above named Defendant, stating as follows:

Jurisdiction and Venue

1. Plaintiff, Otter Products, LLC, is a Colorado limited liability company authorized to do business at 1 Old Town Square, Suite 303, Fort Collins, Colorado.
2. Defendant, Defender Industries, Inc., is a Connecticut corporation authorized to do, and doing business at, 42 Great Neck Road, Waterford, Connecticut.
3. Defendant, and its agents, as a direct competitor of the Plaintiff, sell products, over the internet to customers in the State of Colorado and throughout the United States.
4. This Court has jurisdiction over this civil action pursuant to 28 U.S.C. §1331, 28 U.S.C. §1332, and 28 U.S.C. §1338.

5. Venue is appropriate in this District pursuant to 28 U.S.C. §1391 and 28 U.S.C. §1400 since Defendant has committed tortious acts and conducted business in the State of Colorado and this judicial district.

General Allegations

6. Plaintiff created, designed and invented certain mobile phone cases, iPod cases, PDA cases and Micro cases and was issued four (4) separate United States Patents (the “Patents”) covering same.

7. One of Plaintiff’s series of products for mobile phones is marketed under the name “Defender”.

8. This product is not a marine product, is not a water proof product, and is not included in the lines of products that Plaintiff does market as water proof and as for marine use.

9. Defendant, itself and through divisions, subsidiaries and/or agents, is engaged, *inter alia*, in business as a marine outfitter for boating enthusiasts selling a wide variety of articles in this industry.

10. The business of Defendant as an outfitter is not in direct competition with Plaintiff and does not brand or mark its products with the name “Defender” or “Defender Marine” in its outside sales.

11. The Defendant does sell products in the State of Colorado through its website, including two products that could compete with Plaintiff’s OtterBox Defender products.

12. Neither of the products identified and sold by Defendant are named “Defender” or “Defender Marine”.

First Claim for Relief

(Declaratory Judgment)

13. Plaintiff incorporates and restates the allegations set forth above as though fully set forth herein.

14. The Plaintiff sells a series of products as protective cases for cell phones that are not water proof and are not marketed in the marine industry, but marketed under the name “Defender”.

15. The Defendant, through counsel, by email and through voice messaging, has asserted claims that Otter Products is infringing upon its trademark name “Defender” or “Defender Marine”.

16. The Defendant has requested by email and letter that Plaintiff refrain from selling or manufacturing products using their trademark.

17. Plaintiff seeks a declaratory judgment that Defendant does not have a protectable trademark or, alternatively, that Plaintiff’s use of the term “Defender” is not an infringement on Defendant’s trademark name, if any.

18. The Defendant’s threats and actions taken by Defendant create an actual controversy within the scope of 28 U.S.C. 2201 and 2202, and Plaintiff is entitled to a final determination as to whether their “Defender” products in any way infringe upon the trademark of the Defendant.

WHEREFORE, Plaintiff prays for judgment against the Defendant as follows:

- (a) Declare that Defendant has no protectable interest under United States intellectual property law or trademark law in the name “Defender” or “Defender Marine”.

- (b) Or, alternatively, if the Defendant has protectable intellectual property rights, that Plaintiff's use of the term "Defender" does not infringe upon the rights of Defendant in their trademark.
- (c) That Plaintiff be granted all other legal and equitable relief as deemed just by the Court.

Dated this 9th day of October, 2009.

Respectfully submitted,

Erik G. Fischer, P.C.

/s/ Erik G. Fischer

Erik G. Fischer, #16856

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