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

**FLEET ENGINEERS, INC.**
a Michigan Corporation,

Plaintiff

v.
**MUDGUARD TECHNOLOGIES, LLC**
a Tennessee limited liability company,
**TARUN SURTI**
an Individual,

Defendant.

Case No. 1:12-CV-1143

Hon. Paul L. Maloney

**DEFENDANTS' MOTION TO CHALLANGE THIS COURT'S JUDGMENT**

**IN THE COURT OF APPEALS**

Defendants hereby moves this Court to allow its filing to Challenge this Court judgment (ECF No. 255 and 256) in the Court of Appeals. Defendants believe that this Court has made a **"LEGAL ERROR"** by neglecting its **OWN RULE** established during the Opinion Markman-Hearing (ECF No. 60) and by excluding the **UNDISPUTABLE INTRINSIC EVIDENCES**. Defendants believe that this Court judgment was arbitrarily made and appears to be driven by **"PREJUDICE"** towards Defendants and **"FAVOROTISM"** towards Plaintiff. This Motion is supported by a Memorandum filed contemporaneously herewith.

Respectfully submitted,

Dated: April 26, 2018

By: _____

Tarun N. Surti, Individually
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Defendants
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**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN**

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**DEFENDANTS' MEMORANDUM IN SUPPORT OF ITS MOTION TO CHALLANGE THIS COURT'S JUDGMENT IN THE COURT OF APPEALS**

## 1. INTRODUCTION

Defendants hereby moves this Court to allow its filing to Challenge this Court judgment (ECF No. 255 and 256) in the Court of Appeals. Defendants believe that this Court has made a **"LEGAL ERROR"** by neglecting its **OWN RULE** established during the Opinion Markman-Hearing (ECF No. 60) and by excluding the **UNDISPUTABLE INTRINSIC EVIDENCES**. Defendants believe that this Court judgment was arbitrarily made and appears to be driven by **"PREJUDICE"** towards Defendants and **"FAVOROTISM"** towards Plaintiff.

## 2. LEGAL STANDARD

This Court has already ruled that Mr. Surti is not a legal experts, therefore his testimonies are not admissible. Mr. Surti agree that he is not a legal expert and therefore have chosen not to

make any more legal statement. Mr. Surti is an Electro-Mechanical Engineer who has been working as design engineer since 1974 (almost 44 years). Mr. Surti holds many patents and consider himself an expert design-engineer. Therefore, Defendants would like to address some concerns regarding the final judgment by this Court that failed, (1) to consider the undisputed intrinsic evidence submitted by Defendants, (2) to use broader definition of "VANES", and (3) to include the "Laws of Physics" and "Gravitational Force" that this Court had acknowledged (PageID 399)[1].

## 3. FACTUAL BACKGROUND

Plaintiff filed this case against the Defendants on October 19, 2012 (ECF No. 1) seeking, Count I-Declaratory Judgment of Non-Infringement, Count II- Declaratory Judgment of Invalidity, and Count III-Tortious Interference with Business Relations (Michigan Law).

Defendants counterclaimed (ECF No. 8) seeking, Count I-Patent Infringement, Count II-Breach of Contract, and Count III-Misappropriation of Trade Secrets.

On June 30, 2018, this Court order (ECF No. 255) granting Plaintiff's Motion to Dismiss, Granting in Part Plaintiff's Motion for entry of Judgment and denying Defendants Motion for Order.

1) Fleet Engineer's Count 1, Court DECLARES that Fleet's AeroFlap mudflap, as presented to this Court, does not infringe on Tarun Surti's 8,146,949 (now RE 44,755) patent for mudflap.

[1] The laws of physics necessitate that, with the force at which the water and debris are being thrown at the mudflap by the rotating tire, and the wind force created by the moving vehicle pushing water and debris against the body of the mudflap, the combination of forces will push water and debris through the slotted opening.

2) Fleet Engineer's Count 2, its claim for patent invalidity against Surti's patent is DISMISSED WITH PREJUDICE.

3) Fleet Engineer's Count 3, its tortious interference claim against Defendant Mudguard Technologies is GRANTED and the Court AWARDS A MONEY JUDGMENT in Fleet's favor against Mudguard for $195,523.58.

4) Fleet Engineer's motion for voluntary dismissal of Count 3 against Surti (ECF No. 243) is GRANTED. Fleet Engineer's claim for tortious interference against Defendant Tarun Surti is DISMISSED WITHOUT PREJUDICE.

5) The three counterclaims brought by Surti and Mudguard against Fleet are DISMISSED WITH PREJUDICE.

## 4. ARGUMENT

### A. DEFENDANTS' RELIED ON THIS COURT'S OPINION-MARKMAN HEARING

This Court had opinioned (ECF No. 60), "how each of the disputed phrases should be interpreted. The patent does require the vanes and channels run perpendicular to the road surface. The patent does not require the vanes and channels to run the length of the mud flap without interruption. Finally, the patent does not require the slotted openings to be of a size that stops all water and debris from flowing through them".

### B. COURT'S FINAL JUDGMENT – IS IT A LEGAL ERROR?

In the Opinion (ECF No. 60), the Court noted "superiority of the broadness of claim v. description of the invention" and stated that "court should avoid the danger of reading limitations from the specification into the claim". However in its final judgment, this **Court did exactly the opposite of what it had stated to avoid in its Opinion.** Therefore Defendant is wondering whether this Court has made a "LEGAL ERROR"?

*"the problem becomes particularly acute when "the written description of the invention is narrow, but the* ***claim language is sufficiently broad*** *that it can be read to encompass features not described in the written description, either by general characterization or by example in any of the illustrative embodiments."*(PageID 391).

The Court added, *"The purpose of the specification and the embodiment is to "teach and enable those skilled in the art to make and use the invention and to provide a best mode for doing so." Id. And Certainly, the specification may be used to interpret what the patentee meant by a word or phrase in the claim language. E.I. du Pont de Nemours & Co. v. Phillips Petroleum Co., 849 F.2d 1430, 1433 (Fed. Cir. 1988) However, the description of the embodiment contained in the specification should not be used as a requirement limiting the claim, where the claim language contains no such requirement. Id. The Federal Circuit has repeatedly warned against this sort of interpretive process. Phillips, 415 F.3d at 1323 (explaining that court should "avoid the danger of reading limitations from the specification into the claim[.]"). The purpose of the specification and the embodiment is to "teach and enable those skilled in the art to make and use the invention and to provide a best mode for doing so." Id.* ***Although a specification may describe a specific embodiment of an invention, "we have repeatedly warned against confining the claims to those embodiments,"*** *Id. (PageID 397).*

Defendants believe that this Court neglected its **OWN RULE** regarding the ***"broad meaning of Surti's '755 Patent's claim language"*** and narrowly redefined "VANES" in its final judgment. This Court also forgot to include the **UNDISPUTABLE INTRINSIC EVIDENCE** like Plaintiff's AeroFlap mudflap (p/n 033-08004- BatesID-Fleet-001309) and Plaintiff's drawing, showing cross section of AeroFlap mudflap (BatesID-FLEET-001316), among other documents that Defendants had submitted to this Court to prove the infringement of Surti's '755 Patent by Plaintiff's AeroFlap mudflap. It appears that the Court's arguments, in its final judgment, are arbitrarily made. They failed to utilize Opinion Markman-Hearing (ECF No. 60), knowledge of science, undisputed intrinsic evidences, design criteria of a plastic parts, and plastic injection molding manufacturing process. Therefore Defendants believe that this Court judgment that favors Plaintiff's Count 1 and 3, and against the Defendants Count 1, 2, and 3 (ECF No. 255 and 256) appears to be **LEGALLY WRONG**.

## C. SURTI'S RE 44,755 PATENT

Surti '755 Patent claim 1 reads, "*** *a plurality of laterally spaced, vertically extending vanes defining a plurality of vertically extending channels on the front side of the flap for directing water and debris from the wheel in a downward direction toward the ground and not to the rear or sides of the flap and vertically extending slotted openings in the channels of a size permitting air to pass through the openings to the rear of the flap and preventing water and debris from doing so*". It is implicit in Surti's '755 Patent claim 1 that the size of the openings in the channels are smaller, leaving rear walls around them that positively prevent (stops) rearward motion of the water and debris and directs them in a downward direction toward the ground and not to the rear or sides of the flap".

## D. PLAINTIFF'S MOTIVATION

Plaintiff's filed this malicious lawsuit, knowingly mislead this Court, and dragged the Defendants into this baseless, lengthy and expensive litigation that Plaintiff knew Defendants could not afford.

Plaintiff's malicious intent was, **"TO STEAL SURTI'S '755 PATENT" AND TO ELIMINATE A COMPETITOR BY FORCING THE DEFENDANTS' OUT OF BUSINESS THROUGH AN ABUSIVE LITIGATION WHICH IS EVIDENT FROM PLAINTIFF'S BEHAVIOUR THROUHG OUT THIS CASE".**

## E. INFRINGMENT OF SURTI'S '755 PATENT BY PLAINTIFF'S AEROFLAP

The following explanations will show why Defendants believe that Plaintiff's AeroFlap is infringing on Surti's '755 patent.

6) **RECESSES** - Plaintiff had lied to this Court and to the Patent Office when it claimed "RECESSES" as a novelty of their own invention. The truth is that the idea of recesses was originated by Mr. Surti and incorporated in his V-Flap mudflap, Revision C, dated August 17, 2010 (BatesID No. – Defendants 000145-000147 and 000208-000209). These modifications along with the original part drawings and manufacturing knowhow were shared with the Plaintiff under the protection of "Confidentiality and Non-Competition Agreement[2]". Second, Plaintiff falsely claimed that its AeroFlap has recesses and therefore no vanes. Mechanically it is impossible to have plurality of recesses without dividing vanes. Therefore, it is fair to assume that Plaintiff's AeroFlap plurality of vertical recesses are defined by plurality of **VERTICAL VANES** and horizontal interruptions (the interruptions argument was rejected by this Court - PageID 396-397). Lastly, these recesses are unable to trap water and debris, when the mudflap is used in vertical orientation because it is subjective to the "Laws of Physics" and "Gravitational Forces", but directs them in a downward direction toward the ground and not to the rear or sides of the flap.

7) **DEFINITION OF VANE** – Originally the Plaintiff had asked this court to define **"VANES AS FLAT OR SHAPED PLATE TO DIRECT FLUID FLOW"** (PageID 281), therefore, Defendants found no reason to redefine "vane" after this Court had issued its Opinion-Markman Hearing (ECF No. 60). Plaintiff realized that such broader definition could jeopardize their winning the case, hence resubmitted to this Court a misleading definition of the word "vane" as a blade, plate or sail usually attached radially to a rotating wheel or drum. (*Id.* at 7 PageID.440.) implying that the

[2] ECF No. 1-PageID 4- item 20, and Defendants BatesID No. 000132-000133

vane must be shaped like a blade that protrudes from the outer surface of mudflap body. Surti had broadly used the word 'vane' like water-wheel's vanes rather than wiper blades as suggested by this Court. Plaintiff AeroFlap vanes may look like a flat plate, however, they are still **vanes** and its **tapered sidewalls** (BatesID-FLEET001316) still direct the fluid flow into the recesses.

8) **VERTICAL VANES -** Plaintiff was fully aware that their plastic injection molding manufacturing process produced mudflaps with lower section, which contained vertical vanes, channels, and openings (BatesID- FLEET 000953-000954). However, Plaintiff lied to this court when they denied having vertical vanes, channels, and openings and implied that the lower section was optional and not an integral part of manufactured AeroFlap products. It is obvious that Plaintiff's AeroFlap's lower portion has all infringing components of Surti's '755 Patent. Optional or non-optional, **Infringement is an infringement, even when it is in one section of Plaintiff's AeroFlap.**

9) **PREVENTING WATER & DEBRIS:** Plaintiff's Attorney lied when he stated that, ***"AeroFlap mudflap slotted openings are designed to pass air and water there through but not debris",*** *(PageID 59)* which is technically wrong and against the 'Laws of Physics" because when a liquid, such as water strikes the rear walls, it stops its rearward motion and falls towards the ground and not to the rear or sides of the flap. Plaintiff drawing (BatesID-FLEET001316) and actual AeroFlap mudflap clearly shows that it has rear walls around its openings.

10) **PROTRUDING VANES:** Plaintiff made an intentional misleading statement to this Court suggesting that for a vane to work, it must protrude, maliciously insisting that the protrusion must be above the outer surface of mudflap body instead of a surface of

mudflap body. Plaintiff was fully aware that the Surti's '755 Patent language "protruding vanes" implies that the protrusion is from a surface of its mudflap body where the rear walls are located, not necessarily from the top surface of the mudflap as claimed by the Plaintiff and concluded by this Court. Undisputed intrinsic evidence (BatesID FLEET-001316) shows that Plaintiff's AeroFlap protruding "recesses" are attached to the rear wall, a surface of mudflap body. This Court's final judgment ignored its own rule that reads, *"(when) the **claim language is sufficiently broad** that it can be read to encompass features not described in the written description, either by general characterization or by example in any of the illustrative embodiments."*(PageID 391). Mr. Surti's '755 Patent use of the word "vane" is broad and does not restrict the height, size and shape of the vanes (Surti's '755 Patent, column 2-line 41-44 and column 4-line 34-38). Therefore, this Court had a legal obligation to use the broader definition of vanes as "flat and shaped plate to direct fluid flow", should not have added protruding vanes requirement in Surti's '755 Patent claim, and should have used the same **surface of the mudflap** body to define protrusion, if the Court finds it necessary, where the rear walls are located in Plaintiff's AeroFlap. It is important to note that both mudflaps are manufactured utilizing injection molding technologies, therefore, the entire mudflap is made with one process.

## F. COURT'S JUDGMENT OF NON-INFRINGMENT APPEARS TO BE LEGALLY WRONG

This Court stated (PageID 2830), *"Infringement determinations entail a two-step process. "'First, the claim must be properly construed to determine its scope and meaning. Second, the claim as properly construed must be compared to the accused device or process.'"* *Absolute*

*Software, Inc. v. Stealth Signal, Inc., 659 F.3d 1121, 1129 (Fed. Cir. 2011). The first step, claim construction, is a question of law, while the second step, the determination of whether the properly construed claims read on the accused device, is a question of fact. Wilson Sporting Goods Co. v. Hillerich & Bradsby Co., 442 F.3d 1322, 1326 (Fed. Cir. 2006); Hilgraeve Corp. v. Symantec Corp., 265 F.3d 1336, 1341 (Fed. Cir. 2001) (citations omitted). When the alleged infringer files a motion for summary judgment for non-infringement, summary judgment may be granted where the patent holder's proof does not create a genuine issue of material to satisfy the legal standard for infringement. London v. Carson Pirie Scott & Co., 946 F.2d 1534, 1538 (Fed. Cir. 1991)".*

Paragraph 6 – 10 clearly establish the presence of "VANE" and infringement by Plaintiff's AeroFlap mudflap. Therefore, Defendants believes that this Court has made a **LEGAL ERROR** while rendering its final judgment.

11) This Court appears to be **LEGALLY WRONG** by ignoring the Undisputable Intrinsic Evidence because Defendant has properly shown the accused Plaintiff's AeroFlap mudflap uses each element of Surti's '755 claim, either literally or under the doctrine of equivalents. *Cheese Sys. Inc. v. Tetra Pak Cheese and Powder Sys., Inc.*, 725 F.3d 1341, 1348 (Fed. Cir. 2013).

12) This Court appears to be **LEGALLY WRONG** when it stated, *"Fleet's mud flap does not infringe Surti's patent because Fleet's mud flap does not have vanes"*. (PageID 2832)

13) This Court appears to be **LEGALLY WRONG** when it stated, *"Without dispute, Fleet's mud flap contains no thin, blade-like structures. The absence of any of vane-like structures means that Fleet's mud flap does not literally infringe on Surti's patent"*. (PageID 2835)

14) This Court appears to be **LEGALLY WRONG** when it stated, *"Fleet's mud flap does not*

*infringe Surti's patent under the doctrine of equivalents. Fleet's mud flap does not include a structure that, under the doctrine of equivalents, could be considered a vane".* (PageID 2835)

15) This Court appears to be **LEGALLY WRONG** when it stated, *"The depressions in Fleet's mud flap do not perform the same function as the channels in Surti's mud flap. Although the depressions may trap water and debris, the depressions do not prevent, substantially prevent, or prevent a majority of the water and debris collected in them from passing through the slotted openings".* (PageID 2835 and 2836)

16) This Court appears to be **LEGALLY WRONG** when it stated, *"Fleet's mud flap does not infringe on Surti's patent for another reason. To the extent Fleet's mud flap contains any vanes, channels or slotted openings, those structures are not vertical".* (PageID 2836)

## G. PLAINTIFF'S CLAIM COUNT 3 OF TORTIOUS INTERFERANCE IN BUSINESS REALTIONS (MICHIGAN LAW)

17) Defendants did not interfere with the Plaintiff's business relations but exercised their patent rights according to 35 U.S.C. § 287 (a) "*no damages shall be recovered by the patentee in any action for infringement, except on proof that the infringer was notified of the infringement and continued to infringe thereafter, in which event damages may be recovered only for infringement occurring after such notice. Filing of an action for infringement shall constitute such notice*". Therefore Defendants believed that announcement of patent infringement to their customers, and not to Plaintiff's customers as claimed by Plaintiff, was appropriate. Defendants has always been honest and truthful to this Court. Defendants' failure to meet this Court's requirements, including to retain

counsel, was due to the drainage of their entire savings by this malicious lawsuit and losing their customers to Plaintiff's corporate bulling. It was not due to the misconduct of Defendants.

*18)* Plaintiff lied to these Court while trying to prove its "Tortious Interference in Business Relationship (Michigan Law)" when they claimed Defendants interfered with **"GREAT DANE TRAILERS"** (BatesID- FLEET -000963-000967) who was Plaintiff's customer. However, the truth is that Great Dane Trailers had been a Defendants' customer since 2010 and have continued to purchase mudflaps from Defendants as of today. Great Dane Trailers was under the impression that the mud flap offered by Plaintiff was Surti's mudflaps because Plaintiff never disclosed to them that the "Exclusive Distribution Agreement" between the two parties was terminated and that the AeroFlap was their own mudflap and that Defendants had stopped selling them V-Flap. When Great Dane Trailers learnt about the infringement of Surti's '755 Patent they asked Plaintiff for an explanation, which plaintiff failed to provide. Therefore Mr. Rod Miller of Great Dane Trailers sent an email to Defendant that stated, "*We will be purchasing and installing your V-Flap mud flaps on trailers. We found the following posted on the Internet. "Fleet Engineers, Mudguard reach distribution agreement". Is it true?* ***We called Fleet Engineers Inc. (and they) said they knew nothing about it***".

19) Defendants had provided all their customers list, including Great Dane Trailers, to Plaintiff upon executing the "DISTRIBUTION (EXCLUSIVE) AGREEMENT (PageID-25-31)". Therefore, it was Plaintiff who had interfered with Defendants' customer by signing an "**INDEMNIFICATION AGREEMENT**" with Defendants'

customer, Great Dane Trailer.

20) Therefore the Defendants believe that this Court appears to be **LEGALLY WRONG** for awarding a "tortious interference" judgment in favor of Plaintiff for two reasons, (1) Undisputable Intrinsic Evidence proves that Plaintiff's AeroFlap does infringe Surti's '755 patent and (2) It was Plaintiff who interfered with Defendants customers the "Great Dane Trailers" and not the Defendants. Therefore if this Court is obliged to award someone for "Tortious Interference", the award should go to the Defendants.

## H. PLAINTIFF "BREACH OF CONTRACT" AND "MISAPPROPRIATIONS OF TRADE SECRETS"

20) It is important to note that the Plaintiff had **STOLEN SURTI'S "RECESS" IDEA** because Defendants had already incorporated 'RECESS" in the V-Flap mudflap, Revision C, dated August 17, 2010 (BatesID No. – Defendants 000145-000147 and 000208-000209). The *recess* information along with Surti's mudflap part drawing and its manufacturing knowhow was confidentially shared with the Plaintiff under the protection of "Confidentiality and Non-Competition Agreement[3]" and its unauthorized use by the Plaintiff in its AeroFlap is considered by Defendants as a **"Breach of Contract"** and **"Misappropriation of Trade Secrets".**

21) Plaintiff blatantly claimed that "Distribution Agreement" voided "Confidentiality and Non-Competition Agreement". These two agreements are separate understanding between two parties. Defendants believed that if Plaintiff wanted to void "CNCA" agreement, they should have clearly communicated with Defendants, however, they

[3] ECF No. 1-PageID 4- item 20, and Defendants BatesID No. 000132-000133

never did. Defendants believe that to secretly include such a clause by Plaintiff appears to be a preplanned strategies to fraudulently steal Surti's '755 patent.

22) Plaintiff blatantly claim that Surti's '755 Patented mudflap was a public knowledge, therefore they could freely use his design. It important to note that (1) Public was unaware of Surti's '755 patent application's content that Plaintiff had received under the "Confidentiality and Non-Competition Agreement", (2) Plaintiff's patent attorney had evaluated Surti's '755 Patent application, its strength and weaknesses, and (3) knew its secrets ahead of public. It is the main reason why Plaintiff keeps insisting that "*its AeroFlap does allows air and water to pass through the openings but prevents debris*" to circumvent Surti's '755 patent. Plaintiff was so lazy that instead of properly designing their own "vanes", they cut the height of Surti's vanes in half and left the top flat and rounded the corners just to claims that their vanes are not vanes because the shape is different than Surti. This Court must recognize that Surti's '755 Patent is a utility patent and not a design patent. Therefore Surti's claims have broader meaning that cannot be restricted (PageID 397), which this Court did in its final judgment. If Plaintiff wanted to use public knowledge of mudflap designs to develop their AeroFlap they could have used other designs such as, Andersen's '717, Nakayama's '318 and others mudflaps' design that were also freely available as a public knowledge and they were much easier to duplicate than Surti's '755 Patent. However, **Plaintiff selectively chose to duplicate Surti's '755 patent because Plaintiff had received its design information and manufacturing knowhow.** This unauthorized use of Surti's confidential information and trade secretes by the Plaintiff in its AeroFlap is considered by Defendants as a **"Breach of Contract"** and **"Misappropriation of Trade Secrets".**

Plaintiff also claims that they have been in business for more than 50 years, however, before AeroFlap they never produced their own injection molded mudflap. Plaintiff communicated to the Defendants that they heavily feared infringement of Andersen's '717 patent (BatesID - Defendants 000158) and learnt from Mr. Surti as much as they could about how to avoid prior patent and how to design and develop an injection molded mudflap.

23) Therefore the Defendants believe that this Court is **LEGALLY WRONG** for not awarding a judgment in favor of Defendants while reasoning, **"***Even if Fleet has manufactured a mud flap that resembles Surti's patent, that evidence does not create a genuine issue of material fact for Surti's misappropriation of trade secrets claim".* (PageID 2821).

## 5. CONCLUSION

It is obvious that Plaintiff had a malicious intent to eliminate a genuine competition and to steal Mr. Surti's '755 patent by initiating an abusive litigation that Defendants could not afford. It is very unfortunate that this Court favored the Plaintiff and gave its final judgment that appears more like a decision driven by "PREJUDICE" rather than "LEGALITY".

Therefore, Defendants hereby moves this Court to reverse the judgment that was with or without prejudice, and declare that (1) Plaintiff's Count 1 - AeroFlap does Infringe Surti's '755 Patent, (2) Plaintiff's Count 3 - is not entitled for award on its claim, and Defendants are entitled for all its three Counter-Claims, Count I-Patent Infringement, Count II-Breach of Contract, and Count III-Misappropriation of Trade Secrets.

Respectfully submitted,

Dated: April 26, 2018

By: _____

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