

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

FLOODBREAK, LLC,

Plaintiff,

v.

ART METAL INDUSTRIES, LLC,
KEVIN F. BIEBEL, and DIEGO TRUST, LLC

Defendants.

Civil Action No. 3:18-cv-00503 (SRU)

JURY TRIAL DEMANDED

AMENDED COMPLAINT

Plaintiff, FloodBreak, LLC (“Plaintiff” or “FloodBreak”), by its attorneys, demands a trial by jury on all issues so triable and for its Complaint against Defendants, Art Metal Industries, LLC (“AMI”), Kevin F. Biebel (“Mr. Biebel”), and Diego Trust, LLC (“Diego”) (collectively “Defendants”) alleges as follows:

THE PARTIES

1. Plaintiff FloodBreak is a limited liability company organized and existing under the laws of Texas, with a principal place of business at 5909 West Loop South, Suite 200, Bellaire, Texas 77401.

2. On information and belief, Defendant AMI is a limited liability company organized and existing under the laws of Connecticut, with a principal place of business at 564 Danbury Road, New Milford, Connecticut 06776.

3. On information and belief, Defendant Kevin F. Biebel is an individual and CEO of Defendant AMI and lives at 28 Pumpkin Hill Lane, New Milford, Connecticut 06776.

4. On information and belief, Defendant Diego Trust, LLC is a limited liability company organized and existing under the laws of Connecticut, with a principal place of business at 564 Danbury Road, New Milford, Connecticut 06776.

JURISDICTION AND VENUE

5. This is an action for patent infringement under the laws of the United States, 35 U.S.C. § 271 *et seq.*

6. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1338.

7. This Court has personal jurisdiction over Defendants because they have purposely availed themselves of the rights and benefits of the laws of this State and this Judicial District. This Court also has personal jurisdiction over Defendants by virtue of, among other things, conducting a substantial, systematic and continuous business of making, using, offering to sell and selling goods and/or services in this Judicial District, both generally and with respect to the allegations in this Complaint, including the Defendants' acts of infringement in this Judicial District.

8. Venue is proper under 28 U.S.C. §§ 1391(b) and (c) and § 1400(b).

BACKGROUND

9. United States Patent No. 9,752,342 ("the '342 patent") entitled "Flood Protection For Underground Air Vents," was duly and legally issued to FloodBreak on September 5, 2017, based on an application filed on October 6, 2014. That patent application was based on and relies on a provisional patent application filed by inventor Louis A. Waters, Jr. on October 6, 2013. A copy of the '342 patent is attached as Exhibit A. The '342 patent is entitled to a presumption of validity under 35 U.S.C. § 282.

10. FloodBreak is the owner of the entire right, title and interest in and to the '342 patent.

11. The '342 patent relates to innovative Mechanical Closure Devices ("MCDs") for blocking flooding water from entering underground ventilation passages. FloodBreak has been making and selling MCDs covered by the '342 patent that are used in ventilation ducts in the New York City subway system since prior to August 2015.

12. On information and belief, Defendant AMI is in the structural metals manufacturing business. AMI is making, using, offering for sale, and selling Mechanical Closure Devices for installation in ventilation ducts in at least the New York City subway system. On information and belief, Defendant AMI has copied FloodBreak's technology and partnered with installers, including T. Moriarty & Son, Inc. of Brooklyn, New York, to enter into contracts with the New York City Transit Authority to supply an MCD which has been represented as being "equal to the specified Flood Break unit."

13. On information and belief, Defendant Kevin Biebel is the CEO of AMI and Defendant AMI is controlled and dominated by Mr. Biebel. Dun & Bradstreet, Inc. reports that AMI has only two Principals, Kevin Biebel and Yvonne Hermina-Biebel, who on information and belief, is Kevin Biebel's wife.

14. Defendant Diego is a holding company for, and the 100% owner of, Defendant AMI and Defendant AMI is controlled and dominated by Defendants Diego and Kevin Biebel. Defendant Kevin Biebel is the 100% owner and sole member of Defendant Diego.

15. In around February 2015 and March 2016, Mr. Waters advised AMI's CEO, Kevin Biebel, that FloodBreak had a patent pending on FloodBreak's Mechanical Closure Device for the New York City subway system.

16. On April 7, 2016, the United States Patent and Trademark Office published FloodBreak's application for the '342 Patent.

17. On June 15, 2016, in connection with the NYC Transit Authority's Contract #E-31705, Kevin Biebel submitted a sworn and signed patent assurance letter that his MCD does not infringe "on patents pending or received for this device or any IP rights owned by another manufacturer." Therefore, on information and belief, Mr. Biebel had personal knowledge of the disclosures in Plaintiff FloodBreak's application for the '342 patent by at least this date.

18. The documents submitted with Contract #E-31705 by AMI included several engineering reports prepared by Altermatt Engineering that related to AMI's MCD. The reports were addressed to Defendant Kevin Biebel and referred to MTA-E-31705, AMI Job #22551. These reports included hydrostatic testing and airflow testing required by the New York City Transit Authority. On information and belief, Defendant Biebel requested Altermatt Engineering to perform AMI Job #22551 as part of his plan to induce Defendant AMI to manufacture, use and sell, and to induce the New York City Transit Authority to purchase and use, AMI's MCD.

19. The documents submitted with Contract #E-31705 by AMI and Mr. Biebel also included an Operation and Maintenance Manual for AMI's MCD. The Operation and Maintenance Manual instructed purchasers and/or users of AMI's MCD how to install, field test, inspect, clean and repair the MCD. The Manual also required that the Metropolitan Transportation Authority send to AMI copies of all inspection and field documents in connection with AMI's warranty on its MCD.

20. On February 22, 2018, FloodBreak, through its counsel, sent a letter to Defendants by overnight mail and: (a) advised Mr. Kevin Biebel and AMI that their MCD was infringing at least claims 1, 4-5, 8, 10, 14 and 20-24 of the '342 Patent; (b) sent Mr. Biebel a

copy of the '342 Patent for his convenience; and (c) asked Mr. Biebel and AMI to cease and desist from further infringement. Neither Mr. Biebel nor AMI ever responded, demonstrating that Defendants knew they were infringing the '342 patent and had no defense to Plaintiff's infringement allegations.

21. Upon information and belief, after FloodBreak informed Biebel and AMI that FloodBreak had a patent pending on FloodBreak's Mechanical Closure Device for the New York City subway system, Defendant Kevin Biebel established Defendant Diego, and Defendants Biebel and Diego began systematically stripping Defendant AMI of its assets by fraudulently and wrongfully transferring AMI's assets to Defendant Diego in order to thwart Plaintiff's recovery of any remedy or judgment it obtained. Upon information and belief, Defendants Biebel and Diego, based on their complete domination and control over AMI, caused AMI to fraudulently and wrongfully transfer at least \$4,186,274.16 to Defendant Diego since receiving notice on February 22, 2018 that FloodBreak was asserting a patent infringement claim against AMI for the manufacture and sale of AMI's MCDs. By April 8, 2021, Defendants Biebel and Diego had transferred so many of AMI's assets to Defendant Diego that AMI's bank account balance was depleted to \$1.67.

22. Upon information and belief, Defendants are still making, using, offering to sell and selling their MCD units with full knowledge of their infringement of the '342 Patent to the detriment of FloodBreak.

PATENT INFRINGEMENT

23. FloodBreak re-alleges and incorporates paragraphs 1-22 herein by reference.

24. Defendant AMI has directly infringed one or more claims of the '342 patent, including at least claims 1, 4-5, 8, 10, 14 and 20-24, and is continuing to infringe the claims of the '342 patent, in violation of 35 U.S.C. § 271, by making, using, offering to sell and selling its MCD within the United States and in this Judicial District.

25. Defendant Kevin Biebel, the CEO of AMI, and Defendant Diego, the 100% owner of AMI, have personally taken part in, and are personally responsible for, AMI's infringement of the '342 patent. On information and belief, Mr. Biebel was directly responsible for the design and production of the infringing MCDs and he and Defendant Diego are the only ones who stand to benefit from the sale of the infringing MCDs. There is a unity of interest between all three Defendants such that AMI is the alter ego of Mr. Biebel and Diego. Thus, Defendants Biebel and Diego have directly infringed one or more claims of the '342 patent, including at least claims 1, 4-5, 8, 10, 14 and 20-24, and are continuing to infringe the claims of the '342 patent, in violation of 35 U.S.C. § 271, by making, using, offering to sell, and selling their MCD within the United States and in this Judicial District.

26. Defendant AMI, with full knowledge of the '342 patent and its infringement thereof, actively induces others, including T. Moriarty & Son, Inc., to manufacture, use, offer for sale, or sell in the United States, and induces the New York City Transit Authority, to use in the United States, Mechanical Closure Devices which infringe one or more claims of the '342 patent. On information and belief, Defendant AMI's knowledge of the application for the '342 patent occurred on or before June 15, 2016 and Defendant was aware of its infringement of the '342

patent no later than February 23, 2018. Defendant AMI's infringement will continue unless enjoined by this Court.

27. On information and belief, Defendants Kevin Biebel and Diego, with knowledge of the '342 patent and of their infringement thereof, have aided and abetted AMI's infringement of the '342 patent, and actively induce others, through their position and control of Defendant AMI and by and through their personal capacity, including Defendant AMI and T. Moriarty & Son, Inc., to manufacture, use, offer for sale and/or sell in the United States, and induce the New York City Transit Authority, to use in the United States, Mechanical Closure Devices which infringe one or more claims of the '342 patent. On information and belief, Defendant Biebel's knowledge of the application for the '342 patent occurred on or before June 15, 2016 and Defendant Biebel was aware of his infringement of the '342 patent no later than February 23, 2018. Defendant Biebel's and Diego's infringement will continue unless enjoined by the Court.

28. Defendants' infringement has been and is being conducted with full knowledge of the '342 patent.

29. Upon information and belief, Defendants' infringement of the '342 patent has been willful and deliberate. Plaintiff has been and continues to be damaged and otherwise harmed by such willful infringement.

30. Plaintiff FloodBreak will be irreparably harmed unless Defendants' infringing activities are enjoined.

WHEREFORE, FloodBreak prays for judgment and relief against Defendants AMI and Kevin Biebel, including:

A. Adjudging that Defendants AMI, Kevin Biebel and Diego have infringed the '342 patent;

B. Permanently enjoining AMI, its CEO, Kevin Biebel, and its owner, Diego, its other officers, agents, servants, employees, attorneys, all parent and subsidiary corporations, its assigns and successors in interest, and those persons in active concert or participation with any of them who receive notice of the injunction, including distributors, installers and consumers, from continuing acts of infringement of the '342 patent;

C. Adjudging that an accounting be had for damages caused by AMI's, Kevin Biebel's, and Diego's infringement, together with pre-judgment and post-judgment interest;

D. Adjudging that AMI, Kevin Biebel, and Diego are willful infringers and trebling the aforesaid damages pursuant to 35 U.S.C. § 284;

E. Adjudging that this case is an exceptional case and awarding FloodBreak its costs, expenses and reasonably attorneys' fees pursuant 35 U.S.C. § 285; and

F. Such other and further relief as this Court may deem just and proper.

JURY DEMAND

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff FloodBreak hereby demands a trial by jury as to all issues and causes of action which are so triable by right to a jury.

Respectfully submitted,

Dated: March 8, 2022

/s/ Monte E. Frank

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CERTIFICATION

I hereby certify that on March 8, 2022 a copy of foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Monte Frank
Monte E. Frank