

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

STEPHEN M. SWINFORD, Plaintiff

vs.

360 BOOTH INC.; JAY P. SMITHWECK,
Defendants

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Case No. 8:21-cv-02993-MSS-JSS

Jury Trial Demand

**PLAINTIFF'S FIFTH AMENDED COMPLAINT FOR PATENT
INFRINGEMENT**

Plaintiff Stephen M. Swinford, files this Fifth Amended Complaint for Patent Infringement against Defendants 360 BOOTH INC. and its President Jay P. Smithweck (hereinafter collectively referred to as "Defendants"), and in support thereof, would respectfully show unto the Court as follows:

I. JURISDICTION AND VENUE

1. This action arises under the Patent Act, 35 U.S.C. § 101 et seq. This Court has original jurisdiction over this controversy pursuant to 28 U.S.C. §§ 1331 and 1338.
2. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1400(b); as well as 1391(b) and (c). Defendants both reside in and have their principal place of business in Pasco County; and have infringed, and continue to do so, in Pasco County.

3. This Court has personal jurisdiction over Defendants because they both reside in and have their principal place of business in Pasco County; and because Defendants regularly and continuously do business in Pasco County and have infringed, and continue to do so, in Pasco County.

II. PARTIES

4. Plaintiff Stephen M. Swinford is an individual who owns all the patents-in-suit and resides at 20427 Sapphire Circle Magnolia Texas 77355.

5. Defendant 360 BOOTH INC. is a Florida corporation with its principal place of business at 7781 Still Lakes Drive, Odessa FL 33556, and state corporate records show its registered agent (through whom the Original Complaint was served) is Defendant Jay P. Smithweck, located at its principal place of business.

6. Defendant Jay P. Smithweck is an individual with an unknown residence but who is registered agent for Defendant, who was served the Original Complaint for Defendant 360 BOOTH INC. at 7781 Still Lakes Drive, Odessa FL 33556.

III. THE PATENTS-IN-SUIT

7. Stephen M. Swinford is the sole inventor of all the patents-in-suit, *i.e.*, US Patent Nos. 9,438,864 B1 (the '864 Patent), **Exhibit A**, US Pat. Nos. 8,830,320 B1 (the '320 Patent), **Exhibit B**, and 11,570,369 B1 (the '369 Patent), **Exhibit C**.

IV. DEFENDANTS' ACCUSED PRODUCTS

8. As explained in paragraphs 10 to 40 below, Defendant 360 BOOTH INC. is offering products for sale on its website at www.360booth.com, which directly infringe many claims of each of the patents-in-suit; and is offering some products for sale which may alternatively or additionally indirectly infringe claims of the patents-in-suit. These products include the single door booth product and the two-door booth product which are both referred to below.

9. Defendants had asserted through counsel, that their accused two-door booth product does not literally infringe claims of the '320 or '864 patents because it does not have a camera mounted to its walls. It is anticipated that the same argument will be made against infringement of the '369 patent by the accused two-door booth. Because other statements and social media postings by Defendants demonstrate that their accused two-door booths do have cameras mounted to their walls (see **Exhibit D**, Declaration of Stephen Swinford ("Swinford Declaration")) ¶¶21-27), Plaintiff has concluded that Defendants' customers are mounting cameras if Defendants are not; and that Defendants had the required awareness level of Plaintiff's patents before filing of this action. Accordingly, Plaintiff includes claims for indirect infringement below (inducing infringement and contributory infringement) against Defendants in this Fifth Amended Complaint.

10. Defendant Jay P. Smithweck, the sole named officer of Defendant 360 BOOTH, Inc., is featured in nearly all of its videos and photos posted on line as its advertising and promotion. He has stated that he is custodian of documents for Defendant 360 BOOTH, Inc. Accordingly, there is an inference that he personally took part in the commission of the infringement, specifically directed other officers, agents or employees of Defendant 360 BOOTH, Inc. to commit the infringing acts, or induced Defendant 360 BOOTH, Inc.'s customers to infringe and/or engaged in contributory infringement.

11. Defendants have no license or authority or license from Plaintiff to make, use, offer to sell or sell any of their products.

1. Direct Infringement of the '320 Patent by the Single Door Product

12. Regarding the '320 Patent, Defendants products are directly infringing claim Nos. 1, 3, 6, 9, 11, 12, 13, 15, 17, 18, 19, 20 and 21 to 24 of the '320 Patent under the doctrine of equivalents, as explained with pictorial support in the '320 Patent claim chart (which is **Exhibit 2C**, hereinafter "**Exhibit 2C**") in combination with paragraphs 13-15B below; as every element or its equivalent in each of these claims is in one or both of Defendants' products, and/or is in one or both of Defendants' products functioning in the same way as in the claims, and/or functioning in substantially the same way and achieving the same result.

A. The Single Door Product Directly Infringes Several Claims of the ‘320 Patent Under the Doctrine of Equivalents

13. With respect to the claims of the ‘320 Patent shown in **Exhibit 2C** (Nos. 1, 6, 9, 11, 12, 13, 15, 19, 20 and 21 to 24), the accused single door product shown in **Exhibit 2C** has portions corresponding to most claim elements and some portions equivalent to other claim elements (as indicated by arrows), and the single door products therefore directly infringe these claims under the doctrine of equivalents. Defendants’ single door and two-door products are both shown in **Exhibit 2C** with arrows indicating which portion of each product corresponds with each claim element (and/or indicating necessary further explanation is set forth in **Exhibit D**, which is the Swinford Declaration) to supplement the depictions. It can be seen that there is a corresponding element in the single door products for each element in the foregoing claims, with either literal correspondence or correspondence under the doctrine of equivalents, as indicated. Infringement of the other claims of the ‘320 Patent mentioned in paragraph 12 but not in this paragraph 13. (*i.e.*, Nos. 3, 17, 18) are discussed below in paragraph 15A.

B. The Two-Door Product Directly Infringes Several Claims of the ‘320 Patent, Literally or Alternatively Under the Doctrine of Equivalents

14A. With respect to the claims of the ‘320 Patent shown in **Exhibit 2C** (Nos. 1, 6, 9, 11, 12, 13, 15, 19, 20 and 21 to 24), the two-door accused product shown in

Exhibit 2C has portions corresponding to each claim element (as indicated by arrows), when **Exhibit 2C** is considered with ¶¶34-36 of **Exhibit D** (Swinford Declaration). The two-door accused products therefore literally infringe claim Nos. Nos. 1, 6, 9, 11, 12, 13, 15, 19, 20 and 21 to 24 the ‘320 Patent. In the alternative, the accused two-door products have elements that perform substantially the same function in substantially the same way to obtain the same result as do corresponding elements in these claims, and the accused two-door products therefore alternatively infringe these claims of the ‘320 Patent under the doctrine of equivalents.

14B. For claim elements of claims 15 and 21-24, shown on pp. 14 and 17-19 respectively of **Exhibit 2C**, only the single door product is shown with arrows as having corresponding portions in these claims, and not the two-door product. But on information and belief, and as supported in **Exhibit D** (Swinford Declaration) ¶¶22-27, all elements on pages 14 and 17-19 of **Exhibit 2C** are also literally present in the two-door product, though they are not shown in the publicly-available images of the two-door product and thus not shown in **Exhibit 2C**.

C. The Two-Door and/or Single Door Products Directly Infringe Several Claims of the ‘320 Patent Under the Doctrine of Equivalents

15A. With respect to the remaining infringed claims of the ‘320 Patent (those in paragraph 12 above but not in paragraphs 13, 14A or 14B (*i.e.*, Nos. 3, 17 and 18), their direct infringement under the doctrine of equivalents by the single door and/or two-door products is because:

Claim 3 recites: “one of the arms includes an extension projecting downwardly, and the extension is designed to have the imaging device mounted thereon.” (equivalent to the “adjustable mount” of the single door product on p. 14 of **Exhibit 2C**);

Claim 17 recites: “the display is composed of a plurality of smaller sections.” (display sections in single door and two-door products are equivalent to displays shown on p. 6 of **Exhibit 2C**);

Claim 18 recites: “the display includes the background view on the side thereof facing the imaging device.” (background view of the display is seen *e.g.* on pp. 6 and 7 of **Exhibit 2C**, for single door and two-door products).

15B. **Exhibit X** hereto (from Defendants’ Instagram account) shows that Defendants’ two-door products cost \$80,000, which is twice as much as the single door product. *See* Document 12-1, ¶6 (Swinford Declaration) where the single door booth retail price is estimated to be about \$40,000. Note that the single door product comes with a mounted camera and software system suitable to make a 360 view of the vehicle based on series of images, made when the hanging camera is rotated around the car. *See* Swinford Declaration ¶¶ 25; 26; 31; 33 and **Exhibit 11F**. So, as it costs more, the two-door product, like the less expensive single door product, would be expected to come with a mounted camera included, on information and belief.

2. Indirect Infringement of the '320 Patent by the Two-door Product

16A. In the event that as Defendants claim, they themselves are not mounting cameras on the walls of their accused two-door products (which are shown on nearly all pages of **Exhibit 2C**), these accused two-door products nevertheless indirectly infringe claim Nos. 1, 6, 9, 11, 12, 13, 15, 17, 18, 19, 20, 21, 22, 23, and 24 of the '320 Patent for the reasons set forth in paragraphs 13 to 15B, and further because that means that Defendants' customers are mounting cameras on the walls. Otherwise these products could not be automated nor capture 360 views nor videos, as Defendants' claim they do in advertising. *See* Swinford Declaration ¶¶ 22-27.

16B. Before this action was filed, Defendants knew of Plaintiff's patents or took steps to avoid learning of them as described in paragraphs 17 to 25 below. Even if Defendants do not themselves mount cameras in their two-door booths, because the cameras are mounted by customers (as summarized in ¶¶15A; 15B) they are nevertheless engaging in contributory infringement or are inducing infringement as their accused two-door accused products were especially made for use in the infringement of Plaintiff's patented invention, have no substantial non-infringing use, and Defendants specific intent was to encourage that infringement.

A. Prior Knowledge of Plaintiff's Patents by Defendants

17. As explained in paragraphs 18-24 below, Defendants had actual knowledge of the '320 Patent at the time they engaged in indirect infringement. In the alternative,

they subjectively believed that there was a high probability that the ‘320 Patent existed and took deliberate actions to avoid learning of the ‘320 Patent’s existence.

18. The patent application which became the ‘320 Patent was published on Sept. 15, 2011 (**Exhibit 3** to **Exhibit D** (Swinford Declaration)). In February 2012, Defendant Smithweck was communicating with Joseph Filanowicz of Sonic Automotive about installing one of Defendant Smithweck’s photo booths at Sonic’s Birmingham, Alabama dealership (**Exhibit D**, Swinford Declaration ¶¶5). Plaintiff also was communicating with Joseph Filanowicz about installing one of Plaintiff’s MotoFoto360s at the same location. **Exhibit D**, Swinford Declaration ¶¶4. In May 2012, Defendant Smithweck sent information about his photo booth to Plaintiff (**Exhibit D**, Swinford Declaration ¶¶6) with a photograph of it.

19. Sonic Automotive did not elect to install one of Defendant Smithweck’s photo booths, but instead selected Plaintiff’s, who then installed an outdoor photo studio at the Birmingham, Alabama dealership (**Exhibit D**, Swinford Declaration ¶¶6,8) in about September 2012. There’s a strong inference that the similarities in time period of Plaintiff’s and Defendant’s Sonic-mediated interactions resulted in Defendant Smithweck learning of Plaintiff’s installed outdoor studio around this time. Moreover, Defendant Smithweck made modifications to the design of his booth in 2012, and installed booths at two dealerships in 2013. These booths installed in 2013 had modifications to his original design to make them similar to the design of

Plaintiff's booth installed at the Birmingham, Alabama dealership. (**Exhibit 7D** and ¶¶**15, 16** to **Exhibit D**, Swinford Declaration). This change in design after 2012 further indicates Defendant Smithweck was aware of and copied the design of Plaintiff's outdoor studio installed in 2012 at the Birmingham, Alabama dealership.

20. On August 12, 2014, Defendant Smithweck filed the application which eventually became his US Patent No. 9,046,740 (**Exhibit 8D** to **Exhibit D**, Swinford Declaration). In an apparent attempt to conceal this application from Plaintiff, Defendant Smithweck requested at filing, that this application not be published by the United States Patent & Trademark Office ("USPTO"). **Exhibit D**, Swinford Declaration ¶15.

21. Defendant Smithweck also submitted an information disclosure statement at filing on Aug. 12, 2014, listing eight foreign and domestic patents and patent applications which related to the subject matter of his patent application. **Exhibit D**, Swinford Declaration ¶16. To obtain these eight references, Defendant Smithweck must have performed himself or commissioned the performance of a search for related patents and applications. **Exhibit D**, Swinford Declaration ¶16. But Defendant Smithweck did not submit to the USPTO any information about Plaintiff's three US applications published on Sept. 15, 2011 (**Exhibit D**, Swinford Declaration, **Exhibits 3, 4, 5**) or his Canadian patent application CA2767917A1 published on Sept. 9, 2012 (Swinford Declaration ¶3), all of which were published

well before Defendant Smithweck's patent application was filed in 2014. Plaintiff's three published US applications (Swinford Declaration, **Exhibits 3, 4, 5**) and his Canadian application all relate to revolving photo studios for vehicles (as described and claimed in Defendant Smithweck's application). It would have taken deliberate action to avoid finding (or to find and ignore the existence of) Plaintiff's three published applications (**Exhibit D**, Swinford Declaration, **Exhibits 3, 4, 5**) when the search by Defendants was conducted in 2014.

22. Moreover, Plaintiff had three patents related to revolving vehicle photo studios (**Exhibits B, C1**, which are the '320 patent, US Pat. No. 8,830,321, and US Pat. No. 8,836,785) issued in September 2014 (one patent issued from each of the three published applications mentioned in Swinford Declaration **Exhibits 3, 4, 5**). Defendant Smithweck did not disclose the existence of any of Plaintiff's patents or published applications to the USPTO before Defendant Smithweck's US Patent No. 9,046,740 issued on June 2, 2015. Also, the patent application which became the Swinford '864 patent-in-suit was published on March 19, 2015 as US Publ'n No. 20150077564 (**Exhibit A1**); well before issuance of Defendant Smithweck's US Patent No. 9,046,740 on June 2, 2015. It also was not disclosed to the USPTO by Defendant Smithweck.

23A. Thus, the inference in paragraphs 18 & 19 that Defendant Smithweck knew of Plaintiff's similar photo studio by the time he did his patent search, and the inference

from paragraphs 19 to 22 that Defendant Smithweck saw and copied Plaintiff's outdoor studio design and that his patent search revealed Plaintiff Swinford's patents and published applications (which Defendant Smithweck did not disclose to the USPTO, apparently because it would jeopardize allowance of his US Patent No. 9,046,740) combines to create a strong inference that well before his patent No. 9,046,740 issued, Defendant Smithweck was aware of Plaintiff's published applications and patents, including '320 patent patents-in-suit; or in the alternative, that he took deliberate actions to avoid learning of them. As the '864 patent arises from a continuation-in-part application of the application which became the '320 patent, and as the application which became the '864 patent was published before Defendant Smithweck's US Patent No. 9,046,740 issued; the inference is that he also knew of the '864 patent when it issued on Sept. 6, 2016, as he is inferred to have continued to follow Plaintiff's patent developments in this field.

23B. Regarding Defendants' knowledge of the '369 patent, at a hearing before the Court on 11/16/2022 the undersigned noted that the patent application which became the '369 patent had been filed and was expected to issue within a few months. On 12/8/2022 the undersigned wrote opposing counsel, noting that this patent application which became the '369 patent was allowed, and sent opposing counsel the allowed claims. The undersigned also produced documents filed in the course of the prosecution of this application in response to opposing counsel's document

requests, before patent issuance. The undersigned also wrote to opposing counsel on 1/26/2023, several days before this patent application issued, and informed them of the date of its issuance (1/31/2023) and that their products and related activities were in violation of Plaintiff's provisional patent rights, and that their products and related activities would be infringements of the '369 patent once it issued. The invention as claimed in the '369 patent is substantially identical to the invention as claimed in the published US patent application No. 20230007934, published on Jan. 12, 2023 (**Exhibit C2**).

24. Defendant Smithweck's denials of knowledge of Plaintiff's patents and applications (as in paragraph 23A) before this lawsuit was filed are not credible, as he is a proven perjurer and forger (*see* **Exhibit D**, Swinford Declaration ¶¶ 17, 18). He has also falsely claimed his photo booths had "patented" status before even filing a patent application (Swinford Declaration ¶6) and this reflects his strong awareness of patent issues and lack of candor regarding them. He also requested nonpublication of this application at the USPTO (**Exhibit D**, Swinford Declaration ¶15), in an apparent attempt to conceal the existence of his patent filing from Plaintiff (until and unless it issued as a patent).

25. Opposing counsel K. Vinnakota has admitted to establishing a relationship with Defendant Smithweck in 2016 (**Document** 60-4, Vinnakota Declaration ¶41). Mr. Vinnakota's firm profile (at Cole Schotz P.C.) states that his "[P]ractice focuses on

complex commercial litigation in both federal and state courts, and various administrative agencies, including intellectual property, trade secrets, energy, business torts, partnership disputes, and insurance matters.” (emphasis added) A first step in determining a new client’s scope of patent issues and likelihood of litigation, is for intellectual property counsel to perform a “freedom to operate” search to find related, and possibly infringed, patents.¹ By 2016, Plaintiff had three issued US Patents (including the ‘320 patent-in-suit), a published Canadian patent application CA2767917A1, and four published US patent applications (one of which became the ‘320 patent-in-suit, and one of which became the ‘864 patent-in-suit). It would have been virtually impossible for Mr. Vinnakota not to find some or all of these patents in performing a freedom to operate search anytime in 2016 without taking deliberate actions to avoid learning of them. Again, the inference is that Mr. Vinnakota’s firm was another entity alerting Defendants to the existence of Plaintiff’s patents-in-suit.

3. Direct Infringement of the ‘864 Patent

26. Regarding the ‘864 Patent, both of Defendants’ products are directly infringing a number of its claims, as explained with pictorial support in the ‘864 Patent claim

¹ See e.g. WIPO Magazine Issue 5/2005 (Sept. 2015) “A Freedom to Operate (FTO) analysis invariably begins by searching patent literature for issued or pending patents, and obtaining a legal opinion as to whether a product, process or service may be considered to infringe any patent(s) owned by others.”

charts (**Exhibit 2A, 2B** to **Exhibit D**, hereinafter “**Exhibit 2A, 2B**” respectively) in combination with paragraphs **27-35** below; as every element of such claims is present in both of Defendants’ devices; or alternatively, every such element’s equivalent is present in both of Defendants’ devices, to the extent some elements are functioning in the same way as in the claims, and/or functioning in substantially the same way and achieving the same result.

A. The Two-Door Product Directly Infringes Several Claims of the ‘864 Patent Literally; or, Alternatively Under the Doctrine of Equivalents

27. Claims 1, 5, 6, 10, 12, 13, and 14 to 16 of the ‘864 Patent are infringed by the accused two-door products. With respect to the claims of the ‘864 Patent shown in **Exhibit 2A** (Nos. 1, 5, 6, 10, 12 and 13), the accused two-door products shown in **Exhibit 2A** have portions corresponding to each claim element (as indicated by arrows), when **Exhibit 2A** is considered with paragraphs 21-28, 30, and 31 of **Exhibit D**, Swinford Declaration, and are therefore infringed literally; or in the alternative, the accused two-door products have elements that perform substantially the same function in substantially the same way to obtain the same result as do corresponding elements in these claims, and the accused two-door products alternatively infringe under the doctrine of equivalents.

28. With respect to some of the remaining claims of the ‘864 Patent (14 to 16) in paragraph 27, beginning with claim 14: every element in independent claim 14 is also in claim 1 (as charted in **Exhibit 2A** at pp. 1 to 10) except for the element: “the

wheels of the first and second supports roll on a track resting on a supporting plane ...” The track however is also present in Defendants’ two-door products, as shown on most of the pages in **Exhibit 2A**. So claim 14 is also directly infringed by Defendants’ two-door products.

29. Claim 15 of the ‘864 Patent is also directly infringed by Defendants’ two-door products because it adds that as one option, “[A] row of wheels ... are aligned with the direction of travel of the respective first and second supports.” Wheels in such alignment are also present in Defendants’ two-door products as shown on most pages in **Exhibit 2A**.

30. Claim 16 of the ‘864 Patent (not in **Exhibit 2A**) is also directly infringed by Defendants’ two-door products because it further defines the track of claim 14 whereby “the row of wheels reside on a single track, which is arced.” A track in such alignment is also present in Defendants’ two-door products as shown on most pages in **Exhibit 2A**.

B. The Single Door Product Directly Infringes Several Claims of the ‘864 Patent Under the Doctrine of Equivalents

31. Claims 1, 3, 5, 6, 8, 10, 12, 13 and 14-16 of US Pat. No. 9,438,864 (the “‘864 Patent”) are infringed by the accused single door products under the doctrine of equivalents. With respect to the claims of the ‘864 Patent shown in **Exhibit 2B** (Nos. 1, 5, 6, 8, 10, 12 and 13), the accused single door products shown in **Exhibit 2B** have portions corresponding to or equivalent to each claim element

(as indicated by arrows), when **Exhibit 2B** is considered with paragraphs 21-28, 32, and 33 of **Exhibit D**, Swinford Declaration, and are therefore directly infringed under the doctrine of equivalents as the accused single door products have elements that perform substantially the same function in substantially the same way to obtain the same result as do corresponding elements in these claims.

32. With respect to the remaining claims of the ‘864 Patent (those in paragraph 31 above but not in **Exhibit 2B**), beginning with claim 14: every element in independent claim 14 is also in claim 1 (as charted in **Exhibit 2B** at pp. 1 to 10) except for the element: “the wheels of the first and second supports roll on a track resting on a supporting plane ...” The track however is also present in Defendants’ single door products, as shown on most of the pages in **Exhibit 2B**. So claim 14 is also directly infringed under the doctrine of equivalents by Defendants’ single door products.

33. Claim 15 of the ‘864 Patent is also directly infringed by Defendants’ single door products because it adds that as one option, “[A] row of wheels ... are aligned with the direction of travel of the respective first and second supports.” Wheels in such alignment are also present in Defendants’ single door products as shown on most pages in **Exhibit 2B**. So claim 15 is also directly infringed under the doctrine of equivalents by Defendants’ single door products.

34. Claim 16 of the ‘864 Patent is also directly infringed by Defendants’ single door products because it further defines the track of claim 14 whereby “the row of wheels reside on a single track, which is arced.” A track in such alignment is also present in

Defendants' single door products as shown on most pages in **Exhibit 2B**. So claim 16 is also directly infringed under the doctrine of equivalents by Defendants' single door products.

35. Claim No. 3 of the '864 Patent is also directly infringed under the doctrine of equivalents by Defendants' single door products, as the added elements recited in it corresponds to or performs substantially the same function in substantially the same way to obtain the same result, as do corresponding elements in Defendants' single door products. Claim 3 recites: "one of the arms includes an extension projecting downwardly, and the extension is designed to have the imaging device mounted thereon," which corresponds to the extension with the camera attached shown on pp. 3, 10, 13, 14 of **Exhibit 2B**.

4. Indirect Infringement of the '864 Patent

36. In the event that as Defendants claim, they are not themselves mounting cameras on the walls of their two-door accused products (as shown in **Exhibit 2A**), these two-door accused products nevertheless indirectly infringe claim Nos. 1, 5, 6, 10, 12, 13, and 14 to 16 of the '864 Patent, for the same reasons there is direct infringement as set forth in paragraphs **27 to 30** and further because Defendants knew of or deliberately took steps to avoid learning of Plaintiff's patents (*see* paragraphs 17-25), and further because Defendants' customers must then be mounting cameras on the walls. Otherwise these products could not be automated or

capture 360 views or videos as Defendants' advertising shows. *See Exhibit D*, Swinford Declaration ¶31; **Exhibit 11F**. Defendants' two-door accused products were especially made for use in the infringement of Plaintiff's patented invention, have no substantial non-infringing use, and Defendants specific intent was to encourage that infringement.

5. Direct Infringement of the '369 Patent

37. Regarding the '369 Patent, Defendants products are directly infringing a number of its claims, as can be understood from the detailed charts in **Exhibits 2D, 2E** (where all photos of Defendants' products are taken from their social media accounts), demonstrating in combination with paragraphs **38-40** below, that every element of such claims is present in both of Defendants' devices; or alternatively, every such element's equivalent is present in both of Defendants' devices, to the extent some elements are functioning in the same way as in the claims, and/or functioning in substantially the same way and achieving the same result.

A. The Two-Door Product Directly Infringes Several Claims of the '369 Patent Literally; or, Alternatively Under the Doctrine of Equivalents

38. As shown in **Exhibit 2D**, claim Nos. 1, 5, 6, 7, 9, 10, 11, 12, 13, 14, 17, and 19 of the '369 patent are directly and literally infringed by the accused two-door products. The accused two-door products shown in **Exhibit 2D** have portions corresponding to each claim element (as indicated by arrows), when **Exhibit 2D** is

considered with paragraphs 21-28, 30, and 31 of **Exhibit D**, Swinford Declaration (taking into account that all references to the '864 patent in these paragraphs apply equally to the '369 patent). Therefore claim Nos. 1, 5, 6, 7, 9, 10, 11, 12, 13, 14, 17, and 19 of the '369 patent are literally infringed by the accused two-door products; or in the alternative, the accused two-door products have elements that perform substantially the same function in substantially the same way to obtain the same result as do corresponding elements in these claims, and the accused two-door products alternatively infringe under the doctrine of equivalents.

B. The Single Door Product Directly Infringes Several Claims of the '369 Patent Literally; or, Alternatively Under the Doctrine of Equivalents

39. As shown in **Exhibit 2E**, claim Nos. 1, 12, 17, and 19 of the '369 patent are directly and literally infringed by the accused single door products. The accused single door products shown in **Exhibit 2E** have portions corresponding to each claim element (as indicated by arrows), when **Exhibit 2D** is considered with paragraphs 32 and 33 of **Exhibit D**, Swinford Declaration (taking into account that all references to the '864 patent in these paragraphs apply equally to the '369 patent). In the alternative, the accused single door products have elements that perform substantially the same function in substantially the same way to obtain the same result as do corresponding elements in these claims, and the accused single door products alternatively infringe under the doctrine of equivalents.

6. Indirect Infringement of the '369 Patent

40. In the event that as Defendants claim, they are not themselves mounting cameras on the walls of their two-door accused products (as shown in **Exhibit 2D**), these two-door accused products nevertheless indirectly infringe claim Nos. 1, 5, 6, 7, 9, 10, 11, 12, 13, 14, 17, and 19 of the ‘369 patent; as that means that Defendants’ customers are mounting cameras on the walls. Otherwise these two-door accused products could not be automated or capture 360 views or videos, as Defendants’ claim they do in advertising. *See Exhibit D*, Swinford Declaration ¶¶ 21-27. Defendants are engaging in contributory infringement or are inducing infringement as their two-door accused products were especially made for use in the infringement of Plaintiff’s invention of the ‘369 patent and Defendants intended and directed that infringement.

7. Conclusion

41. Defendants have been and are now infringing, and will continue all such direct and indirect infringing activities, in this Judicial District and elsewhere in the United States, by one or more of, making, using, importing, selling, and offering for sale the single door and two-door products, including the 360Booth and related devices and products.

COUNTS

Count I: Literal Infringement of the ‘320 Patent by Defendants’ Two-Door Product in violation of 35 U.S.C. § 271(a) Asserted Against Defendant 360Booth, Inc. and Jay Smithweck

Plaintiff reiterates and incorporates by reference the allegations of the preceding paragraphs 4 to 11 and 14A, 14B, 15A, and 15B. Defendants' acts of making, using, importing, selling, and/or offering for sale the two-door product and related products literally (or in the alternative, under the doctrine of equivalents) infringes claims 1, 6, 9, 11, 12, 13, 15, 19, 20 and 21 to 24 of the '320 Patent; and Defendants are liable for the infringement as 360Booth, Inc. is the entity infringing and Defendant Smithweck personally took part in the commission of the infringement, and/or specifically directed other officers, agents or employees of 360Booth, Inc. to commit the infringing acts, and thus is also personally liable for the infringement.

Count II: Infringement of the '320 Patent Under the Doctrine of Equivalents by Defendants' Two-Door Product in Violation of 35 U.S.C. § 271(a) Asserted Against Defendant 360Booth, Inc. and Jay Smithweck

Plaintiff reiterates and incorporates by reference the allegations of the preceding paragraphs 4 to 11 and 14A, 14B, 15A, and 15B. Defendants' acts of making, using, importing, selling, and/or offering for sale the two-door product and related products infringes claims 3, 17 and 18 of the '320 Patent under the doctrine of equivalents. Defendants are liable for the infringement as 360Booth, Inc. is the entity infringing and Defendant Smithweck personally took part in the commission of the infringement, and/or specifically directed other officers, agents or employees of

360Booth, Inc. to commit the infringing acts, and thus is also personally liable for the infringement.

Count III: Infringement of the ‘320 Patent Under the Doctrine of Equivalents by Defendants’ Single Door Product in Violation of 35 U.S.C. § 271(a) Asserted Against Defendant 360Booth, Inc. and Jay Smithweck

Plaintiff reiterates and incorporates by reference the allegations of the preceding paragraphs 4 to 11, 12, and 13. Defendants’ acts of making, using, importing, selling, and/or offering for sale the single door products, or the 360Booth and related products, directly infringes claims 1, 3, 6, 9, 11, 12, 13, 15, 17, 18, 19, 20 and 21 to 24 of the ‘320 Patent under the doctrine of equivalents. Defendants are liable for the infringement as 360Booth, Inc. is the entity infringing and Defendant Smithweck personally took part in the commission of the infringement, and/or specifically directed other officers, agents or employees of 360Booth, Inc. to commit the infringing acts, and thus is also personally liable for the infringement.

Count IV: Indirect Infringement of the ‘320 Patent by Defendants’ Two-Door Product in Violation of 35 U.S.C. § 271(b) & (c) Asserted Against Defendant 360Booth, Inc. and Jay Smithweck

Plaintiff reiterates and incorporates by reference the allegations of **Counts I and II** and paragraphs 4-25, 16A, and 16B. In the alternative to **Counts I and II**, Defendants’ acts of selling the two-door product indirectly infringes claims 1, 6, 9, 11, 12, 13, 15, 17, 18, 19, 20, 21, 22, 23, and 24 of the ‘320 Patent upon a customer using this product as intended. Defendants are liable for the indirect infringement as

360Booth, Inc. is the entity indirectly infringing and Defendant Smithweck personally took part in the commission of the indirect infringement, and/or specifically directed other officers, agents or employees of 360Booth, Inc. to commit the acts constituting indirect infringement, and thus is also personally liable for the indirect infringement.

Count V: Literal Infringement of the ‘864 Patent by Defendants’ Two-Door Product in Violation of 35 U.S.C. § 271(a) Asserted Against Defendant 360Booth, Inc. and Jay Smithweck

Plaintiff reiterates and incorporates by reference the allegations of the preceding paragraphs 4 to 11 and 26 to 30. Defendants’ acts of making, using, importing, selling, and/or offering for sale of the two-door products directly infringes claims 1, 5, 6, 10, 12, 13, and 14 to 16 of the ‘864 Patent literally; or, in the alternative, under the doctrine of equivalents. Defendants are liable for the direct infringement as 360Booth, Inc. is the entity directly infringing and Defendant Smithweck personally took part in the commission of the indirect infringement, and/or specifically directed other officers, agents or employees of 360Booth, Inc. to commit the acts constituting direct infringement, and thus is also personally liable for the direct infringement.

Count VI: Infringement of the ‘864 Patent under the Doctrine of Equivalents by Defendants’ Single Door Product in Violation of 35 U.S.C. § 271(a) Asserted Against Defendant 360Booth, Inc. and Jay Smithweck

Plaintiff reiterates and incorporates by reference the allegations of the preceding paragraphs 4 to 11 and 31-35. Defendants’ acts of making, using, importing, selling,

and/or offering for sale of the single door products or the 360Booth and related products directly infringes claims 1, 3, 5, 6, 8, 10, 12, 13 and 14-16 of the '864 Patent under the doctrine of equivalents. Defendants are liable for the infringement as 360Booth, Inc. is the entity infringing and Defendant Smithweck personally took part in the commission of the infringement, and/or specifically directed other officers, agents or employees of 360Booth, Inc. to commit the acts constituting infringement, and thus is also personally liable for the infringement.

Count VII: Indirect Infringement of the '864 Patent by Defendants' Two Door Product in Violation of 35 U.S.C. § 271(b)&(c) Asserted Against Defendant 360Booth, Inc. and Jay Smithweck

Plaintiff reiterates and incorporates by reference the allegations of the preceding paragraphs 4 to 11, 17 to 25 and 36. In the alternative to **Counts V and VI**, Defendants' acts of selling the two-door products indirectly infringes claims 1, 5, 6, 10, 12, 13, and 14 to 16 of the '864 Patent upon a customer using these products as intended. Defendants are liable for the indirect infringement as 360Booth, Inc. is the entity indirectly infringing and Defendant Smithweck personally took part in the commission of the indirect infringement, and/or specifically directed other officers, agents or employees of 360Booth, Inc. to commit the acts constituting indirect infringement, and thus is also personally liable for the indirect infringement.

Count VIII: Literal Infringement of the ‘369 Patent by Defendants’ Two Door Product in Violation of 35 U.S.C. § 271(a) Asserted Against Defendant 360Booth, Inc. and Jay Smithweck

Plaintiff reiterates and incorporates by reference the allegations of the preceding paragraphs 37, 38 and the exhibits referenced therein. Defendants’ acts of making, using, importing, selling, and/or offering for sale the two-door product and related products directly and literally infringes claim Nos. 1, 5, 6, 7, 9, 10, 11, 12, 13, 14, 17, and 19 of the ‘369 patent. Defendants are liable for the infringement as 360Booth, Inc. is the entity infringing and Defendant Smithweck personally took part in the commission of the infringement, and/or specifically directed other officers, agents or employees of 360Booth, Inc. to commit the acts constituting infringement, and thus is also personally liable for the infringement.

Count IX: Literal Infringement of the ‘369 Patent by Defendants’ Single Door Product in Violation of 35 U.S.C. § 271(a) Asserted Against Defendant 360Booth, Inc. and Jay Smithweck

Plaintiff reiterates and incorporates by reference the allegations of the preceding paragraphs 37 to 39 and the exhibits referenced therein. Defendants’ acts of making, using, importing, selling, and/or offering for sale the single door products, or the 360Booth and related products, directly and literally infringes claim Nos. 1, 12, 17, and 19 of the ‘369 patent. Defendants are liable for the infringement as 360Booth, Inc. is the entity infringing and Defendant Smithweck personally took part in the

commission of the infringement, and/or specifically directed other officers, agents or employees of 360Booth, Inc. to commit the acts constituting infringement, and thus is also personally liable for the infringement.

Count X: Indirect Infringement of the ‘369 Patent by Defendants’ Two Door Product in Violation of 35 U.S.C. § 271(b)&(c) Asserted Against Defendant 360Booth, Inc. and Jay Smithweck

Plaintiff reiterates and incorporates by reference the allegations of the preceding paragraphs 4 to 11, 17 to 25 and 37-40. In the alternative to **Count IX**, Defendants’ acts of making, using, importing, selling, and/or offering for sale of two-door products and related products indirectly infringes claim Nos. 1, 5, 6, 7, 9, 10, 11, 12, 13, 14, 17, and 19 of the ‘369 patent upon a customer using these products as intended. Defendants are liable for the indirect infringement as 360Booth, Inc. is the entity indirectly infringing and Defendant Smithweck personally took part in the commission of the indirect infringement, and/or specifically directed other officers, agents or employees of 360Booth, Inc. to commit the acts constituting indirect infringement, and thus is also personally liable for the indirect infringement.

Count XI: Reasonable Royalty for Violations of Plaintiff’s Provisional Rights under of 35 U.S.C. § 154(d) Following Publication of the Application Which Became the ‘369 Patent, by Defendants’ Single Door and Two-door Products

Plaintiff reiterates the allegations in paragraph 23.B, and as Defendants had notice of the application which became Publication No. 20230007934, published on Jan. 12, 2023 as **Exhibit C2**, and as the other statutory requirements for a reasonable

royalty under [35 U.S.C. § 154\(d\)](#) have been met, as described in paragraph 23.B, Plaintiff asserts its rights to a reasonable royalty from Jan. 12, 2023, as well as any other relief Plaintiff is entitled to under **Count VIII, IX, and X.**

Count XII: Irreparable Injury, Injunction

As a result of Defendants' unlawful activities, Plaintiff has suffered and will continue to suffer irreparable harm for which there is no adequate remedy at law, and should be granted permanent injunction under [35 U.S.C. § 283](#).

Count XIII: Monetary Damages

Defendants' direct and/or indirect infringement of the patents-in-suit has injured and continues to injure Plaintiffs in an amount to be proven at trial, but not less than a reasonable royalty and/or lost profits, as provided in [35 U.S.C. § 284](#).

Count XIV: Willful Infringement Damages and Attorneys' Fees

On information and belief, as discussed above in paragraphs 17-25, Defendants were aware of the '864 and '320 patents-in-suit before this lawsuit was filed, and was aware of the '369 Patent before this Fifth Amended Complaint was filed; or, took deliberate actions to avoid learning of the '864 and '320 patents-in-suit; and also were aware of and copied Plaintiff's MotoFoto360 and as such, Defendants have acted recklessly and continue to willfully, wantonly, and deliberately engage in acts of infringement of all the patents-in-suit, justifying an award to Plaintiffs of increased damages under [35 U.S.C. § 284](#), and attorneys' fees and costs incurred under [35 U.S.C. § 285](#).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands a jury trial, and Plaintiff prays for judgment and relief as follows:

A. An entry of judgment holding that Defendants have infringed and are directly or indirectly infringing all of the patents-in-suit;

B. A preliminary injunction followed by a permanent injunction against Defendants and their officers, employees, agents, servants, attorneys, instrumentalities, and/or those in privity with them, from infringing the patents-in-suit, and for all further and proper injunctive relief pursuant to [35 U.S.C. § 283](#);

C. An award to Plaintiff of such past damages, not less than a reasonable royalty, as it shall prove at trial against Defendants, jointly and severally, that is adequate to fully compensate Plaintiff for Defendants' infringement of the patents-in-suit;

D. A determination that Defendants' infringement has been willful, wanton, and deliberate and that the damages against it be increased up to treble on this basis or for any other basis in accordance with the law;

E. A finding that this case is "exceptional" and an award to Plaintiff of his costs and reasonable attorneys' fees, as provided by [35 U.S.C. § 285](#);

F. An accounting of all infringing sales and revenues, together with post judgment interest and prejudgment interest from the first date of infringement of the patents-in-suit;

G. Such further and other relief as the Court may deem proper and just.

Respectfully submitted,

By: /s/ Eric P. Mirabel
Eric P. Mirabel
State Bar No. 14199560
Special Admission
3783 Darcus St.
Houston, Texas 77005
Telephone: (281) 772-3794
Facsimile: (713) 667-4234
eric@emirabel.com

**ATTORNEY FOR PLAINTIFF,
STEPHEN SWINFORD**

CERTIFICATE OF SERVICE

On this 7th day of February, 2023, I hereby certify that a true and correct copy of the foregoing document was served via the Clerk of the Court through the ECF system. /s/ Eric Mirabel