

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
TYLER DIVISION**

BROOKS INSTRUMENT, LLC and	)	
BI PRODUCTS, LLC,	)	
	)	Civil Action No. 6:10-cv-223-LED
Plaintiffs,	)	
	)	
v.	)	
	)	
MKS INSTRUMENTS, INC.	)	JURY TRIAL DEMANDED
	)	
Defendant.	)	
	)	

**FIRST AMENDED COMPLAINT FOR PATENT INFRINGEMENT (Tinsley Patents)**

Plaintiffs, Brooks Instrument, LLC, and BI Products, LLC (collectively, “Plaintiffs”), by and through their attorneys, bring this action against defendant, MKS Instruments, Inc. (“Defendant”), and allege as follows:

**PARTIES**

1. Brooks is a Delaware limited liability company having its principal place of business at 407 W. Vine Street, Hatfield, PA 19440-3000. Brooks maintains manufacturing facilities in Allen, Texas.

2. BI Products, LLC (“BI Products”) is a Delaware limited liability company with its principal place of 407 W. Vine Street, Hatfield, PA 19440-3000.

3. On information and belief, Defendant MKS is a Pennsylvania corporation having its principal place of business at 2 Tech Drive, Andover, Massachusetts 01810.

**JURISDICTION AND VENUE**

4. This action arises under the Patent laws of the United States, 35 U.S.C. §§ 1 *et seq.*

5. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1338(a).

6. Upon information and belief, Defendant is subject to this Court's general and specific jurisdiction because: Defendant has minimum contacts within the State of Texas and within this District, including via its website, pursuant to due process and/or the Texas Long Arm statute; Defendant has purposefully availed itself of the privileges of conducting business in the State of Texas and within this District; Defendant regularly conducts and solicits business within the State of Texas and within this District; and Plaintiffs' causes of action arise directly from Defendant's business contacts and other activities in the State of Texas and within this District.

7. More specifically, upon information and belief, Defendant, directly and/or through intermediaries, ships, distributes, offers for sale, sells and/or advertises (including via the provision of interactive web pages) its products and services in the State of Texas and within the Eastern District of Texas. Defendant has a sales office in Richardson, Texas. Upon information and belief, Defendant has committed Patent infringement, induced Patent infringement, and contributed to the infringement of Plaintiffs' Patents in the State of Texas and within this District. For example, Defendant solicits customers in the State of Texas and within this District. Upon information and belief, Defendant has paying customers in the Eastern District of Texas, including, but not limited to, Flextronics International, Texas

Instruments Incorporated, and TriQuint Semiconductor, Inc., who each use Defendant's products and services in the State of Texas and within this District.

8. Defendant has committed acts within this District that give rise to this action and does business in this District, including offering infringing products for sale, selling infringing products, and providing service and support to its customers in this District. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and (c) and 28 U.S.C. § 1400(b).

### **GENERAL ALLEGATIONS**

9. Brooks is the owner by assignment of United States Patent Nos. 6,343,617 (the "'617 Patent"), entitled "System and Method of Operation of a Digital Mass Flow Controller"; 6,640,822 (the "'822 Patent"), entitled "System and Method of Operation of a Digital Mass Flow Controller"; and 6,681,787 (the "'787 Patent"), entitled "System and Method of Operation of a Digital Mass Flow Controller" (collectively, "the Asserted Patents").

10. BI Products is the exclusive licensee of the '617 Patent, the '822 Patent, and the '787 Patent.

11. On February 5, 2002, the USPTO duly and properly issued the '617 Patent to inventors Kenneth E. Tinsley and Faisal Tariq. Brooks was assigned the entire right, title and interest in the '617 Patent, and granted BI Products an exclusive license for the '617 Patent. A true and correct copy of the '617 Patent is attached as Exhibit A.

12. On November 4, 2003, the USPTO duly and properly issued the '822 Patent to inventors Kenneth E. Tinsley and Faisal Tariq. Brooks was assigned the entire right, title and interest in the '822 Patent, and granted BI Products an exclusive license for the '822

Patent. A true and correct copy of the '822 Patent is attached as Exhibit B.

13. On January 27, 2004, the USPTO duly and properly issued the '787 Patent to inventors Kenneth E. Tinsley and Faisal Tariq. Brooks was assigned the entire right, title and interest in the '787 Patent, and granted BI Products an exclusive license for the '787 Patent. A true and correct copy of the '787 Patent is attached as Exhibit C.

**COUNT I: INFRINGEMENT OF THE '617 PATENT**

14. Plaintiffs incorporate and reallege the allegations of paragraphs 1 through 13 as if set fully forth herein.

15. Defendant has been and is infringing, inducing infringement and/or contributing to the infringement of the '617 Patent in this District, and throughout the United States, by making, selling, offering for sale, using, and/or importing infringing flow delivery products covered by one or more claims of the '617 Patent, including at least the ALTA Series and  $\pi$ MFC Series of mass flow controllers and/or mass flow meters. Upon information and belief, Defendant also infringes the '617 patent by making, using, selling, and offering to sell calibration services on at least the ALTA and  $\pi$ MFCs and utilize equipment during such calibration that itself infringes because such equipment, upon information and belief, contains ALTA and/or  $\pi$ MFCs. Additionally, Defendant makes, sells, offers for sale, uses and/or imports other, custom-designed products that contain infringing ALTA and/or  $\pi$ MFCs, and makes, sells, offers for sale, uses, and/or imports additional products, including, but not limited to, MKS Tru-Flow Mass Verifiers, MKS Gas Box Rate-of-Rise In Situ Verifiers, MKS Califlows, MKS Type PFTS1A Portable Flow Measurement Systems, and MKS Type PVS6E Portable Vacuum Calibration Systems that infringe the '617 patent.

16. Upon information and belief, Defendant has sold products and services especially designed to be used by its customers in such a way that infringes the '617 Patent, which lack substantial noninfringing uses, and which customers have used to actually infringe the '617 Patent, including those identified in paragraph 15. Upon information and belief, Defendant has also sold products and services to its customers, and, despite its knowledge of the '617 Patent, has specifically intended that its customers infringe the '617 Patent by providing at least marketing materials and instruction manuals detailing how to use its products in such a way that infringes the '617 Patent, as well as providing and supporting the aforementioned calibration services, and Defendant's customers have utilized Defendant's products and services to actually infringe the '617 Patent.

17. Defendant committed these acts of infringement without license or authorization.

18. Upon information and belief, to the extent any marking was required by 35 U.S.C. § 287, all predecessors in interest to the '617 Patent complied with such requirements.

19. Defendant had actual notice of the '617 Patent prior to this lawsuit, but has continued to willfully and deliberately infringe despite such notice.

20. As a result of Defendant's willful infringement of the '617 Patent, Plaintiffs have suffered monetary damages in an amount not yet determined, and will continue to suffer damages in the future unless Defendant's infringing activities are enjoined by this Court.

21. Plaintiffs have suffered and will continue to suffer severe and irreparable harm unless this Court issues a permanent injunction prohibiting Defendant, its agents, servants,

employees, representatives, and all others acting in active concert therewith from infringing the '617 Patent

**COUNT II: INFRINGEMENT OF THE '822 PATENT**

22. Plaintiffs incorporate and reallege the allegations of paragraphs 1 through 21 as if set fully forth herein.

23. Defendant has been and is infringing, inducing infringement and/or contributing to the infringement of the '822 Patent in this District, and throughout the United States, by making, selling, offering for sale, using, and/or importing infringing flow delivery products covered by one or more claims of the '822 Patent, including at least the ALTA Series and  $\pi$ MFC Series of mass flow controllers and/or mass flow meters. Upon information and belief, Defendant also infringes the '822 patent by making, using, selling, and offering to sell calibration services on at least the ALTA and  $\pi$ MFCs and utilize equipment during such calibration that itself infringes because such equipment, upon information and belief, contains ALTA and/or  $\pi$ MFCs. Additionally, Defendant makes, sells, offers for sale, uses and/or imports other, custom-designed products that contain infringing ALTA and/or  $\pi$ MFCs, and makes, sells, offers for sale, uses, and/or imports additional products, including, but not limited to, MKS Tru-Flow Mass Verifiers, MKS Gas Box Rate-of-Rise In Situ Verifiers, MKS Califlows, MKS Type PFTS1A Portable Flow Measurement Systems, and MKS Type PVS6E Portable Vacuum Calibration Systems that infringe the '822 patent.

24. Upon information and belief, Defendant has sold products and services especially designed to be used by its customers in such a way that infringes the '822 Patent, which lack substantial noninfringing uses, and which customers have used to actually infringe

the '822 Patent, including those identified in paragraph 23. Upon information and belief, Defendant has also sold products and services to its customers, and, despite its knowledge of the '822 Patent, has specifically intended that its customers infringe the '822 Patent by providing at least marketing materials and instruction manuals detailing how to use its products in such a way that infringes the '822 Patent, as well as providing and supporting the aforementioned calibration services, and Defendant's customers have utilized Defendant's products and services to actually infringe the '822 Patent.

25. Defendant committed these acts of infringement without license or authorization.

26. Upon information and belief, to the extent any marking was required by 35 U.S.C. § 287, all predecessors in interest to the '822 Patent complied with such requirements.

27. Defendant had actual notice of the '822 Patent prior to this lawsuit, but has continued to willfully and deliberately infringe despite such notice.

28. As a result of Defendant's willful infringement of the '822 Patent, Plaintiffs have suffered monetary damages in an amount not yet determined, and will continue to suffer damages in the future unless Defendant's infringing activities are enjoined by this Court.

29. Plaintiffs have suffered and will continue to suffer severe and irreparable harm unless this Court issues a permanent injunction prohibiting Defendant, its agents, servants, employees, representatives, and all others acting in active concert therewith from infringing the '822 Patent.

**COUNT III: INFRINGEMENT OF THE '787 PATENT**

30. Plaintiffs incorporate and reallege the allegations of paragraphs 1 through 29 as if set fully forth herein.

31. Defendant has been and is infringing, inducing infringement and/or contributing to the infringement of the '787 Patent in this District, and throughout the United States, by making, selling, offering for sale, using, and/or importing infringing flow delivery products covered by one or more claims of the '787 Patent, including at least the ALTA Series and  $\pi$ MFC Series of mass flow controllers and/or mass flow meters. Upon information and belief, Defendant also infringes the '787 patent by making, using, selling, and offering to sell calibration services on at least the ALTA and  $\pi$ MFCs and utilize equipment during such calibration that itself infringes because such equipment, upon information and belief, contains ALTA and/or  $\pi$ MFCs. Additionally, Defendant makes, sells, offers for sale, uses and/or imports other, custom-designed products that contain infringing ALTA and/or  $\pi$ MFCs, and makes, sells, offers for sale, uses, and/or imports additional products, including, but not limited to, MKS Tru-Flow Mass Verifiers, MKS Gas Box Rate-of-Rise In Situ Verifiers, MKS Califlows, MKS Type PFTS1A Portable Flow Measurement Systems, and MKS Type PVS6E Portable Vacuum Calibration Systems that infringe the '787 patent.

32. Upon information and belief, Defendant has sold products and services especially designed to be used by its customers in such a way that infringes the '787 Patent, which lack substantial noninfringing uses, and which customers have used to actually infringe the '787 Patent, including those identified in paragraph 31. Upon information and belief, Defendant has also sold products and services to its customers, and, despite its knowledge of



the '787 Patent, has specifically intended that its customers infringe the '787 Patent by providing at least marketing materials and instruction manuals detailing how to use its products in such a way that infringes the '787 Patent, as well as providing and supporting the aforementioned calibration services, and Defendant's customers have utilized Defendant's products and services to actually infringe the '787 Patent.

33. Defendant committed these acts of infringement without license or authorization.

34. Upon information and belief, to the extent any marking was required by 35 U.S.C. § 287, all predecessors in interest to the '787 Patent complied with such requirements.

35. Defendant had actual notice of the '787 Patent prior to this lawsuit, but has continued to willfully and deliberately infringe despite such notice.

36. As a result of Defendant's willful infringement of the '787 Patent, Plaintiffs have suffered monetary damages in an amount not yet determined, and will continue to suffer damages in the future unless Defendant's infringing activities are enjoined by this Court.

37. Plaintiffs have suffered and will continue to suffer severe and irreparable harm unless this Court issues a permanent injunction prohibiting Defendant, its agents, servants, employees, representatives, and all others acting in active concert therewith from infringing the '787 Patent.

**JURY DEMAND**

38. Plaintiffs demand a trial by jury on all issues so triable.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request the Court to grant it the following relief:

- (a) A judgment in favor of the Plaintiffs that Defendant has infringed, directly, and/or indirectly, by way of inducing and/or contributing to the infringement of claims of the '617 Patent;
- (b) A judgment in favor of the Plaintiffs that Defendant has infringed, directly, and/or indirectly, by way of inducing and/or contributing to the infringement of claims of the '822 Patent;
- (c) A judgment in favor of the Plaintiffs that Defendant has infringed, directly, and/or indirectly, by way of inducing and/or contributing to the infringement of claims of the '787 Patent;
- (d) A judgment that such infringement was willful;
- (e) A permanent injunction enjoining Defendant and its officers, directors, agents, servants, affiliates, employees, divisions, branches, subsidiaries, parents, and all others acting in concert therewith from infringement, inducing the infringement of, or contributing to the infringement of, each of the Asserted Patents;
- (f) A judgment and order requiring Defendant to pay Plaintiffs their damages, costs, expenses, and pre-judgment and post-judgment interest for Defendant's infringement of each of the Asserted Patents;
- (g) An award to Plaintiffs for enhanced damages resulting from the knowing, deliberate and willful nature of Defendant's infringement;

- (h) A judgment and order finding that this is an exceptional case within the meaning of 35 U.S.C. § 285 and awarding Plaintiffs their reasonable attorneys' fees; and
- (i) Any and all such other relief that this Court deems just and proper.

Dated: September 13, 2010

Respectfully submitted,



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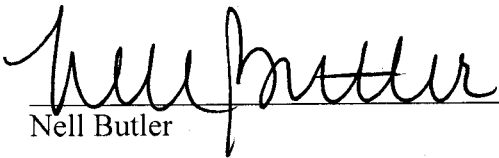
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**ATTORNEYS FOR BROOKS  
INSTRUMENT, LLC and  
BI PRODUCTS, LLC**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) this 13<sup>th</sup> day of September, 2010. Any other counsel of record will be served by facsimile transmission and/or first class mail.

  
Nell Butler

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