

**PRESTON REFRIGERATION  
COMPANY, INC.,**

Case No.

## JURY TRIAL DEMANDED

**FIRST AMENDED COMPLAINT**

Plaintiff, Preston Refrigeration Company, Inc. (“Preston”), as and for its First Amended Complaint against Defendants McNeil Refrigeration, Inc., McNeil Refrigeration Systems, Inc., Michael Kendall, and Joel McCosh (collectively “Defendants”), alleges as follows:

## PARTIES

1. Preston is a corporation organized and existing under the laws of the State of Kansas, having a principal place of business at 3200 Fiberglass Road, Kansas City, Kansas 66115.

2. McNeil Refrigeration, Inc. is a corporation organized and existing under the laws of the State of Nebraska, having a principal place of business at 8425 Madison Street, Omaha, Nebraska 68127-4122, and upon information and belief, a place of business at 1362 North Highway 9, Suite B, Parkville, Missouri 64152, within this judicial district. McNeil Refrigeration, Inc. may be served with process by serving its Registered Agent, Bernard J. McNeil, at 8425 Madison Street, Omaha, Nebraska 68127-4122.

3. McNeil Refrigeration Systems, Inc. is a corporation organized and existing under the laws of the State of Nebraska, registered to do and doing business in the State of Missouri, within this judicial district, at 1362 North Highway 9, Suite B, Parkville, Missouri 64152. McNeil Refrigeration Systems, Inc. may be served with process by serving its Registered Agent, Gary Smith, at 1362 North Highway 9, Suite B, Parkville, Missouri 64152. McNeil Refrigeration, Inc. and McNeil Refrigeration Systems, Inc. are collectively referred to herein as “the McNeil Defendants.”

4. Upon information and belief, Defendant Michael Kendall is an individual residing at 7902 Acuff Lane, Lenexa, Kansas 66215, and who may be found within this judicial district at 1362 North Highway 9, Suite B, Parkville, Missouri 64152.

5. Upon information and belief, Defendant Joel McCosh is an individual residing within this judicial district at 11875 NW Crooked Rd, Parkville, Missouri 64152-4934, and who may be found within this judicial district at 1362 North Highway 9, Suite B, Parkville, Missouri 64152.

### **JURISDICTION AND VENUE**

6. This is an action for patent infringement, contributory patent infringement, and inducement of patent infringement pursuant to 35 U.S.C. § 271. This Court has jurisdiction under 28 U.S.C. §§ 1338(a) and 1331, as well as supplemental jurisdiction under 28 U.S.C. § 1367. This Court has personal jurisdiction over Defendants in that they are located in Missouri or have transacted business and committed tortious acts in the State of Missouri, out of which this action arises. Mo.Rev.Stat. § 506.500.

7. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b) and (c) and § 1400(b), in that a substantial part of the events giving rise to the claim occurred here,

Defendants reside and may be found here, and Defendants are subject to personal jurisdiction here.

**COUNT I**  
**Infringement Of U.S. Patent No. 6,266,973**  
**(Against the McNeil Defendants)**

8. Preston incorporates by reference the allegations contained in Paragraphs 1 through 7 above, as if fully set forth herein.

9. On July 31, 2001, the United States Patent and Trademark Office duly and legally issued U.S. Patent No. 6,266,973 (the “‘973 Patent”) entitled “Refrigeration System.” A copy of the ‘973 Patent is attached hereto as Exhibit 1.

10. Preston is the owner by assignment of the ‘973 Patent. Preston holds the right to sue for past, present, and future infringement of the ‘973 Patent.

11. Upon information and belief, the McNeil Defendants have made, used, offered to sell, and/or sold refrigeration systems and methods covered by one or more claims of the ‘973 Patent.

12. Upon information and belief, the McNeil Defendants have infringed the ‘973 Patent, and continue to infringe the ‘973 Patent, by practicing, using, manufacturing, selling and offering to sell refrigeration systems and related methods covered by one or more claims of the ‘973 Patent. Upon information and belief, the McNeil Defendants’ infringement has been knowing and willful. Such infringement will continue unless enjoined by the Court.

13. Preston has complied with the requirements of 35 U.S.C. § 287 with respect to the ‘973 Patent.

14. As a direct and proximate result of the conduct of the McNeil Defendants, Preston has suffered damages in an amount to be proven at trial.

15. Preston is without an adequate remedy at law and will be irreparably injured if the Court does not enter an order preliminarily and permanently enjoining the McNeil Defendants from committing the acts of infringement complained of herein.

WHEREFORE, Plaintiff Preston prays that:

A. Defendants McNeil Refrigeration, Inc. and McNeil Refrigeration Systems, Inc. and their respective officers, agents, servants, employees, and attorneys, and all of those persons in active concert or participation with Defendants McNeil Refrigeration, Inc. and McNeil Refrigeration Systems, Inc., be enjoined preliminarily and permanently from directly or indirectly infringing U.S. Patent No. 6,266,973;

B. Preston be awarded damages against Defendants McNeil Refrigeration, Inc. and McNeil Refrigeration Systems, Inc., jointly and severally, accrued through the time of trial and that these damages be trebled;

C. Preston's costs be assessed against Defendants McNeil Refrigeration, Inc. and McNeil Refrigeration Systems, Inc., jointly and severally;

D. Preston be awarded pre-judgment and post-judgment interest against each of Defendants McNeil Refrigeration, Inc. and McNeil Refrigeration Systems, Inc.;

E. This matter be deemed an exceptional case pursuant to 35 U.S.C. § 285 and Preston be awarded its reasonable attorneys' fees against each of Defendants McNeil Refrigeration, Inc. and McNeil Refrigeration Systems, Inc.; and

F. Preston be awarded such other and further relief as the Court may deem just and proper.

**COUNT II**  
**Contributory Infringement of U.S. Patent No. 6,266,973**  
**(Against the McNeil Defendants)**

16. Preston incorporates by reference the allegations contained in Paragraphs 1 through 15 above, as if fully set forth herein.

17. Upon information and belief, the McNeil Defendants have offered to sell, sold, or manufactured a component of the '973 Patent, or a material or apparatus for use in practicing the '973 Patent, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of the '973 Patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use within the meaning of 35 U.S.C. § 271(c).

18. Upon information and belief, the McNeil Defendants have contributed to the infringement of the '973 Patent, and continue to contribute to the infringement of the '973 Patent, by contributing to the manufacture, use, sale or offers to sell refrigeration systems and related methods covered by one or more claims of the '973 Patent.

19. Upon information and belief, the McNeil Defendants' contributory infringement has been knowing and willful. Such contributory infringement will continue unless enjoined by the Court.

20. As a direct and proximate result of the McNeil Defendants' contributory infringement, Preston has suffered damages in an amount to be proven at trial.

21. Preston is without an adequate remedy at law and will be irreparably injured if the Court does not enter an order preliminary and permanently enjoining the McNeil Defendants from committing the acts of infringement complained of herein.

WHEREFORE, Plaintiff Preston prays that:

A. Defendants McNeil Refrigeration, Inc. and McNeil Refrigeration Systems, Inc. and their respective officers, agents, servants, employees, and attorneys, and all of those persons in active concert or participation with each or any of the Defendants McNeil Refrigeration, Inc. and McNeil Refrigeration Systems, Inc., be enjoined preliminarily and permanently from contributing to the infringement of U.S. Patent No. 6,266,973;

B. Preston be awarded damages against Defendants McNeil Refrigeration, Inc. and McNeil Refrigeration Systems, Inc., jointly and severally, accrued through the time of trial and that these damages be trebled;

C. Preston's costs be assessed against Defendants McNeil Refrigeration, Inc. and McNeil Refrigeration Systems, Inc., jointly and severally;

D. Preston be awarded pre-judgment and post-judgment interest against each of Defendants McNeil Refrigeration, Inc. and McNeil Refrigeration Systems, Inc.;

E. This matter be deemed an exceptional case pursuant to 35 U.S.C. § 285 and Preston be awarded its reasonable attorneys' fees against each of Defendants McNeil Refrigeration, Inc. and McNeil Refrigeration Systems, Inc.; and

F. Preston be awarded such other and further relief as the Court may deem just and proper.

**COUNT III**  
**Inducement of Infringement of U.S. Patent No. 6,266,973**  
**(Against All Defendants)**

22. Preston incorporates by reference the allegations contained in Paragraphs 1 through 21 above, as if fully set forth herein.

23. Upon information and belief, the McNeil Defendants and Defendants Joel McCosh and Michael Kendall have actively induced the infringement of the '973 Patent, and continue to actively induce the infringement the '973 Patent within the meaning of 35 U.S.C. § 271(b), by actively inducing the manufacture, use, sale and offering for sale of refrigeration systems and related methods covered by one or more claims of the '973 Patent. Upon information and belief, Defendants' inducement of infringement has been knowing and willful. Such inducement of infringement will continue unless enjoined by the Court.

24. As a direct and proximate result of Defendants' active inducement of infringement, Preston has suffered damages in an amount to be proven at trial.

25. Preston is without an adequate remedy at law and will be irreparably injured if the Court does not enter an order preliminarily and permanently enjoining Defendants from committing the acts of inducement of infringement complained of herein.

WHEREFORE, Plaintiff Preston prays that:

A. Defendants McNeil Refrigeration, Inc. and McNeil Refrigeration Systems, Inc. and their respective officers, agents, servants, employees, and attorneys, and Defendants Michael Kendall, Joel McCosh and their respective agents, servants, employees, and attorneys, and all of those persons in active concert or participation with each or any of the Defendants, be enjoined preliminarily and permanently from inducing infringement of U.S. Patent No. 6,266,973;

B. Preston be awarded damages against Defendants, jointly and severally, accrued through the time of trial and that these damages be trebled;

C. Preston's costs be assessed against Defendants, jointly and severally;

D. Preston be awarded pre-judgment and post-judgment interest against each of the Defendants;

E. This matter be deemed an exceptional case pursuant to 35 U.S.C. § 285 and Preston be awarded its reasonable attorneys' fees against each of the Defendants; and

F. Preston be awarded such other and further relief as the Court may deem just and proper.

**COUNT IV**  
**Replevin**  
**(Against All Defendants)**

26. Preston incorporates by reference the allegations contained in Paragraphs 1 through 25 above, as if fully set forth herein.

27. Each of the individual defendants, Michael Kendall and Joel McCosh, was formerly employed by Preston.

28. Each of the individual defendants was necessarily given access to confidential and proprietary information, including but not limited to patent applications, drawings, sketches, plans, blueprints, customer lists, invention disclosures, computer programs, financial documentation, and source codes, of Preston during the tenure of their employment with Preston.

29. Upon information and belief, each of the individual defendants took, converted, and misappropriated confidential and proprietary information belonging to Preston.

30. Defendants have improperly exercised unauthorized control over and retained such confidential and proprietary information of Preston.

31. Preston is the rightful possessor of the property, who has been deprived of its rights to possession by Defendants.



32. Preston is in danger of losing the property unless this honorable Court issues its order for replevin allowing Preston to take immediate possession of its misappropriated property.

33. The total value of the property cannot be currently ascertained. In the event the property is not delivered to Preston under the aforesaid order for replevin, Preston may forever lose the value of the property.

**WHEREFORE**, Preston prays that this Court enter judgment against Defendants for immediate recovery of possession of its property, and for the value of the property not delivered; and if recovery cannot be had, then for judgment in an amount to be determined at trial of the value of the property, together with interest, reasonable attorneys' fees, damages Preston has incurred as a result of the wrongful detention of the property in an amount to be determined at trial, costs of suit, and such other and further relief as this honorable Court deems just and proper under the circumstances.

**COUNT V**  
**Conversion**  
**(Against All Defendants)**

34. Preston hereby re-alleges each and every allegation set forth in paragraphs 1-33 above, and incorporates them by reference as if fully set forth herein.

35. Preston is entitled to the immediate possession of all of the property and information taken by each of the individual Defendants.

36. Defendants have wrongfully taken possession of the property and appropriated it for their own use in open defiance of Preston's right to immediate possession thereof.

37. Defendants have unlawfully come into possession of the property and unlawfully converted it and disposed of it, depriving Preston of its rights to possession.

38. Defendants' actions have proximately caused Preston to suffer damages.

39. Defendants' actions are outrageous because of their evil motive or reckless indifference to the rights of Preston.

**WHEREFORE**, Preston prays that this Court enter judgment against Defendants, jointly and severally, in an amount to be determined at trial that is fair and reasonable, together with interest on the value of the converted property from the date of conversion, punitive damages of not less \$500,000 per Defendant, Preston's reasonable attorneys' fees, costs of suit and such other and further relief as this honorable Court deems just and proper under the circumstances.

**COUNT VI**  
**Civil Conspiracy**  
**(Against All Defendants)**

40. Preston hereby re-alleges each and every allegation set forth in paragraphs 1-39 above, and incorporates them by reference as if fully set forth herein.

41. Defendants conspired with each other to misappropriate Preston's confidential and proprietary information and to use the misappropriated information to compete unfairly against Preston.

42. At all times mentioned herein, Defendants wrongfully, intentionally and willfully conspired and agreed to commit the various tortious acts and conduct described herein.

43. Preston has been damaged as a result of the conspiracy and unfair competition of Defendants.

44. Defendants' actions are outrageous, willful, malicious, intentional and display an evil motive and reckless indifference to the rights of Preston.

**WHEREFORE**, Preston prays that this Court enter judgment against Defendants, jointly and severally, in an amount to be determined at trial that is fair and reasonable, together with interest on the value of the converted property from the date of conversion, punitive damages of not less \$500,000 per Defendant, Preston's reasonable attorneys' fees, costs of suit and such other and further relief as this honorable Court deems just and proper under the circumstances.

**COUNT VII**  
**Tortious Interference With Business**  
**And Contractual Relationships**  
**(Against All Defendants)**

45. Preston hereby re-alleges each and every allegation set forth in paragraphs 1-44, and incorporates them by reference as if fully set forth herein.

46. Preston, in the operation of its business, entered into contracts with its customers to supply said customers services. Defendants, both prior to and subsequent to the termination of the individual Defendants from Preston's employ, have had full knowledge of these contracts and business relationships. Despite their obligations and duties to Preston, and upon information and belief, Defendants have intentionally interfered with and undermined these contractual and business relationships, causing breaches thereof.

47. Defendants' conduct has been completely unjustified, and is furthering their wrongful and unreasonable scheme to harm Preston.

48. Preston has suffered and is continuing to suffer damages as a direct and proximate result of Defendants' wrongful and deliberate interference with Preston's contractual and business relationships in an amount not yet determined.

49. Defendants' conduct is wanton, willful, and malicious, and an award of punitive damages is both necessary and appropriate to punish and deter them from like conduct in the future.

**WHEREFORE**, Preston prays that this Court enter judgment against Defendants, jointly and severally, in an amount to be determined at trial that is fair and reasonable, together with interest on the value of the converted property from the date of conversion, punitive damages of not less \$500,000 per Defendant, Preston's reasonable attorneys' fees, costs of suit and such other and further relief as this honorable Court deems just and proper under the circumstances.

**DEMAND FOR JURY TRIAL**

Plaintiff hereby demands a jury trial on all issues so triable.

POLSINELLI SHALTON FLANIGAN SUELTHAUS, PC

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ATTORNEYS FOR PLAINTIFF  
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### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 6<sup>th</sup> day of September, 2007, the foregoing was electronically filed using the CM/ECF system, which sent notification of such filing to the following:

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