UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AMSTAR OF WESTERN NEW YORK, INC.

Plaintiffs,

COMPLAINT

VS.

Case No._____

K&L MANUFACTURING, LTD.

Defendants.

DEMAND FOR JURY TRIAL

Plaintiff, Amstar of Western New York, Inc. ("Plaintiff"), by its attorneys, Damon & Morey LLP, as and for its Complaint against defendant, K&L Manufacturing, Ltd. ("Defendant"), alleges:

NATURE OF THIS ACTION

1. This is a claim for a declaratory judgment of patent invalidity and non-infringement pursuant to 28 U.S.C. §§2201 and 2202.

2. As a result of the acts set forth herein, an actual justiciable controversy exists between Defendant and Plaintiff with respect to the validity of Defendant's patent claims and Plaintiff's alleged infringement of them.

JURISDICTION

3. Jurisdiction is predicated on 28 U.S.C. §§1331 and 1338.

4. This action arises under the patent laws of the United States, more particularly 35 U.S.C. §§ 271 and 281.

5. Any and all other non-patent claims arise under the same set of circumstances and are part of the same case or controversy as the patent claims, so that this court has supplemental jurisdiction of the non-patent claims under 28 U.S.C. § 1367(a).

VENUE

6. Venue for this action is proper in this court under 28 U.S.C. §§ 1391 and 1400(b) and alleged acts of infringement complained of have been committed in the Western District of New York.

PARTIES

7. Plaintiff is a corporation organized and existing under the laws of the State of New York, having its principal place of business at 825 Rein Road, Cheektowaga, New York 14225.

8. Defendant is a corporation organized and existing under the laws of the State of Michigan, having established a place of business at 6055 Jackson Road, Suite 5, Ann Arbor, Michigan 48103.

COUNT I

9. Plaintiff incorporates the allegations of the preceding paragraphs as though fully set forth herein.

10. Defendant is the alleged owner by a purported assignment of U.S. Patent Number 5,033,240 ("the '240 patent") entitled "Method and Apparatus to Enshroud Large Vertical Structures," which was purportedly issued by the United States Patent and Trademark Office on July 23, 1991.

11. A copy of the '240 patent is attached hereto, marked **Exhibit "A"**, and incorporated by reference.

12. Defendant is the alleged owner by a purported assignment of U.S. Patent Number 5,285,603 ("the '603 patent") entitled "Method and Apparatus to Enshroud Large Vertical Structures," which was purportedly issued by the United States Patent and Trademark Office on February 15, 1994.

13. A copy of the '603 patent is attached hereto, marked **Exhibit "B"**, and incorporated by reference.

14. By a cease and desist letter, dated December 4, 2006, Defendant's attorney advised of a potential claim of infringement based on Plaintiff's use of an environmental containment system generally used in water tower resurfacing and painting. Defendant's attorney instructed Plaintiff to contact him regarding "K&L's patent infringement claim."

15. A true and correct copy of the December 4, 2006 letter is attached hereto, marked **Exhibit "C"**, and incorporated by reference.

16. On January 30, 2007, Plaintiff's attorney sent a letter advising that Plaintiff "respects the intellectual property rights of others" and has undertaken a review of the system that Plaintiff is using as well as Defendant's claims of infringement.

17. A true and correct copy of the January 30, 2007 letter is attached hereto, marked **Exhibit "D"**, and incorporated by reference.

18. On March 9, 2007, Plaintiff's attorney wrote a letter to Defendant's attorneys advising that after a thorough consideration of the of Defendant's alleged claim for patent infringement, it was determined that Plaintiff's shrouding apparatus and method of operation do not infringe the '240 and/or '603 Patents.

19. A true and correct copy of the March 9, 2007 letter is attached hereto, marked **Exhibit "E"**, and incorporated by reference.

20. On March 28, 2007, Defendant's attorney sent a reply letter dated March 9, 2007 to Plaintiff's attorney demanding that Defendant be allowed to review the containment system used by Plaintiff at its next containment project.

21. A true and correct copy of the March 28, 2007 letter is attached hereto, marked **Exhibit "F"**, and incorporated by reference.

22. Plaintiff's position has consistently been that its shrouding apparatus and method of operation infringes no valid claim of rights by Defendant.

23. By virtue of the exchange of letters outlined above, there is a substantial and continuing justiciable controversy between Plaintiff and Defendant as to Defendant's right to a patent monopoly covering Plaintiff's shrouding apparatus and method of operation, and as to the validity and scope of the Patents and as to Plaintiff's continuing right to make, inventory, ship, sell, use and warrant its shrouding apparatus and method of operation.

24. The '240 and the '603 Patents are invalid and void in that they lack patentable novelty and invention as required by 35 U.S.C. §§102 and 103 and fail to comply with 35 U.S.C. §112.

25. Plaintiff contends that the claims for the Patent Nos. '240 and '603 are invalid, unenforceable, and void because they have not and may not be duly or legally issued for many reasons including, without limitation, the reasons that:

a. The subject matter claimed in the Patent Nos. '240 and '603 was known or used by others in this country, or patented or described in

printed publications in this or a foreign country prior to the alleged invention by the patentee;

b. The subject matter claimed in the Patent Nos. '240 and '603 was patented or described in printed publications in this or a foreign country, or in public use or on sale in this country more than one year prior to the date on which the applications of the Patent Nos. '240 and/or '603 were filed in the United States Patent and Trademark Office;

c. The subject matter claimed in the Patent Nos. '240 and '603 is a conjunction of known components that do not perform any new and unexpected function in aggregation;

d. The difference between the subject matter claimed in the Patents Nos. '240 and '603 and the prior art was such that the subject matter as a whole would have been obvious at the time the alleged invention was made to a person having ordinary skill in the art to which such subject matter pertains;

e. The patentee did not first make the alleged invention of the Patent Nos. '240 and/or '603;

f. The alleged invention of the Patent Nos. '240 and/or '603 was abandoned;

g. The specification of the Patent Nos. '240 and/or '603 do not contain a written description of the invention and of the manner and process of making and using them, in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which they

pertain, or which they are most nearly connected, to make, construct, compound, or use the specifications, and the description does not adequately explain the principle or the best mode in which the patentee contemplated applying that principle so as to distinguish them from other inventions, as required by Title 35, United States Code;

g. The claims of the Patent Nos. '240 and/or '603 are functional, indefinite, and are broader than the alleged invention as set forth in the specifications of the Patents.

h. The claims of Defendant's Patents are fatally vague and indefinite, and therefore invalid and void, because they do not particularly point out and distinctly claim the subject matter of the alleged invention, as required by 35 U.S.C. §112.

i. Defendant's Patents do not adequately set forth the best mode contemplated by the inventor of carrying out the inventions purported to be covered thereby.

26. Other particulars with respect to the grounds of patent invalidity above set forth will be furnished to Defendant in writing by Plaintiffs at least thirty (30) days before the trial of this case in compliance with 35 U.S.C. §282. Any additional grounds of invalidity of said patents of which Plaintiff may hereinafter learn will be brought to Defendant's notice by appropriate pleadings.

27. Plaintiff contents that the Patents Nos. '240 and '603 are not infringed by Plaintiff by the making, using, or selling of any product.

28. Alternatively, Plaintiff contends that the claims for Patent Nos. '240 and/or '603 are invalid, unenforceable, and void because Defendant has not and may not be duly or legally issued Patents Nos. '240 and '603 for any legitimate reason.

29. Plaintiff, denying infringement of the Patents, aver that unless they are found to infringe same or the Patents are adjudged invalid, void and unenforceable, Plaintiffs and other members of the industry will have efforts to sell or use their products unfairly frustrated.

WHEREFORE, Plaintiffs demand relief against Defendants as follows:

(1) A judgment declaring that Patents Nos. '240 and '603 are totally invalid, void, and without force and effect;

(2) A judgment declaring that Plaintiff has not infringed any claim of Patents Nos. '240 and '603;

(3) A judgment for the costs, expenses and reasonable attorneys' fees incurred by Plaintiff;

(4) A judgment for a preliminary and permanent injunction enjoining Defendant, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with it who receive actual notice of the injunction from:

(a) Initiating infringement litigation or threatening Plaintiff or any of its customers, dealers, agents, servants, or employees, or any prospective or present sellers, dealers, or users of Plaintiff's shrouding apparatus and method of operation, with infringement litigation, or charging any of them either verbally or in writing with infringement of Patent Nos. '204 and/or '603 because of the manufacture, use, sale or

offering for sale of the shrouded apparatus and method of operation made by Plaintiff; and

(4) A judgment for Plaintiff for all other relief this Court may deem proper.

JURY DEMAND

Plaintiff requests a trial by jury of any and all issues triable of right by a jury.

DATED: Buffalo, New York
April 12, 2007

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