

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

CUTSFORTH, INC.,

Plaintiff,

v.

LEMM LIQUIDATING COMPANY, LLC, f/k/a
FULMER COMPANY, LLC, WESTINGHOUSE
AIR BRAKE TECHNOLOGIES
CORPORATION, AND MOTIVEPOWER,
INC.,

Defendants.

Civil Action No. 12-cv-1200(SRN-JSM)

JURY TRIAL DEMANDED

SECOND AMENDED COMPLAINT

Plaintiff Cutsforth, Inc., by way of its Second Amended Complaint against Defendants LEMM Liquidating Company, LLC, f/k/a Fulmer Company, LLC, Westinghouse Air Brake Technologies Corporation, and MotivePower, Inc. (collectively, “Defendants”) states and alleges as follows:

NATURE OF THE ACTION

1. This is an action for patent infringement, arising under the patent laws of the United States, 35 U.S.C. §§ 1 et seq.

THE PARTIES

2. Plaintiff Cutsforth, Inc. (“Cutsforth”) is a corporation organized and existing under the laws of the state of Minnesota. Cutsforth has a principal place of business at 37837 Rock Haven Road, Cohasset, MN 55721-8912. Cutsforth also has a distribution and field service facility at 7854 12th Ave South, Bloomington, MN 55425.

3. Defendant Westinghouse Air Brake Technologies Corporation (“Wabtec”), upon information and belief, is a corporation organized and existing under the laws of the state of

Delaware and has its principal place of business at 1001 Air Brake Avenue, Wilmerding, PA 15148.

4. Defendant LEMM Liquidating Company, LLC, f/k/a Fulmer Company, LLC (“Fulmer”), upon information and belief, is a corporation organized and existing under the laws of the state of Pennsylvania, and has its principal place of business at 3004 Venture Court, Westmoreland Industrial Park III, Export, PA 15632.

5. Upon information and belief, on or about November 18, 2011 Fulmer changed its name to LEMM Liquidating Company, LLC (“LEMM”).

6. Fulmer’s website (www.fulmercompany.com) states Fulmer is a Wabtec Company. Fulmer’s website does not mention or reference LEMM.

7. Defendant MotivePower, Inc. (“MotivePower”), upon information and belief, is a corporation organized and existing under the laws of the state of Delaware, and has its principal place of business at 4600 Apple Street, Boise, Idaho 83716.

8. MotivePower is a wholly-owned subsidiary of Wabtec.

9. Upon information and belief, Wabtec, through its wholly-owned subsidiary MotivePower, purchased at least the assets of Fulmer on November 18, 2011.

10. Upon information and belief, when Wabtec purchased the assets of Fulmer those assets included Fulmer’s existing inventory of FC-101 model brush holders.

JURISDICTION AND VENUE

11. This Court has original jurisdiction over claims for patent infringement, arising under the patent laws of the United States, pursuant to 28 U.S.C. §§ 1331 and 1338(a).

12. This Court has personal jurisdiction over Defendants under the Minnesota Long Arm Statute, Minn. Stat. § 543.19.

13. Fulmer maintains a website, <http://www.fulmercompany.com>. On its homepage, Fulmer states, “Our dedication to total quality control has enabled our company to grow from a small, regional manufacturer to one currently serving customers throughout the U.S., Canada and international markets.”

14. Additionally, upon information and belief, Fulmer, Wabtec, and MotivePower have made products that have been advertised and sold into Minnesota, including the accused product, the FC-101 model brush holder.

15. Defendant MotivePower conducts extensive business in the state of Minnesota and maintains ongoing and continuing contact with the state as a result of its business. By way of example, on information and belief, MotivePower maintains ongoing contact with the state of Minnesota at least through its manufacture and maintenance of locomotives used for Minnesota’s Northstar line.

16. Upon information and belief, MotivePower has sold at least \$14,000,000 worth of goods and services to Minnesota entities since January 1, 2007.

17. Defendants have also caused injury to Cutsforth, a corporation having its principal place of business in Minnesota, by infringing Cutsforth’s patents as set forth below.

18. Venue is proper in this District pursuant to at least 28 U.S.C. §§ 1391(b) and (c) and 1400(b).

BACKGROUND

19. Cutsforth filed its Complaint in this case on May 17, 2012, alleging claims of direct and indirect infringement, as well as willful infringement against Fulmer and Wabtec.

20. On July 6, 2012, Fulmer and Wabtec moved to dismiss Cutsforth’s claims of indirect and willful infringement.

21. At the time Fulmer and Wabtec moved to dismiss Cutsforth's claims of indirect and willful infringement, Cutsforth believed based on the information available at that time that Wabtec was the entity currently selling the accused FC-101 model brush holder. Indeed, as recently as August 14, the FC-101 model brush holder was being advertised as being sold by "Fulmer Company, A Wabtec Company." A true and correct copy of an example of such an advertisement is attached as Exhibit A to this Complaint.

22. In light of this, and to avoid unnecessary motion practice, Cutsforth amended its complaint and withdrew its allegations of indirect infringement on July 13, 2012.

23. After Cutsforth amended its complaint, Wabtec informed Cutsforth that Wabtec was not the entity selling the accused FC-101 model brush holder. Rather, according to Wabtec's counsel, MotivePower "is the entity currently making, selling, and offering for sale the accused holder."

FIRST CLAIM FOR RELIEF
INFRINGEMENT OF U.S. PATENT NO. 7,122,935

24. Cutsforth restates and realleges paragraphs 1 through 23 of this Complaint.

25. On October 17, 2006, United States Patent No. 7,122,935 ("the '935 patent"), entitled "Brush Holder Apparatus, Brush Assembly, and Method," was duly and legally issued by the United States Patent and Trademark Office.

26. Cutsforth owns the '935 patent. A true and correct copy of the '935 patent is attached as Exhibit B to this Complaint.

27. Defendants have been infringing the '935 patent in the United States. Defendants make, use, sell, offer for sale and/or import brush holders, including at least the FC-101 model brush holder, that infringe the '935 patent.

28. Upon information and belief, Defendants will continue to infringe the '935 patent unless and until they are enjoined by this Court.

29. Defendant Fulmer has known of the '935 patent since at least shortly after January 31, 2007 when it learned of the patent as a result of an action filed against Fulmer by Cutsforth in this Court. Further, Cutsforth has complied with the statutory requirement of placing a notice of the '935 patent on its brush holders since approximately early 2007.

30. Fulmer's infringement of the '935 patent since at least shortly after January 31, 2007 has been taking place with knowledge of the '935 patent, is in disregard of the patent, and is willful. By continuing to commit acts of infringement with full knowledge of the '935 patent, Fulmer has failed to meet the required standard of care to avoid a finding of willful infringement.

31. Upon information and belief, Defendant Wabtec's infringement of the '935 patent is taking place with actual or constructive knowledge of the '935 patent, is in disregard of the '935 patent, and is willful. By continuing to commit acts of infringement with knowledge of the '935 patent, Wabtec has failed to meet the required standard of care to avoid a finding of willful infringement.

32. Upon information and belief, Defendant MotivePower's infringement of the '935 patent is taking place with actual or constructive knowledge of the '935 patent, is in disregard of the '935 patent, and is willful. By continuing to commit acts of infringement with knowledge of the '935 patent, MotivePower has failed to meet the required standard of care to avoid a finding of willful infringement.

33. Cutsforth has been damaged by Defendants' infringement of the '935 patent and is suffering and will continue to suffer damage and irreparable harm as a result until Defendants are enjoined from infringing the '935 patent.

SECOND CLAIM FOR RELIEF
INFRINGEMENT OF U.S. PATENT NO. 7,141,906

34. Cutsforth restates and realleges paragraphs 1 through 23 of this Complaint.

35. On November 28, 2006, United States Patent No. 7,141,906 (“the ‘906 patent”), entitled “Brush Holder Apparatus, Brush Assembly, and Method,” was duly and legally issued by the United States Patent and Trademark Office.

36. Cutsforth owns the ‘906 patent. A true and correct copy of the ‘906 patent is attached as Exhibit C to this Complaint.

37. Defendants have been infringing the ‘906 patent in the United States. Defendants make, use, sell, offer for sale and/or import brush holders, including at least the FC-101 model brush holder, that infringe the ‘906 patent.

38. Upon information and belief, Defendants will continue to infringe the ‘906 patent unless and until they are enjoined by this Court.

39. Defendant Fulmer has known of the ‘906 patent since at least shortly after January 31, 2007 when it learned of the patent as a result of an action filed against Fulmer by Cutsforth in this Court. Further, Cutsforth has complied with the statutory requirement of placing a notice of the ‘906 patent on its brush holders since approximately early 2007.

40. Fulmer’s infringement of the ‘906 patent since at least shortly after January 31, 2007 has been taking place with knowledge of the ‘906 patent, is in disregard of the patent, and is willful. By continuing to commit acts of infringement with full knowledge of the ‘906 patent, Fulmer has failed to meet the required standard of care to avoid a finding of willful infringement.

41. Upon information and belief, Defendant Wabtec’s infringement of the ‘906 patent is taking place with actual or constructive knowledge of the ‘906 patent, is in disregard of the ‘906 patent, and is willful. By continuing to commit acts of infringement with knowledge of the ‘906 patent, Wabtec has failed to meet the required standard of care to avoid a finding of willful infringement.

42. Upon information and belief, Defendant MotivePower’s infringement of the ‘906 patent is taking place with actual or constructive knowledge of the ‘906 patent, is in disregard of the ‘906 patent, and is willful. By continuing to commit acts of infringement with knowledge of

the '906 patent, MotivePower has failed to meet the required standard of care to avoid a finding of willful infringement.

43. Cutsforth has been damaged by Defendants' infringement of the '906 patent and is suffering and will continue to suffer damage and irreparable harm as a result until Defendants are enjoined from infringing the '906 patent.

THIRD CLAIM FOR RELIEF
INFRINGEMENT OF U.S. PATENT NO. 7,990,018

44. Cutsforth restates and realleges paragraphs 1 through 23 of this Complaint.

45. On August 2, 2011, United States Patent No. 7,990,018 ("the '018 patent"), entitled "Brush Holder Apparatus, Brush Assembly, and Method," was duly and legally issued by the United States Patent and Trademark Office.

46. Cutsforth own the '018 patent. A true and correct copy of the '018 patent is attached as Exhibit D to this Complaint.

47. Defendants have been infringing the '018 patent in the United States. Defendants make, use, sell, offer for sale and/or import brush holders, including at least the FC-101 model brush holders, that infringe the '018 patent.

48. Upon information and belief, Defendants will continue to infringe the '018 patent unless and until they are enjoined by this Court.

49. The claims of the '018 patent are embodied in the same product as the claims of the '935 patent and '906 patent.

50. Cutsforth has complied with the statutory requirement of placing a notice of the '018 patent on its brush holders since approximately December 2011.

51. Upon information and belief, Defendant Fulmer's infringement of the '018 patent is taking place with actual or constructive knowledge of the '018 patent, is in disregard of the '018 patent, and is willful. By continuing to commit acts of infringement with knowledge of the '018 patent, Fulmer has failed to meet the required standard of care to avoid a finding of willful infringement.

52. Upon information and belief, Defendant Wabtec's infringement of the '018 patent is taking place with actual or constructive knowledge of the '018 patent, is in disregard of the '018 patent, and is willful. By continuing to commit acts of infringement with knowledge of the '018 patent, Wabtec has failed to meet the required standard of care to avoid a finding of willful infringement.

53. Upon information and belief, Defendant MotivePower's infringement of the '018 patent is taking place with actual or constructive knowledge of the '018 patent, is in disregard of the '018 patent, and is willful. By continuing to commit acts of infringement with knowledge of the '018 patent, MotivePower has failed to meet the required standard of care to avoid a finding of willful infringement.

54. Cutsforth has been damaged by Defendants' infringement of the '018 patent and is suffering and will continue to suffer damage and irreparable harm as a result until Defendants are enjoined from infringing the '018 patent.

FOURTH CLAIM FOR RELIEF
INFRINGEMENT OF U.S. PATENT NO. 7,417,354

55. Cutsforth restates and realleges paragraphs 1 through 23 of this Complaint.

56. On August 26, 2008, United States Patent No. 7,417,354 (the '354 patent'), entitled "Brush Holder Apparatus, Brush Assembly, and Method," was duly and legally issued by the United States Patent and Trademark Office.

57. Cutsforth own the '354 patent. A true and correct copy of the '354 patent is attached as Exhibit E to this Complaint.

58. Defendants have been infringing the '354 patent in the United States. Defendants make, use, sell, offer for sale and/or import brush holders, including at least the FC-101 model brush holders, that infringe the '354 patent.

59. Upon information and belief, Defendants will continue to infringe the '354 patent unless and until they are enjoined by this Court.

60. The claims of the '354 patent are embodied in the same product as the claims of the '935 patent and the '906 patent.

61. Cutsforth has complied with the statutory requirement of placing a notice of the '354 patent on its brush holders since approximately October 2010.

62. Upon information and belief, Defendant Fulmer's infringement of the '354 patent is taking place with actual or constructive knowledge of the '354 patent, is in disregard of the '354 patent, and is willful. By continuing to commit acts of infringement with knowledge of the '354 patent, Fulmer has failed to meet the required standard of care to avoid a finding of willful infringement.

63. Upon information and belief, Defendant Wabtec's infringement of the '354 patent is taking place with actual or constructive knowledge of the '354 patent, is in disregard of the '354 patent, and is willful. By continuing to commit acts of infringement with knowledge of the '354 patent, Wabtec has failed to meet the required standard of care to avoid a finding of willful infringement.

64. Upon information and belief, Defendant MotivePower's infringement of the '354 patent is taking place with actual or constructive knowledge of the '354 patent, is in disregard of the '354 patent, and is willful. By continuing to commit acts of infringement with knowledge of the '354 patent, MotivePower has failed to meet the required standard of care to avoid a finding of willful infringement.

65. Cutsforth has been damaged by Defendants' infringement of the '354 patent and is suffering and will continue to suffer damage and irreparable harm as a result until Defendants are enjoined from infringing the '354 patent.

FIFTH CLAIM FOR RELIEF
INFRINGEMENT OF U.S. PATENT NO. 8,179,014

66. Cutsforth restates and realleges paragraphs 1 through 23 of this Complaint.

67. On May 15, 2012, United States Patent No. 8,179,014 (“the ’014 patent”), entitled “Brush Holder Apparatus, Brush Assembly, and Method,” was duly and legally issued by the United States Patent and Trademark Office.

68. Cutsforth owns the ’014 patent. A true and correct copy of the ’014 patent is attached as Exhibit F to this Complaint.

69. Defendants are infringing the ’014 patent in the United States. Defendants make, use, sell, offer for sale and/or import brush holders, including at least the FC-101 model holders, that infringe the ’014 patent.

70. Upon information and belief, Defendants will continue to infringe the ’014 patent unless and until they are enjoined by this Court.

71. Cutsforth has been damaged by Defendants’ infringement of the ’014 patent and is suffering and will continue to suffer damage and irreparable harm as a result until Defendants are enjoined from infringing the ’014 patent.

JURY TRIAL DEMAND

72. Cutsforth demands a jury trial on all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, Cutsforth respectfully requests this Court enter judgment:

- (1) that Defendants have infringed the ’935, ’906, ’018, ’354, and ’014 patents;
- (2) enjoining Defendants and their officers, agents, servants, employees, attorneys, and all persons in active concert or participation with any of them, from infringing the ’935, ’906, ’018, ’354, and ’014 patents;
- (3) awarding Cutsforth its damages in an amount sufficient to compensate it for Defendants’ infringement of the ’935, ’906, ’018, ’354, and ’014 patents, together with prejudgment and post-judgment interest and costs, pursuant to 35 U.S. C. § 284;
- (4) trebling the damages awarded to Cutsforth by reason of Defendants’ willful infringement of the ’935, ’906, ’018, and ’354 patents pursuant to 35 U.S.C. § 284;

(5) declaring this case to be “exceptional” under 35 U.S.C. § 285 and awarding Cutsforth is attorneys’ fees, expenses, and costs incurred in this action; and

(6) awarding Cutsforth such other and further relief as this Court deems just and proper.

Dated: September 25, 2012

FISH & RICHARDSON P.C.

By: /s/ Mathias W. Samuel

Mathias W. Samuel (#0272164)

Michael J. Pape (#026989X)

Joseph Herriges, Jr. (#390350)

60 South Sixth Street, Suite 3200

Minneapolis, MN 55402

Tel: (612) 335-5070

Fax: (612) 288-9696

Attorneys for Plaintiff
CUTSFORTH, INC.

60796775.doc