

No.

In the Supreme Court of the United States

FALKBUILT LTD.; FALKBUILT, INC.; MOGENS SMED,

Applicants,

v.

DIRTT ENVIRONMENTAL SOLUTIONS, INC.;
DIRTT ENVIRONMENTAL SOLUTIONS, LTD.,

Respondents.

**APPLICATION FOR STAY PENDING THE FILING AND DISPOSITION
OF A PETITION FOR A WRIT OF CERTIORARI**

ON APPLICATION TO STAY THE MANDATE OF THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

KEVIN N. ANDERSON
Counsel of Record
ARTEMIS D. VAMIANAKIS
TANNER J. BEAN
FABIAN VANCOTT
95 So. State Street, Suite 2300
Salt Lake City, UT 84111
(801) 531-8900
kanderson@fabianvancott.com

Counsel for Applicants

May 2, 2023

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Applicants Falkbuilt Ltd, Falkbuilt Inc., and Mogens Smed hereby disclose that Falkbuilt Ltd. has no parent corporation and that there is no publicly held corporation that owns 10% or more of its stock. Applicants also disclose that Falkbuilt Ltd. is the parent corporation of Falkbuilt, Inc. and there is no publicly held corporation that owns 10% or more of Falkbuilt, Inc.'s stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	i
TABLE OF CONTENTS.....	ii
TABLE OF APPENDICES	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	6
JURISDICTION.....	7
STATEMENT OF THE CASE.....	8
REASONS FOR GRANTING THE STAY	16
I. There Is a Reasonable Probability This Court Will Grant Certiorari and a Fair Prospect It Will Reverse the Judgment Below.	16
II. Irreparable Harm Will Result from Denial of a Stay.....	23
III. The Equities Weigh in Favor of Granting a Stay	25
CONCLUSION.....	27

TABLE OF APPENDICES

OPINION OF THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT, FILED APRIL 11, 2012 1a

ORDER DENYING STAY OF THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT, FILED APRIL 26, 2023 15a

MOTION FOR STAY OF MANDATE PENDING PETITION FOR WRIT
OF CERTIORARI, FILED APRIL 25, 2023..... 16a

EXCERPTS OF APPELLANTS’ APPENDIX VOLUME 1 OF 6, FILED
SEPTEMBER 10, 2021 36a

EXCERPTS OF APPELLANTS’ APPENDIX VOLUME 3 OF 6, FILED
SEPTEMBER 10, 2021 170a

EXCERPTS OF APPELLANTS’ APPENDIX VOLUME 4 OF 6, FILED
SEPTEMBER 10, 2021 219a

EXCERPTS OF APPELLANTS’ APPENDIX VOLUME 5 OF 6, FILED
SEPTEMBER 10, 2021 292a

EXCERPTS OF APPELLANTS’ SUPPLEMENTAL APPENDIX
VOLUME I OF II, FILED MARCH 14, 2022..... 388a

EXCERPTS OF APPELLEES’ SUPPLEMENTAL APPENDIX
VOLUME I OF II, FILED MAY 13, 2022 504a

EXCERPTS OF APPELLEES’ SUPPLEMENTAL APPENDIX
VOLUME II OF II, FILED MAY 13, 2022..... 618a

TABLE OF AUTHORITIES

Cases

<i>Am. Dredging Co. v. Miller</i> , 510 U.S. 443 (1994).....	16
<i>Archangel Diamond Corp. Liquidating Tr. v. Lukoil</i> , 812 F.3d 799 (10th Cir. 2016)	26
<i>Associação Brasileira de Medicina de Grupo v. Stryker Corp.</i> , 891 F.3d 615 (6th Cir. 2018)	15
<i>Baumgart v. Fairchild Aircraft Corp.</i> , 981 F.2d 824 (5th Cir. 1987)	15
<i>Dietz v. Bouldin</i> , 579 U.S. 40 (2016)	17
<i>Dirtt Env't Sols., Inc. v. Henderson</i> , No. 1:19-CV-00144-DBB, 2021 WL 2043216 (D. Utah May 21, 2021)	6
<i>DIRTT Environmental Solutions, Inc. v. Falkbuilt, Inc. et al</i> , Case No. 22-10329 (5th Cir., Apr. 17, 2023).....	13
<i>DIRTT Environmental Solutions, Inc. v. Falkbuilt, Inc. et al</i> , Case No. 22-10329 (5th Cir., Apr. 21, 2023).....	13
<i>DIRTT Environmental Solutions, Inc. v. Falkbuilt, Inc. et al</i> , Case No. 22-10329 (5th Cir., June 2, 2022).....	12
<i>DIRTT Environmental Solutions, Inc. v. Falkbuilt, Inc. et al</i> , Case No. 3:21-CV-1483-N (N.D. Texas, Mar. 3, 2022)	12
<i>DIRTT Env't Sols., Inc. v. Henderson</i> , No. 1:19-CV-144 DBB, 2021 WL 6063831 (D. Utah Dec. 22, 2021).....	6
<i>Fischer v. Magyar Allamvasutak Zrt.</i> , 777 F.3d 847 (7th Cir. 2015)	15
<i>Gov't Emps. Ins. Co. v. Strutsoukiy</i> , No. 12-CV-330, 2017 WL 4837584 (W.D.N.Y. Oct. 26, 2017)	24
<i>Gulf Oil Corp. v. Gilbert</i> , 330 U.S. 501 (1947).....	16
<i>Hilton v. Guyot</i> , 159 U.S. 113 (1895).....	21
<i>Hollingsworth v. Perry</i> , 558 U.S. 183 (2010).....	14
<i>In re Air Crash Disaster Near New Orleans, La.</i> , 821 F.2d 1147 (5th Cir. 1987)	15

<i>Int’l Fashion Prods., B.V. v. Calvin Klein, Inc.</i> , 1995 WL 92321 (S.D.N.Y. Mar. 7, 1995).....	24
<i>Jolen, Inc. v. Kundan Rice Mills, Ltd.</i> , No. 19-CV-1296 (PKC), 2019 WL 1559173 (S.D.N.Y. Apr. 9, 2019)	24
<i>Kamel v. Hill-Rom Co., Inc.</i> , 108 F.3d 799 (7th Cir. 1997)	15
<i>Keep on Kicking Music, Ltd. v. Hibbert</i> , 268 F. Supp. 3d 585 (S.D.N.Y. 2017)	23
<i>Koster v. (Am.) Lumbermens Mut. Cas. Co.</i> , 330 U.S. 518 (1947).....	16, 17
<i>New York Bay Cap., LLC v. Cobalt Holdings, Inc.</i> , 456 F. Supp. 3d 564 (S.D.N.Y. 2020)	24
<i>Nken v. Holder</i> , 556 U.S. 418 (2009).....	23
<i>Norex Petroleum Ltd. v. Access Indus., Inc.</i> , 416 F.3d 146 (2d Cir.2005).....	27
<i>Phillips USA, Inc. v. Allflex USA, Inc.</i> , 77 F.3d 354 (10th Cir. 1996)	22
<i>Piper Aircraft Co. v. Reyno</i> , 454 U.S. 235 (1981).....	2, 16, 17, 18, 19, 20, 21
<i>Ritchie v. McMullen</i> , 159 U.S. 235 (1895).....	21
<i>Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.</i> , 549 U.S. 422 (2007).....	22
<i>Smith v. Toronto-Dominion Bank</i> , 166 F.3d 1222 (10th Cir. 1999)	21-22
<i>Soc’y of Lloyd’s v. Reinhart</i> , 402 F.3d 982 (10th Cir. 2005)	21
<i>Travis v. Knox Terpezzone Co.</i> , 215 N.Y. 259, 109 N.E. 250 (1915).....	17
<i>U.S. ex rel. Chandler v. Cook Cnty.</i> , 282 F.3d 448 (7 th Cir. 2002).....	25
<i>U.S.O. Corp. v. Mizuho Holding Co.</i> , 547 F.3d 749 (7th Cir. 2008)	21
<i>Van Cauwenberghe v. Biard</i> , 486 U.S. 517 (1988).....	17
<i>Williams v. Green Bay & WR Co.</i> , 326 U.S. 549 (1946).....	16

Statutes

28 U.S.C. § 1254(1) 7
28 U.S.C. § 2101(f) 7, 14

Rules

Supreme Court Rule 23 14
Supreme Court Rule 23.3 6
Supreme Court Rule 29.6 i

To the HONORABLE NEIL M. GORSUCH, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Tenth Circuit:

Can a district court exercise its discretion in certain circumstances and appropriately dismiss part of an action pursuant to the *forum non conveniens* doctrine while allowing a severable, discrete part of the case against different defendants to remain and proceed before the district court? Or, alternatively, is a district court—regardless of the circumstances—foreclosed from bifurcating any portion of a case pursuant to the *forum non conveniens* doctrine if some portion of the original case remains in the district court? A panel of three judges of the Tenth Circuit Court of Appeals recently took the latter approach in this case, answering a question of first impression and creating a rigid *per se* rule in the process that is contrary to decades of Supreme Court precedent recognizing that flexibility and discretion are the rightful hallmarks of a *forum non conveniens* analysis: “*We therefore foreclose this possibility [i.e., of splitting cases in the manner employed by the district court] by expressly holding that forum non conveniens is not available as a tool to split or bifurcate cases.*” Opinion at 13 (emphasis added).

Over the years, this Court has refrained from condoning specific circumstances or creating particular rules that justify or require either a grant or denial of dismissal for *forum non conveniens*. Instead, to help guide a district court’s exercise of discretion, the Court has provided a variety of “private interest factors” affecting the convenience of the litigants and “public interest factors” affecting the convenience of the forum to be considered in a *forum non conveniens* analysis. This carefully crafted

discretion and flexibility inherent in the *forum non conveniens* doctrine is now more important than ever. Cross-border business dealings have become commonplace, with countless foreign companies now doing business in the United States, and vice versa. These business dealings are complex, multi-layered, and often involve numerous parties from around the world with widely varying legal relationships and unique circumstances. In light of these realities, the creation and application of a *per se* rule in the *forum non conveniens* context is not just at odds with this Court's well-established decisions, but the modern business world itself. Thus, it is imperative that district courts retain the discretion they need to continue to make *forum non conveniens* determinations on a *case-by-case basis*. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249-50 (1981).

At its core, this is a case between two widely known Calgary, Alberta based construction companies, DIRTT and Falkbuilt, and their common Canadian founder, Mogens Smed, who is a resident of Calgary, regarding alleged theft and misappropriation of intellectual property created and owned by an Alberta entity and alleged wrongful acts that first began in Alberta. Unsurprisingly, the vast majority of documents and witnesses are found in Alberta. This broad-ranging dispute arose after Mr. Smed was ousted from DIRTT and started Falkbuilt. The litigation between them began shortly thereafter when DIRTT filed suit in the Court of Queen's Bench, Alberta in May 2019, alleging misappropriation of trade secrets and confidential information, breach of non-competition and non-solicitation agreements, and the like. Seven (7) months later, DIRTT expanded the litigation between them across the

border, when DIRTT's wholly owned U.S. subsidiary (headquartered in Calgary) filed suit in Utah against Falkbuilt and its Utah-based independent dealer (Lance Henderson, Kristy Henderson, and their company, Falk Mountain States, LLC (collectively, the "Hendersons")). The complaint in the Utah action, as detailed below, alleged much of what already had been alleged in DIRTT's first-filed, first-chosen Canadian action. While the claims against the Hendersons (such as breach of contract), were unique and not specifically spelled out in the Canadian action, they also were narrow and, as later found by the Utah district court, a small piece in the broader battle between DIRTT, Falkbuilt, and Mr. Smed.

Falkbuilt filed a counterclaim in the Utah action, which was subsequently amended. Boiled down, Falkbuilt's counterclaim alleged defamation by DIRTT in filing its Utah complaint and immediately mass-distributing it to the press, which had the effect of scuttling some then-planned financing for the nascent Falkbuilt. Of note, DIRTT responded to the counterclaim by moving to dismiss it for *forum non conveniens*. While the motion was pending, discovery ensued. After meeting resistance to cross-border discovery, DIRTT amended its Utah action, adding its Canadian mothership as a plaintiff and Falkbuilt's U.S. subsidiary and Mr. Smed as defendants. The amended complaint added new allegations and claims that directly targeted conduct that occurred, and damages that were allegedly incurred, outside of the United States. Following this expansion, Falkbuilt followed DIRTT's lead, moving to dismiss the amended complaint for *forum non conveniens*, given the even greater degree of overlap with DIRTT's first-filed, ongoing Canadian action

In the end, the Utah district court granted both motions to dismiss, first dismissing Falkbuilt’s amended counterclaim for *forum non conveniens* and, about seven weeks later, dismissing DIRTT’s amended complaint as to Falkbuilt and Mr. Smed, also for *forum non conveniens*. Of pertinence to this Application and soon to be Petition for Writ of Certiorari, the Utah district court did *not* dismiss the entire case before it. Instead, it dismissed what the judge described as the “broader case” between DIRTT, Falkbuilt, and Mr. Smed (because that dispute, among other things, concerned wide swaths of alleged conduct, which occurred outside of Utah and largely in Canada, and numerous individuals, the vast majority of whom reside in Canada) and kept the Utah-focused, “narrow case” between DIRTT and the Hendersons before it. In doing so, the district court received and considered lengthy briefing, conducted substantial oral arguments, and exercised its discretion to reach a decision based on the particular facts and circumstances of this case.

DIRTT appealed the dismissal of its amended complaint against Falkbuilt and Mr. Smed to the Tenth Circuit. And, tellingly, as DIRTT was appealing to the Tenth Circuit, it also filed a new lawsuit against Falkbuilt, but not Mr. Smed or the Hendersons, in Texas federal district court. That new Texas complaint mirrored wide swaths of DIRTT’s amended complaint in Utah, which had just been dismissed for *forum non conveniens*. The Texas district court similarly dismissed DIRTT’s complaint there for *forum non conveniens*. DIRTT appealed that dismissal to the Fifth Circuit, which stayed its appeal pending the Tenth Circuit’s decision.

As further detailed below, because the Tenth Circuit's decision represents a significant departure from Supreme Court precedent that could have substantial negative consequences on the *forum non conveniens* doctrine and U.S. courts more broadly, there is a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari and a fair prospect that a majority of the Court will vote to reverse the judgment below. In addition, if the Application is not granted, two largely identical cases (one in Utah and one in Alberta) will be proceeding in parallel with the very real threat of inconsistent, cross-border rulings. Several lower court decisions in analogous circumstances have found such circumstances to justify a finding of irreparable harm. Further, a balancing of the equities weighs decisively in Falkbuilt's favor. Accordingly, Falkbuilt respectfully requests that the Application be granted.

OPINIONS BELOW

The opinions of the district court are reported at *DIRTT Env't Sols., Inc. v. Henderson*, No. 1:19-CV-00144-DBB, 2021 WL 2043216 (D. Utah May 21, 2021) (granting motion to dismiss) and *DIRTT Env't Sols., Inc. v. Henderson*, No. 1:19-CV-144 DBB, 2021 WL 6063831 (D. Utah Dec. 22, 2021) (denying motion for relief from dismissal). The district court's reasons stated on the record supporting its subsequent written opinions, as well as the written opinions themselves, are cited to by reference to the appendices before the Tenth Circuit, appended hereto.

The Tenth Circuit's opinion is reported at *DIRTT Env't Sols., Inc. v. Falkbuilt Ltd.*, 2023 WL 2879983 (10th Cir. 2023). This opinion is cited by its original page numbering. The Tenth Circuit's denial of Defendants-Applicants' Motion for Stay of Mandate Pending Petition for Writ of Certiorari is not yet reported. Pursuant to Supreme Court Rule 23.3, the Tenth Circuit's opinion and denial of motion for stay are appended hereto. References to the record herein will be citations to the attached Appendix ("App."), numbered 1a - 684a).

JURISDICTION

The Tenth Circuit issued its opinion on April 11, 2023. Applicants filed a Motion for Stay of Mandate Pending Petition for Writ of Certiorari on April 24, 2023. The Tenth Circuit denied the motion on April 25, 2023. Absent a stay by this Court, the mandate will issue on May 3, 2023.

The Court has jurisdiction to stay or to recall a mandate and enter a stay of the Tenth Circuit's opinion pending review on a writ of certiorari. *See* 28 U.S.C. §§ 1254(1), 2101(f).

STATEMENT OF THE CASE

On May 9, 2019, DIRTT Environmental Solutions, Ltd. (“DIRTT CAN”), a Calgary based Canadian company, sued Falkbuilt Ltd. (“Falkbuilt CAN”), another Calgary based Canadian company, as well as their common Canadian founder, Mogens Smed, a resident of Calgary, and another resident of Calgary, Barrie Loberg, in the Court of Queen’s Bench of Alberta, Canada. (App. 334a-351a.) DIRTT’s statement of claim in that Canadian action alleged misappropriation of confidential information and trade secrets, interference with business relations, breaches of employment agreements and duties, including non-compete and nonsolicitation covenants, copyright infringement, and unjust enrichment. (*Id.*) That action also sought preliminary and permanent injunctions restraining the use of the alleged confidential information and trade secrets, declaratory relief, and over \$18,500,000 in damages. (App. 348a-350a.) DIRTT filed an amended amended statement of claim on January 28, 2020, adding several individual defendants and allegations that the defendants were passing off Falkbuilt goods and services as those of DIRTT, causing confusion in the market. (App. 273a-291a.)

Seven (7) months *after* the Canadian litigation began, on December 11, 2019, DIRTT Environmental Solutions, Inc. (“DIRTT U.S.”), the U.S. wholly owned subsidiary of DIRTT Canada, filed a complaint in federal district court in Utah. Named as defendants were Falkbuilt CAN and Falkbuilt LLC (later voluntarily dismissed), as well as Lance Henderson and Kristy Henderson (Utah residents) and their Utah entity, Falk Mountain States, LLC. (App. 47a-80a.) DIRTT alleged trade secret violations under Utah, Pennsylvania, and federal statutes, and breach of

contract. (*Id.*) The complaint sought preliminary and permanent injunctions restraining the use of confidential information and trade secrets, and damages. (App. 78a-80a.) All defendants in the Utah action, as well as Falkbuilt’s non-party distribution partners, stipulated to the entry of DIRTT’s requested preliminary injunction. (App. 161a-169a; 508a-518a, 519a-528a.) Falkbuilt has never breached the preliminary injunction, nor has DIRTT alleged a breach in any court.

On February 5, 2020, Falkbuilt answered DIRTT’s Utah complaint and asserted a counterclaim against DIRTT for defamation by mass publication of its complaint and intentional interference with economic relations. (App. 81a-129a.) Following receipt of a motion to dismiss, on March 18, 2020, Falkbuilt filed an amended counterclaim. (App. 130a-160a.)

Notably, on April 1, 2020, DIRTT moved to dismiss Falkbuilt’s amended counterclaim on *forum non conveniens* grounds, therein arguing that “a Canadian court is certainly competent and adequate” in a *forum non conveniens* analysis, (App. 639a), and that Canadian law should apply to tort claims between the parties in a *forum non conveniens* analysis, (App. 145a, 147a). Further briefing and discovery ensued.

Thereafter, on October 20, 2020, DIRTT filed an amended complaint in the Utah district court. (App. 181a-272a.) The amended complaint added DIRTT CAN as a new plaintiff, as well as two new defendants, Falkbuilt U.S., and Mogens Smed, the common co-founder of DIRTT and Falkbuilt who is and was at that time a resident of Calgary. (*Id.*) DIRTT also added a Lanham Act claim, as well as consumer protection

and deceptive practices claims under Colorado and Ohio law. (App. 255a-268a.) Substantial changes were made to the amended complaint that extended its allegations and sought damages beyond the United States, into Canada, and across the globe. (App. 361a-362a, 529a-617a (redline).)

On November 19, 2020, Falkbuilt and Mr. Smed moved to dismiss the amended complaint as to them on *forum non conveniens* grounds, similar to what DIRTT Inc. had previously done in regard to Falkbuilt's amended counterclaim. (App. 303a-333a.) Therein, Falkbuilt and Mr. Smed argued that, in expanding the scope of the lawsuit in the amended complaint, "DIRTT has pled itself out of this Court by overlapping its pending case in Alberta," (*id.* at 306a.)

On March 30, 2021, the Utah district court granted DIRTT's motion to dismiss Falkbuilt's amended counterclaim under the doctrine of *forum non conveniens*, finding that the amended counterclaim was better litigated in Canada where the first-filed case involving the parties was ongoing. (App. 622a-623a, 670a-683a.)

Thereafter, on May 21, 2021, the Utah district court granted Falkbuilt's motion to dismiss DIRTT's amended complaint, also based on the doctrine of *forum non conveniens*. (App. 355a-358a, 359a-387a.) In doing so, the district court found:

The two competitor parent companies in this matter, DIRTT, Ltd. and Falkbuilt, Ltd., are both Canadian companies with their primary places of business in Alberta, Canada. DIRTT, Ltd. initially filed suit against Falkbuilt, Ltd. in Alberta, Canada, alleging that its former CEO, Mogens Smed, a resident of Alberta, Canada, misappropriated trade secrets and wrongfully recruited DIRTT, Ltd. employees when he founded Falkbuilt, Ltd. in Alberta, Canada. The allegedly wrongful actions spread to the United States, involving multiple other related or otherwise involved entities and individuals....

Although the dispute between the parties has grown beyond Canada, the parent companies are in Alberta, the former CEO of one and current founder of the other is in Alberta, the intellectual property at issue is owned by an Alberta entity, and the first wrongful acts allegedly occurred there.

(App. 356a-357a.)

Of significance to this Application, the district court's order left DIRTT's claims against the Hendersons, two Utah residents, and their Utah entity, Falk Mountain States, LLC, pending in the Utah district court, (App.357a, 372a, 372a-373a), because of "its narrow Utah focus," (App. 372a). In contrast, for the "broader case," the Utah district court found, in a detailed preliminary ruling following oral argument and later in its memorandum decision, that "[t]he Canadian court is best suited to handle all of the claims between Falkbuilt, DIRTT, and Mr. Smed in one proceeding, which includes Falkbuilt's counterclaims which I previously dismissed at DIRTT's request at the last hearing." (App.379a; *see also* App.359a-381a, 356a-358a.)

As conditions of the dismissal, Falkbuilt agreed to consent to Canadian jurisdiction, (App. 380a), to be bound by the terms of the preliminary injunction, and to facilitate entry of the previously stipulated preliminary injunction in the Canadian litigation. (App. 352a-354a, 463a-471a.) Together with the entry of the preliminary injunction in Canada, DIRTT filed additional claims against Falkbuilt in the Canadian action, mimicking the claims recently dismissed in Utah, and added DIRTT U.S. as a plaintiff and Falkbuilt U.S. as a defendant. (App. 398a, 445a-462a.)

DIRTT appealed the Utah district court's order, as well as the district court's denial of DIRTT's motion for relief, to the Tenth Circuit. (App. 501a-503a; 656a-657a,

658a-660a, 661a-664a.) The Utah district court stayed the case against the Hendersons pending appeal. (App. 665a-669a.)

As DIRTT was appealing the Utah district court's orders, it filed a new lawsuit against Falkbuilt, but not Mr. Smed or the Hendersons, in Texas federal district court. (App. 394a-444a.) The Texas complaint mirrored wide swaths of DIRTT's amended complaint in Utah, which had just been dismissed for *forum non conveniens*. See *DIRTT Environmental Solutions, Inc. v. Falkbuilt, Inc. et al*, Case No. 3:21-CV-1483-N (N.D. Texas, Mar. 3, 2022) (Dkt. No. 76, at 3-4). Its causes of action were the same apart from the substitution of a Texas trade secrets claim for the Utah trade secrets claim and a request for entry of the previously stipulated preliminary injunction in Texas. (Compare App. 394a-444a with App. 181a-272a.)

After the Texas district court, too, dismissed the case for *forum non conveniens* on the same grounds as the Utah district court had, see *DIRTT Environmental Solutions, Inc. v. Falkbuilt, Inc. et al*, Case No. 3:21-CV-1483-N (N.D. Texas, Mar. 3, 2022) (Dkt. No. 76), DIRTT appealed that dismissal to the Court of Appeals for the Fifth Circuit. See *DIRTT Environmental Solutions, Inc. v. Falkbuilt, Inc. et al*, Case No. 3:21-CV-1483-N (N.D. Texas, Mar. 3, 2022) (Dkt. No. 78). The appeal was stayed pending the Tenth Circuit's opinion. See *DIRTT Environmental Solutions, Inc. v. Falkbuilt, Inc. et al*, Case No. 22-10329 (5th Cir., June 2, 2022).

On April 11, 2023, the Tenth Circuit issued the subject opinion, reversing and remanding the case to the Utah district court. Although the parties briefed nearly every aspect of the district court's *forum non conveniens* determination, the Tenth

Circuit reached only the first prong of the first threshold question under the *forum non-conveniens* determination: whether Canada was an *available* alternative forum. (App. 2a.)

The Tenth Circuit resolved the case by answering a single question of first impression: Can a district court appropriately dismiss part of an action pursuant to the *forum non conveniens* doctrine while allowing the other part to proceed before it? (*Id.*) The Tenth Circuit answered that question as “no.” (*Id.*) Because the Utah district court’s dismissal “split” the United States case by sending the claims between DIRTT, Falkbuilt, and Mr. Smed to Canada while leaving DIRTT’s claims against the Hendersons in Utah, the Tenth Circuit found that Canada was not an “available alternative forum.” (App. 13a.) The Tenth Circuit went further, foreclosing “splitting cases” by expressly holding that “*forum non conveniens* is not available as a tool to split or bifurcate cases.” (*Id.*) The Tenth Circuit declined to reach any issue beyond the availability prong of the first threshold question of the *forum non conveniens* analysis, but did clarify in a footnote that plaintiffs are “not ‘foreign’ if they are based in the United States.” (App. 12a-13a, n.6.)

After the Tenth Circuit issued its opinion, the Fifth Circuit lifted its stay and issued a briefing schedule, *see DIRTT Environmental Solutions, Inc. v. Falkbuilt, Inc. et al*, Case No. 22-10329 (5th Cir., Apr. 17, 2023)), although DIRTT has motioned for a remand instead, *see DIRTT Environmental Solutions, Inc. v. Falkbuilt, Inc. et al*, Case No. 22-10329 (5th Cir., Apr. 21, 2023).

The Canadian action involving DIRTT, Falkbuilt, and Mr. Smed, and several others was never stayed during the pendency of the appeals before the Fifth and Tenth Circuits and has been proceeding since May 9, 2019.

REASONS FOR GRANTING THE STAY

“To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent.” *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (*per curiam*) (citations omitted); *see also* 28 U.S.C. § 2101(f); Supreme Court Rule 23. This standard is met here.

I. There Is a Reasonable Probability This Court Will Grant Certiorari and a Fair Prospect It Will Reverse the Judgment Below.

A stay of the mandate is warranted because there is a reasonable probability this Court will grant the petition and a fair prospect that it will reverse the Tenth Circuit’s decision.

First, the issue presented to the Tenth Circuit was one of first impression. Specifically, the Tenth Circuit styled the question as: “Can a district court appropriately dismiss part of an action pursuant to the *forum non conveniens* doctrine while allowing the other part to proceed before it?” While the Tenth Circuit described this as a question of first impression in its own circuit, the specific question, as

articulated and under the facts of this case, is one of first impression to this Court as well.

In analyzing the question of first impression, the Tenth Circuit cited to cases from other circuits for the proposition that “there is support among the various circuits for the idea that all parties (and by extension the entire case) must be subject to the jurisdiction of an alternative forum in order for it to be considered available under *forum non conveniens*.” (App. 11a.) The cases cited, however, do not expressly answer the Tenth Circuit’s question and do not go so far as to create a *per se* rule foreclosing application of *forum non conveniens*, as the Tenth Circuit did. *See, e.g., Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 835 (5th Cir. 1987) (“a foreign forum is available when the entire case and all parties can come within the jurisdiction of that forum” but case splitting was not at issue; no *per se* rule was created; and dismissal upheld) (*citing In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1165 (5th Cir. 1987) (dismissal improper in case where U.S. did not agree to jurisdiction in alternative forum; no *per se* rule created)); *Kamel v. Hill-Rom Co., Inc.*, 108 F.3d 799, 803 (7th Cir. 1997) (citing *In re Air Crash* but case splitting not at issue; no *per se* rule created); *Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847, 867 (7th Cir. 2015) (citing *Kamel*; no *per se* rule created); *Associação Brasileira de Medicina de Grupo v. Stryker Corp.*, 891 F.3d 615, 620 (6th Cir. 2018) (case splitting not at issue, no *per se* rule.) Thus, in its Opinion, the Tenth Circuit answered a question of first impression and to the extent the Tenth Circuit went further in its application than the other cited circuits, the petition for writ of

certiorari will present substantial questions for this Court to resolve. Even if the Tenth Circuit's rule could be construed to merely rephrase the holdings from other circuits, this Court has never addressed the emerging restrictive trend of rules precluding "case splitting" in *forum non conveniens* analyses from any circuit that has adopted such a rule.

Second, importantly, the Tenth Circuit's articulation of a *per se* rule governing and foreclosing *forum non conveniens* is inconsistent with this Court's longstanding precedent, and it is reasonably probable that this Court will review and reverse that restrictive rule. While the doctrine of *forum non conveniens* has roots in European common law, it "was not fully crystalized" until the Supreme Court's decision in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). *See Piper Aircraft Co.*, 454 U.S. at 248-49, n.13. There, this Court recognized: "Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts . . ." 330 U.S. at 508.

This Court added to the foundational precepts of *forum non conveniens* in another case decided the same day as *Gilbert*. In *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, the Court described how it had rejected "laying down a rigid rule to govern discretion" and instead pronounced that "[e]ach case turns on its facts." 330 U.S. 518, 528 (1947) (quoting *Williams v. Green Bay & WR Co.*, 326 U.S. 549, 557 (1946)); *see also Am. Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994) ("We have . . . repeatedly rejected the use of *per se* rules in applying the doctrine."). The Court noted that to

“trace in advance the precise line of demarcation between the controversies affecting a foreign corporation in which jurisdiction will be assumed and those in which jurisdiction will be declined would be a difficult and hazardous venture.” *Koster*, 330 U.S. at 530 (quoting *Travis v. Knox Terpezone Co.*, 215 N.Y. 259, 109 N.E. 250 (1915)).

Years later, this Court affirmed that “the central focus of the *forum non conveniens* inquiry is convenience” and that its previous decisions “have repeatedly emphasized the need to retain flexibility.” *Piper Aircraft Co.*, 454 U.S. at 249; *see also Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988) (“the district court is accorded substantial flexibility”). “If central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable.” *Piper Aircraft Co.*, 454 U.S. at 249-50. Doing so may result in “practical problems,” such as “American courts, which are already extremely attractive to foreign plaintiffs, . . . becom[ing] even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts.” *Id.* at 252. To maintain the flexibility of the doctrine, the Court stated that the “*forum non conveniens* determination is committed to the sound discretion of the trial court.” *Id.* at 257; *see also Dietz v. Bouldin*, 579 U.S. 40, 46 (2016) (stating a district court’s authority to dismiss for *forum non conveniens* is derived from its inherent power to achieve “the just, speedy, and inexpensive resolution of disputes.”).

Piper Aircraft Co. is particularly instructive. There, as this Court explained, the Third Circuit had “decided that dismissal [under *forum non conveniens*] is *automatically barred* if it would lead to a change in the applicable law unfavorable to

the plaintiff.” 454 U.S. at 246 (emphasis added). The Court, however, rejected creation of that *per se* rule, finding it was “inconsistent” with the Court’s precedent that has “repeatedly emphasized the need to retain flexibility.” *Id.* at 249. While the Court noted that, “[a]t the outset of a *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum,” it declined to accept the Third Circuit’s holding that a plaintiff could *automatically* defeat that threshold merely by showing that substantive law in the alternate forum is less favorable to plaintiffs. *Id.* at 247, 254 & n.22 (emphasis added). “[I]f conclusive or substantial weight were given to the possibility of a change of law, the *forum non conveniens doctrine* would become virtually useless.” *Id.* at 250. Instead, this Court made clear that it was not itself creating a *per se* rule—it was not holding that “the possibility of an unfavorable change in the law should *never* be a relevant consideration.” *Id.* at 254 (emphasis in original). Rather, the analysis of that factor would be on a case-by-case basis. Indeed, the Court went on to find that the possibility of a change in law did *not* foreclose application of the *forum non conveniens* doctrine in that case, ultimately upholding dismissal. *Id.* at 255.

Thus, the core principles of flexibility and discretion articulated by this Court in decades of precedent are undercut by the creation of the Tenth Circuit’s *per se* rule stripping district courts of *any* discretion to dismiss a “broader case” for *forum non conveniens* while retaining a “narrower case” against different defendants, as was done here, regardless of the circumstances. Such an inflexible rule undermines the doctrine of *forum non conveniens*.

Third, similar to *Piper Aircraft Co.*, by creating and simply applying the *per se* rule that *forum non conveniens* cannot be used as a tool to split or bifurcate a case under any circumstances, the Tenth Circuit did not fully address the district court's reasoning for allowing the split of cases here. The district court acknowledged *forum non conveniens*' central purpose of convenience, (App. 360a), and reasoned that its decision to dismiss "would allow this case to proceed on its narrow Utah focus against [the Hendersons]," (App. 372a), and that "[j]udicial economy favors resolution of the bulk of th[e] claims against Falkbuilt and Mr. Smed in one trial" in Canada, (App. 375a-376a). Further, the district court noted that while Utah "certainly has connection to the claims against the Hendersons," and that DIRTT's claims against them "are more directly tied to Utah," (App. 376a), Canada "has a much stronger local interest in the broad dispute between DIRTT and Falkbuilt [and its common Canadian founder], while Utah has an interest in the proceeding with respect to the Hendersons," (App. 377a).

All considered, the Utah district court found that there was "significant overlap between the alleged wrongful actions and the relief sought in both actions," (App. 362a-363a, 366a), i.e., between DIRTT's first-filed Canadian action and DIRTT's later filed Utah action, and the "Canadian court is best suited to handle all of the claims between Falkbuilt, DIRTT, and Mr. Smed in one proceeding, which includes Falkbuilt's counterclaims which I previously dismissed at DIRTT's request at the last hearing. Therefore, the litigation and trial will be more convenient there." (App. 380a; *see also* App. 497a.)

The Utah district court’s careful, case-specific analysis, however, was not analyzed by the Tenth Circuit in reversing the dismissal. Instead, like the Third Circuit in *Piper*, the Tenth Circuit created and enforced a *per se* rule that automatically foreclosed *forum non conveniens* in this case and any others like it.

Fourth, the new *per se* rule has considerable negative policy implications that will lead to the type of “practical problems” this Court has repeatedly cautioned against in its *forum non conveniens* precedent. For example, the *per se* rule will embolden foreign plaintiffs to expand foreign litigation into the United States, naming only tangentially related American defendants as a strategic tool either to avoid litigating abroad in a forum that is more convenient for the defendant(s) or to open costly battlefronts—fighting the same battles simultaneously—in multiple international forums.

This is not hyperbole. This is precisely what happened in this case, as the Utah district court recognized when dismissing the claims by DIRTT against Falkbuilt and Mr. Smed for *forum non conveniens*. DIRTT’s first-filed Canadian action concerned the same parties as in the later amended Utah action (but which DIRTT also had crafted to include segregable claims against local Utah defendants, the Hendersons), the same underlying trade secrets and intellectual property, and the same alleged wrongful conduct covering an extended period of time and large geographic, international areas. The vast majority of witnesses and evidence also lay in Canada. Falkbuilt, a Canadian startup, was faced with defending against two massive, substantially overlapping commercial litigation cases in both Canada and the United

States. And under the Tenth Circuit's new *per se* rule, that will happen much more often, as savvy lawyers will find local distributors, contractors, or small subsidiaries of international companies that they can sue simultaneously on tangentially related grounds and thereby defeat dismissal on *forum non conveniens*, subjecting international defendants to costly litigation on two or more simultaneous fronts in the United States and abroad. This does not serve *forum non conveniens*' central purpose of convenience, *Piper Aircraft Co.*, 454 U.S. at 256, and instead will likely make courts in the United States even more attractive to foreign plaintiffs and invite further congestion to already crowded courts. *See id.* at 252.

Finally, the new *per se* rule foreclosing *forum non conveniens* forces defendants to shoulder the burden of costly litigation as they await either the foreign or United States proceedings to become *res judicata* of the other. "There is no reason for identical suits to be proceeding in different courts in different countries thousands of miles apart. Such parallel proceedings incite a race to judgment in the hope that the judgment in the home forum will favor the home litigant and be usable to block the other suit by interposing a defense of *res judicata* in it." *U.S.O. Corp. v. Mizuho Holding Co.*, 547 F.3d 749, 750 (7th Cir. 2008). And there is no reason to suspect that a legitimate foreign judgment (in Canada, here) will not be recognized within the Tenth Circuit for the purposes of *res judicata*. *See Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895); *Ritchie v. McMullen*, 159 U.S. 235, 242-43 (1895) (enforcing a Canadian judgment); *Soc'y of Lloyd's v. Reinhart*, 402 F.3d 982, 999 (10th Cir. 2005) ("principles of comity require recognition of a [legitimate] foreign judgment"); *Smith v. Toronto-*

Dominion Bank, 166 F.3d 1222 at *2, 5 (10th Cir. 1999) (unpublished) (compiling cases of “the long history of other courts recognizing Canadian judgments under principles of comity” and holding two Canadian judgments estopped a plaintiff from asserting claims against a defendant); *Phillips USA, Inc. v. Allflex USA, Inc.*, 77 F.3d 354, 359-61 (10th Cir. 1996) (holding an Australian judgment’s *res judicata* effect barred a United States suit); Restatement (Fourth) of Foreign Relations Law §§ 483, 484. The operation of *res judicata* also falls on whatever court fails to reach a dispositive ruling first. The judicial resources are expended for no other reason than the court lost a race to judgment with a rival tribunal. See *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 435 (2007) (“Judicial economy is disserved by continuing litigation in the Eastern District of Pennsylvania given the proceedings long launched in China.”).

Ultimately, this case presented a question of first impression to the Tenth Circuit and, in answering that question, the Tenth Circuit created and enforced a new *per se* rule that departs from well-established Supreme Court precedent providing for flexibility and discretion in *forum non conveniens* analyses and that, without question, limits a district court’s ability to apply *forum non conveniens* on a case-by-case basis. The rule goes further than the other cited circuits and could have significant, negative practical consequences. Accordingly, Falkbuilt’s petition for writ of certiorari will present substantial questions leading to this Court’s review and reversal of the Tenth Circuit’s judgment.

II. Irreparable Harm Will Result from Denial of a Stay.

In addition to the reasons set forth in Section I, irreparable harm will result absent a stay of the mandate while the petition for writ of certiorari is filed and considered by this Court. DIRTT's first-filed case has been proceeding in Canada since May 2019. That case was never stayed during the pendency of the Fifth and Tenth Circuit appeals. Instead, all those claims—including some claims added in the Canadian action after dismissal of the Utah claims against Falkbuilt and Mr. Smed—continue to be litigated together. And, as the Utah district court found and which the Tenth Circuit did not question, the parties, the alleged wrongdoing, and the requested relief in DIRTT's first-filed Canadian action “substantially overlap[]” with the Utah action. They are in very large part *the same case*.

Thus, if the Tenth Circuit issues the mandate, two almost identical cases will proceed simultaneously in both Utah and Alberta, with inconsistent results very possible. Numerous courts have found similar circumstances to support a finding of irreparable harm.¹ *See, e.g., Keep on Kicking Music, Ltd. v. Hibbert*, 268 F. Supp. 3d 585, 589, 591 (S.D.N.Y. 2017) (holding, in a case with duplicative litigation in Jamaica, with the “same claims at issue” although “styled differently,” and with the “lawsuit aris[ing] from the same operative facts,” that “[t]he specter of inconsistent rulings, particularly where this Court has already dismissed some of the claims, constitutes irreparable harm. . . . [and t]hat harm is further compounded by the

¹ *Nken v. Holder*, 556 U.S. 418, 434 (2009) (“There is a substantial overlap between [the standard for a motion to stay] and the factors governing preliminary injunctions.”)).

additional time and expense that Movants will incur (and have already incurred) to re-litigate the underlying claims”) (citations omitted); *New York Bay Cap., LLC v. Cobalt Holdings, Inc.*, 456 F. Supp. 3d 564, 574 (S.D.N.Y. 2020) (finding irreparable harm “because of the possibility of inconsistent rulings from an arbitrator and the Court” where “substantial overlap” between a case and arbitration existed).²

In addition, the Fifth Circuit may have to come to decide whether to continue to the merits of an appeal in that case that may be mooted by this Court’s decision and/or whether to permit the Texas district court to reconsider its *forum non conveniens* dismissal of DIRTT’s third-filed action against Falkbuilt, which might also be sustainable on the alternative basis of the first-filed case rule. The Utah district court and the parties therein also will have to resolve exactly how to reset that litigation. All these issues may be moot, however, if the Supreme Court grants the petition for certiorari and upholds the Utah district court’s decision.

Finally, staying this case until the questions herein are resolved definitively, and before the district court and the parties undergo the burdensome, complicated,

² See also *Jolen, Inc. v. Kundan Rice Mills, Ltd.*, No. 19-CV-1296 (PKC), 2019 WL 1559173, at *5 (S.D.N.Y. Apr. 9, 2019) (“Jolen has demonstrated irreparable harm because the specter of inconsistent rulings constitutes irreparable harm, along with the time and expense necessary to re-litigate the claims.”) (citations omitted); *Int’l Fashion Prods., B.V. v. Calvin Klein, Inc.*, 1995 WL 92321, at *2 (S.D.N.Y. Mar. 7, 1995) (party is irreparably harmed when it is “compelled to litigate this action on two continents, and may be subject to inconsistent rulings.”); *Gov’t Emps. Ins. Co. v. Strutsovskiy*, No. 12-CV-330, 2017 WL 4837584, at *6 (W.D.N.Y. Oct. 26, 2017) (“[M]ultiple federal and state courts have concluded that wasting time and resources in arbitrations that might result in awards inconsistent with future judicial rulings constitutes irreparable harm sufficient to stay arbitration.”).

and costly process of resetting inarguably duplicative litigation, which may be mooted by the *res judicata* effect of a Canadian judgment, is an important consideration, demonstrates irreparable harm, and supports a stay in this case. *See, e.g., U.S. ex rel. Chandler v. Cook Cnty.*, 282 F.3d 448, 451 (7th Cir. 2002) (agreeing that party's desire not to be put to the further expense of preparing for trial until the legal question of immunity was decided definitively, was an important consideration, and granting stay of mandate).

III. The Equities Weigh in Favor of Granting a Stay.

Finally, at a minimum, the balance of the equities weighs in favor of a stay. Specifically, the harm, burden, and expense which will be imposed on Falkbuilt absent a stay of the Tenth Circuit's mandate outweighs any interest DIRTT has in litigating its dispute with Falkbuilt in multiple, simultaneous forums. Indeed, other than continuing to enjoy the benefit of this strategic litigation tool to pressure Falkbuilt's finances, DIRTT will suffer no discernable harm from a stay of the mandate.

First, DIRTT stands to benefit just as much as Falkbuilt in saved litigation expenses if this Court stays the Tenth Circuit's mandate and reverses the Tenth Circuit's new *per se* rule. DIRTT, too, will avoid the expense of satellite litigation in potentially two different U.S. forums (Utah and Texas) when a first-filed case is ongoing in Canada that will resolve the dispute between the parties and has the potential to render the U.S. proceedings moot via *res judicata*.

Second, a stay, and eventual reversal, will not deprive DIRTT of any remedy it seeks. As a condition of dismissal, the Utah district court required Falkbuilt, its non-party distribution partners, Mr. Smed, and the Hendersons to remain subject to the preliminary injunction and required Falkbuilt to cause that preliminary injunction to be entered in the Canadian action. Thus, for years now, DIRTT has enjoyed the fruits of a preliminary injunction, which have required Falkbuilt, the Hendersons, and many others to disclose to DIRTT all confidential “information in [their] possession, custody or control,” and prohibits them from “using . . ., relying upon, disclosing, disseminating, deleting or disposing” of the same during the pendency of the dispute. (App. 168a). This is the ultimate injunctive relief sought by DIRTT in its multi-platform litigation, (App. 268a-271a), which DIRTT will continue to enjoy during a stay. Relatedly, DIRTT has never alleged in any court that Falkbuilt or any other defendant has breached the preliminary injunction.

Moreover, granting a stay, and eventual reversal of the Tenth Circuit’s opinion, will not result in DIRTT being unable to pursue a remedy against the Hendersons. Although DIRTT has protested that leaving only the Hendersons in the Utah case will deprive DIRTT of the joint and several liability it sought between the Hendersons, Mr. Smed, and Falkbuilt, *forum non conveniens* analysis makes clear that the remedies available in the foreign forum need not be identical to those available in the United States. *See, e.g., Archangel Diamond Corp. Liquidating Tr. v. Lukoil*, 812 F.3d 799, 804 (10th Cir. 2016) (“[T]he availability of an adequate alternative forum does not depend on the existence of the identical cause of action in

the other forum,’ nor on identical remedies.”) (quoting *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 158 (2d Cir.2005)).

Overall, the equities weigh in favor of Falkbuilt and granting of the stay.

CONCLUSION

For the forgoing reasons, Falkbuilt respectfully requests that the Court stay, and, if necessary, recall the Tenth Circuit’s mandate until Falkbuilt’s petition for certiorari is filed and this Court reaches final disposition.

Dated: May 2, 2023

Respectfully submitted,

KEVIN N. ANDERSON
Counsel of Record
ARTEMIS D. VAMIANAKIS
TANNER J. BEAN
FABIAN VANCOTT
95 So. State Street, Suite 2300
Salt Lake City, UT 84111
(801) 531-8900
kanderson@fabianvancott.com

Counsel for Applicants

APPENDIX

TABLE OF CONTENTS

	<i>Page</i>
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED APRIL 11, 2012.....	1a
ORDER DENYING STAY OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED APRIL 26, 2023	15a
MOTION FOR STAY OF MANDATE PENDING PETITION FOR WRIT OF CERTIORARI, FILED APRIL 25, 2023	16a
EXCERPTS OF APPELLANTS' APPENDIX VOLUME 1 OF 6, FILED SEPTEMBER 10, 2021.....	36a
EXCERPTS OF APPELLANTS' APPENDIX VOLUME 3 OF 6, FILED SEPTEMBER 10, 2021.....	170a
EXCERPTS OF APPELLANTS' APPENDIX VOLUME 4 OF 6, FILED SEPTEMBER 10, 2021.....	219a
EXCERPTS OF APPELLANTS' APPENDIX VOLUME 5 OF 6, FILED SEPTEMBER 10, 2021.....	292a
EXCERPTS OF APPELLANTS' SUPPLEMENTAL APPENDIX VOLUME I OF II, FILED MARCH 14, 2022	388a
EXCERPTS OF APPELLEES' SUPPLEMENTAL APPENDIX VOLUME I OF II, FILED MAY 13, 2022	504a
EXCERPTS OF APPELLEES' SUPPLEMENTAL APPENDIX VOLUME II OF II, FILED MAY 13, 2022	618a

FILED
United States Court of Appeals
Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

April 11, 2023

Christopher M. Wolpert
Clerk of Court

DIRTT ENVIRONMENTAL
SOLUTIONS, INC.; DIRTT
ENVIRONMENTAL SOLUTIONS, LTD.,

Plaintiffs - Appellants,

v.

Nos. 21-4078, 21-4153

FALKBUILT LTD.; FALKBUILT, INC.;
MOGENS SMED,

Defendants - Appellees,

and

LANCE HENDERSON; KRISTY
HENDERSON; FALK MOUNTAIN
STATES, LLC,

Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
(D.C. No. 19-CV-00144-DBB-DBP)

Catherine A. Miller, Akerman LLP (Jeffrey J. Mayer, Akerman LLP, Chicago, Illinois, and Chad E. Nydegger, Workman Nydegger, Salt Lake City, Utah, with her on the briefs), Chicago, Illinois, for Plaintiffs – Appellants.

Artemis D. Vamianakis (Tanner J. Bean with her on the brief), Fabian VanCott, Salt Lake City, Utah, for Defendants – Appellees.

Before **CARSON**, **BALDOCK**, and **EBEL**, Circuit Judges.

BALDOCK, Circuit Judge.

In today’s appeal we address a question of first impression in this Circuit: Can a district court appropriately dismiss part of an action pursuant to the *forum non conveniens* doctrine while allowing the other part to proceed before it? Reasoning that the *forum non conveniens* doctrine is fundamentally concerned with the convenience of the venue—and relatedly the efficient administration of justice—we conclude the answer to that question is “no.” Accordingly, we hold a district court clearly abuses its discretion when, as here, it elects to dismiss an action as to several defendants under a theory of *forum non conveniens* while simultaneously allowing the same action to proceed against other defendants. Exercising jurisdiction pursuant to Fed. R. Civ. P. 54(b) and 28 U.S.C. § 1291,¹ we **REVERSE** the district court’s judgment.²

¹ We consider two consolidated appeals in this case. The first, no. 21-4078, addresses the district court’s decision to dismiss part of the underlying action under a *forum non conveniens* theory. The district court certified this appeal under Fed. R. Civ. P. 54(b). The second, no. 21-4153, addresses the district court’s decision to deny Appellants’ motion filed under Fed. R. Civ. P. 60(b). Because we resolve this case by reversing the district court’s underlying decision in appeal no. 21-4078, we **DISMISS** appeal no. 21-4153 as **MOOT**.

² Appellants also filed a motion asking us to take judicial notice of filings from their Rule 60(b) motion and a related proceeding before another district court outside our Circuit. Because we do not need to consider these materials to grant Appellants the relief they seek by reversing the district court’s decision, we **DENY** Appellants’ motion as **MOOT**.

I.

The Parties to this appeal are no strangers to the facts of the underlying dispute since they have litigated it in one form or another since May 2019. As a result, we limit our discussion of the facts and procedural history of this case solely to those necessary to resolve the issue before us.

The facts of this case—as alleged in Appellants’ first amended complaint—concern the litigious aftermath of an acrimonious corporate divorce. Appellants are DIRTT Environmental Solutions, Inc., a Colorado corporation,³ and DIRTT Environmental Solutions Ltd., its Canadian parent (collectively “DIRTT”). DIRTT operates a business specializing in the design and construction of prefabricated interior spaces and utilizes proprietary software in its design process. DIRTT was founded in 2003 by Mogens Smed and two other individuals. For years, DIRTT enjoyed a fruitful relationship with Smed, who served as DIRTT’s CEO. That changed in 2018 when, for reasons that remain unclear based on this record, DIRTT decided to part ways with Smed. Following his termination, Smed established his own company, Falkbuilt Ltd. (and Falkbuilt, Inc., its U.S. based subsidiary). Like DIRTT, Falkbuilt’s business also focuses on producing prefabricated

³ DIRTT, Inc.’s principal place of business was the subject of some debate in the proceedings below. DIRTT originally stated in its complaint that DIRTT, Inc.’s principal place of business was in Canada. DIRTT later stated in its first amended complaint that DIRTT, Inc.’s principal place of business was in the United States. The district court noted that DIRTT’s “filings and representations regarding DIRTT, Inc. have been many and varied.” We offer no opinion on DIRTT, Inc.’s principal place of business. We note, however, that both parties appear to have taken contradictory positions on various matters at different stages of this litigation, depending on whether they were seeking or opposing dismissal for *forum non conveniens*. See Appellants’ Br. at 5, Appellee’s Br. at 10–11.

interior spaces. Falkbuilt relies on a network of affiliates that are invested in Falkbuilt itself to facilitate the conduct of its business. DIRTT alleges that Smed remained heavily influenced by his time at DIRTT and that he continued “to identify himself as a ‘DIRTTbag,’ a phrase used by DIRTT employees to describe themselves and express pride in adhering to DIRTT’s philosophy,” even after his departure from the firm.

According to DIRTT, Smed set up Falkbuilt to directly compete with it. To this effect, DIRTT claims Smed recruited its employees and affiliates not only to join his new business, but to bring DIRTT’s proprietary information with them. In this regard, DIRTT’s allegations as they pertain to Lance Henderson (“Lance”), a former DIRTT employee, and his wife Kristy Henderson (“Kristy”), a former employee of a DIRTT affiliate, are particularly relevant. Lance worked as a Utah sales representative for DIRTT from 2009 until 2019. As part of his employment with DIRTT, Lance acknowledged receipt of DIRTT’s confidentiality policy, which prohibited him from, amongst other things, retaining DIRTT’s sensitive data.

Unbeknownst to DIRTT, Lance had a felony conviction for defrauding investors of between \$6 and \$8 million. Smed apparently knew about Lance’s conviction but did not bring it to DIRTT’s attention because DIRTT alleges it only first learned about Lance’s past after Smed’s departure when the State of Utah sent it an administrative garnishment order. Sometime thereafter, Lance decided to leave DIRTT and “either made contact or accelerated plans with Mr. Smed and Falkbuilt to assist them in launching a business in Utah.” Lance then uploaded 35 gigabytes of DIRTT’s data on to his personal drives at Smed’s behest or direction. DIRTT learned of this upload one week after it took place,

and Lance admitted to uploading the information but denied any wrongdoing or nefarious intent. Less than one month before Lance's departure, Kristy incorporated Falk Mountain States, LLC ("FMS") to serve as Falkbuilt's Utah affiliate. When Lance ultimately parted ways with DIRTT in August 2019, he informed them he would be starting a construction business even though he intended to work for Falkbuilt. Smed allegedly recruited numerous other DIRTT employees to participate in similar schemes, although those former employees are not subject to this suit.

DIRTT began its legal campaign against Falkbuilt and Smed in May 2019—before Lance's departure—by filing suit against them for breach of contract in Canadian court. DIRTT expanded its legal campaign after it learned about Lance's apparent misappropriation of its data by filing the instant lawsuit against Falkbuilt Ltd., the Hendersons, and FMS. DIRTT's original complaint alleged various theft of trade secret claims under both federal and state law as well as a breach of contract claim against Lance. DIRTT also sought a preliminary injunction. Falkbuilt responded by filing a counterclaim, which DIRTT moved to dismiss on *forum non conveniens* grounds. The parties then engaged in a series of protracted discovery disputes. DIRTT subsequently amended its complaint in October 2020. The first amended complaint (amongst other things) added new parties—DIRTT Ltd. as a plaintiff as well as Falkbuilt, Inc. and Smed as defendants—changed DIRTT, Inc.'s principal place of business from Canada to the United States and refined its allegations to be more focused on harm suffered in the United States. Falkbuilt and Smed moved to dismiss DIRTT's first amended complaint, based on *forum non*

conveniens. The Hendersons and FMS refused to join this motion or consent to Canadian jurisdiction—the alternative forum proposed in Falkbuilt’s motion to dismiss.

In March 2021, the district court held a hearing on DIRTT’s motion to dismiss Falkbuilt’s counterclaim for *forum non conveniens*. The district court granted that motion. Thereafter, in May 2021, the district court held a hearing on Falkbuilt and Smed’s motion to dismiss DIRTT’s first amended complaint. After hearing argument from the parties, the district court issued a preliminary ruling from the bench.⁴ In doing so, the district court went through each factor of the *forum non conveniens* analysis and ultimately granted Falkbuilt and Smed’s motion. DIRTT appealed that ruling and it is the subject of appeal no. 21-4078. DIRTT also filed a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b) based on a series of emails disclosed by Falkbuilt during discovery. The district court denied that motion in a written order. DIRTT appealed that ruling as well, and it is the subject of appeal no. 21-4153. We consolidated these appeals for briefing and oral argument. But because our resolution of the *forum non conveniens* issue disposes of both appeals, we focus our analysis on DIRTT’s first appeal. *See supra* n.1.

II.

Forum non conveniens is a discretionary common law doctrine under which “a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter

⁴ Although the district court described this ruling as a preliminary one, it provided no meaningful explanation of its *forum non conveniens* analysis in the written order it issued thereafter. As a practical matter, a district court generally should issue rulings on complex matters such as *forum non conveniens* in written form. This makes it easier for both parties and appellate courts to understand the district court’s reasoning, thereby enhancing judicial economy and facilitating the efficient administration of justice.

of a general venue statute.” *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947). “At bottom, the doctrine of *forum non conveniens* is nothing more or less than a supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined.” *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994). Those “conditions” are “central[ly] focus[ed]” on the convenience of the forum as compared to foreign alternatives. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248–249 (1981). Accordingly, dismissal under a *forum non conveniens* theory “will ordinarily be appropriate where trial in the plaintiff’s chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice.” *Id.* at 249. The doctrine therefore requires courts to ask whether a suit could be more conveniently resolved in a foreign jurisdiction rather than the forum chosen by the plaintiff. To answer that question, our precedents follow a familiar framework. That framework gives effect to the principle that:

[W]hen an alternative forum has jurisdiction to hear a case, and when trial in the chosen forum would establish oppressiveness and vexation to a defendant out of all proportion to the plaintiff’s convenience, or when the chosen forum is inappropriate because of considerations affecting the court’s own administrative and legal problems, the court may, in the exercise of its sound discretion, dismiss the case, even if jurisdiction and proper venue are established.

Am. Dredging Co., 510 U.S. at 447–48 (internal quotations and punctuation omitted).

Accordingly, our inquiry begins with two threshold questions. *Yavuz v. 61 MM, Ltd.*, 576 F.3d 1166, 1172 (10th Cir. 2009). First, we ask whether the Canadian forum is “an adequate alternative forum” in which Defendants are amenable to process.” *Gschwind*

v. Cessna Aircraft Co., 161 F.3d 602, 605 (10th Cir. 1998) (citing *Piper Aircraft*, 454 U.S. at 254 n.22). Second, we consider whether Canadian, *i.e.*, foreign, law applies. *Id.* (citing *Rivendell Forest Prods., Ltd. v. Canadian Pac. Ltd.*, 2 F.3d 990, 994 (10th Cir. 1993)). We may only proceed with the analysis if the answer to both questions is yes. *Id.* at 605–06. In the event we can continue the analysis, we then examine and balance various private and public interest factors, none of which come into play here. *Id.* at 606. We will only reverse a district court’s *forum non conveniens* determination “when there has been a clear abuse of discretion.” *Piper Aircraft*, 454 U.S. at 257

III.

Appellants challenge virtually every aspect of the district court’s decision to dismiss the Falkbuilt Entities and Smed from their suit. Because we conclude the district court abused its discretion by finding that Canada was an adequate alternative forum—the first of the two threshold inquiries in the analysis—we need only address the parties’ arguments relating to this specific issue. This, of course, does not constitute an implicit endorsement of the aspects of the court’s decision we need not address.

The threshold inquiry of “whether there is an adequate alternative forum” for the suit is itself comprised of two components: The alternative forum must be both “available” and “adequate.” *Gschwind*, 161 F.3d at 606; *Yavuz*, 576 F.3d at 1174. The district court found that Canada was both available and adequate as an alternative forum. The district court devoted most of its analysis to the question of whether Canada was an adequate forum and appeared to simply assume it was an available forum because “DIRTT, Limited, filed suit against Falkbuilt, Ltd, and Mr. Smed in Alberta, Canada, on May 9, 2019.” But we

are concerned with the court’s findings as to the first consideration—whether Canada was available as a forum.

Appellants argue this finding was erroneous and an abuse of discretion. Specifically, they contend the district court abused its discretion by concluding Canada was an available forum when three of the six defendants in the suit—Lance Henderson, Kristy Henderson, and Falk Mountain States—were not subject to Canadian jurisdiction and had not consented to proceeding with an action there. *See* Appellants’ Br. at 42. For their part, Appellees argue the district court correctly concluded Canada was an available forum because “[t]he Falkbuilt Defendants explicitly agreed to be subject to the Canadian court’s jurisdiction” and because DIRT “‘splintered’ the litigation over this dispute when it filed one case in Canada and then filed a second, overlapping action seven months later in Utah.” Appellees’ Br. at 27–28.

The key question here is what does it mean for a foreign forum to be available under *forum non conveniens*? We have previously explained that an alternative forum is generally considered available “when the defendant is amenable to process in the other jurisdiction.” *Fireman’s Fund Ins. Co. v. Thyssen Mining Const. of Can., Ltd.*, 703 F.3d 488, 495 (10th Cir. 2012) (quoting *Piper Aircraft*, 454 U.S. at 254 n.22). As such, we have stated that a forum can be considered available when the defendant consents to the jurisdiction of the alternative forum. *See Archangel Diamond Corp. Liquidating Tr. v. Lukoil*, 812 F.3d 799, 804 (10th Cir. 2016); *Yavuz*, 576 F.3d at 1174–75; *Gschwind*, 161 F.3d at 606. Appellees hang their hats on these statements and would have us hold a foreign forum is available for the purposes of *forum non conveniens* whenever *the particular*

defendants moving for dismissal are amenable to process in, and subject to the jurisdiction of, that foreign forum, even if that does not include other defendants in the action.

Adopting Appellees' position, however, would require us to accept the premise that *forum non conveniens* can be used to split cases. Appellees—who carry the burden of establishing that Canada is available as a forum, *see Rivendell*, 2 F.3d at 993—cite no authority on the question of whether a district court can split cases using *forum non conveniens*. *See* Appellees' Br. at 27–29. In contrast, Appellants point to authority from the Fifth Circuit stating “[a] foreign forum is available when *the entire case and all parties* can come within the jurisdiction of that forum.” *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 835 (5th Cir. 1993) (emphasis added) (quoting *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1165 (5th Cir. 1987) (en banc), *partially vacated on other grounds*, 490 U.S. 1032 (1989)). Appellants have the better of this argument. Although our own precedents appear not to have expressly addressed this question, we have at least implicitly endorsed the Fifth Circuit's understanding of forum availability. As we stated in *Yavuz*: “The availability requirement is usually satisfied, however, where the *defendants* concede to be amenable to process in the alternative forum.” 576 F.3d at 1174 (emphasis added). *Yavuz* addressed a multi-defendant situation, and this statement recognizes the basic logic of requiring all defendants in such suits be amenable to the jurisdiction of another forum before considering it available for the purposes of *forum non conveniens*.

Furthermore, we can find support for this understanding of availability from our sister circuits. The Seventh Circuit, for example, has expressly adopted the Fifth Circuit's

understanding of forum availability, stating “[a]n alternative forum is available if *all parties* are amenable to process and are within the forum’s jurisdiction.” *Kamel v. Hill-Rom Co., Inc.*, 108 F.3d 799, 803 (7th Cir. 1997) (emphasis added) (citing *In re Air Crash Disaster*, 821 F.2d at 1165); *see also Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847, 867 (7th Cir. 2015) (same). The Sixth Circuit has also followed suit, noting that “a foreign forum is not truly ‘available’—and a defendant is not meaningfully ‘amenable to process’ there—if the foreign court cannot exercise jurisdiction over both parties.” *Associacao Brasileira de Medicina de Grupo v. Stryker Corp.*, 891 F.3d 615, 620 (6th Cir. 2018) (citing *Watson v. Merrell Dow Pharm., Inc.*, 769 F.2d 354, 357 (6th Cir. 1985)).⁵ In other words, there is support among the various circuits for the idea that *all parties* (and by extension the entire case) must be subject to the jurisdiction of an alternative forum in order for it to be considered available under *forum non conveniens*.

Logically, this makes good sense. *Forum non conveniens* is a doctrine that is fundamentally concerned with convenience. *See, e.g., Piper Aircraft*, 454 U.S. at 256;

⁵ *But see Watson v. Merrell Dow Pharms., Inc.*, 769 F.2d 354 (6th Cir. 1985). In *Watson*, the Sixth Circuit addressed a case where a series of plaintiffs sued a pharmaceutical company and several individuals for alleged birth defects. 769 F.2d at 355–56. The pharmaceutical company moved to dismiss the case under *forum non conveniens* and agreed to consent to the United Kingdom’s jurisdiction. *Id.* at 356–57. The individual defendants did not consent to that jurisdiction. *Id.* at 357. The district court granted the motion, reasoning that the pharmaceutical company was the “primary” defendant. *Id.* at 357–58. The Sixth Circuit disagreed with that assessment and highlighted the principle that “dismissal predicated on *forum non conveniens* requires [the] availability of [an] alternative forum possessing jurisdiction as to *all parties*.” *Id.* (citation omitted). Nevertheless, the *Watson* court inexplicably decided to affirm the district court’s decision as it applied to the pharmaceutical company but reversed it as it applied to the individual defendants—effectively splitting the case. *Id.* While we agree with *Watson*’s description of the law, we disagree with its ultimate resolution.

Gschwind, 161 F.3d at 605; *Yavuz*, 576 F.3d at 1172. And convenience is a multi-dimensional concept that is not primarily focused on any one party's interests. Instead, courts should consider convenience as it applies to the *entire case* when it analyzes the appropriateness of dismissal for *forum non conveniens*. That means considering the convenience as it relates to *all* parties as well as the court's inherent interest in the efficient administration of justice. *See Piper*, 454 U.S. at 257–61. As such, the Supreme Court has explained that dismissal for *forum non conveniens* “will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice.” *Id.* at 249. The latter consideration is particularly relevant to this case. This is clearly not a case “where the plaintiff is unable to offer *any* specific reasons of convenience supporting his choice [of forum].” *Id.* (emphasis added). When a plaintiff brings suit against multiple defendants in a forum where they are all subject to jurisdiction and the proposed alternative forum could only exercise jurisdiction over some of those defendants, the plaintiff has satisfied the requirements of *Piper Aircraft*.⁶

⁶ In general, the plaintiff's choice of forum is entitled to deference. *See, e.g., Gschwind*, 161 F.3d at 606; *Yavuz*, 576 F.3d at 1172; *Sinochem Int'l Co. v. Malaysia Shipping Corp.*, 549 U.S. 422, 430 (2007). Foreign plaintiffs' choices are entitled to less deference, however. *Id.* The district court found DIRTT was a “foreign” plaintiff because it is incorporated in Colorado rather than Utah. While we offer no opinion on DIRTT, Inc.'s principal place of business or citizenship, we believe it is important to highlight that the district court misunderstood the meaning of “foreign” in this context. For the purposes of *forum non conveniens*, plaintiffs are not “foreign” if they are based in the United States. *See Ranza v. Nike, Inc.*, 793 F.3d 1059, 1076 (9th Cir. 2015) (“A plaintiff's choice of forum is generally entitled to deference, *especially where the plaintiff is a United States citizen or resident*, because it is presumed a plaintiff will choose her ‘home forum.’” (emphasis

Here, all the defendants are subject to the district court’s jurisdiction. The Utah based defendants, however, are not subject to Canadian jurisdiction and neither consented to that jurisdiction nor joined the Canadian defendants’ motion to dismiss for *forum non conveniens*. As a result, Canada is not an available alternative forum. Appellees failed to establish the first threshold requirement for dismissing a case under *forum non conveniens* and the district court abused its discretion by finding they had. Splitting cases in the manner employed by the district court fundamentally contradicts the “central purpose” of *forum non conveniens* because it only increases the possibility of overlapping, piecemeal litigation that is inherently inconvenient for both the parties and the courts. *See Gschwind*, 161 F.3d at 605. We therefore foreclose this possibility by expressly holding that *forum non conveniens* is not available as a tool to split or bifurcate cases. Because we conclude Appellees failed to pass the first threshold requirement in the *forum non conveniens* analysis, we need not inquire any further to reverse the district court’s judgment and dispose of this appeal.

IV.

We hold the district court abused its discretion by granting Appellees’ motion to dismiss. We therefore **REVERSE** the district court’s judgment in appeal no. 21-4078 and **REMAND** with instructions for the district court to exercise jurisdiction over the entirety

added) (citing *Piper Aircraft*, 454 U.S. at 255)); *Reid-Walen v. Hansen*, 933 F.2d 1390, 1394 (8th Cir. 1991) (“[T]he ‘home’ forum for the plaintiff is any federal district in the United States, not the particular district where the plaintiff lives.” (footnote omitted)).

of Appellants' action. We also **DISMISS** appeal no. 21-4153 as **MOOT** and **DENY** Appellants' motion to take judicial notice filed in appeal no. 21-4078 as **MOOT**.

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

April 26, 2023

Christopher M. Wolpert
Clerk of Court

DIRTT ENVIRONMENTAL
SOLUTIONS, INC., et al.,
Plaintiffs - Appellants,

v.

FALKBUILT LTD., et al.,
Defendants - Appellees,

and

LANCE HENDERSON, et al.,
Defendants.

Nos. 21-4078 & 21-4153
(D.C. No. 1:19-CV-00144-DBB-DBP)
(D. Utah)

ORDER

Before **CARSON, BALDOCK, and EBEL**, Circuit Judges.

These matters are before us on Appellees' *Motion for Stay of Mandate Pending Petition for Writ of Certiorari*. Upon careful consideration, the motion is DENIED.

Entered for the Court,



CHRISTOPHER M. WOLPERT, Clerk

Case Nos. 21-4078, 21-4153

**United States Court of Appeals
for the Tenth Circuit**

DIRTT ENVIRONMENTAL SOLUTIONS, INC.;
DIRTT ENVIRONMENTAL SOLUTIONS, LTD,

Plaintiffs-Appellants,

v.

FALKBUILT LTD.; FALKBUILT, INC.; MOGENS SMED,

Defendants-Appellees,

and

LANCE HENDERSON; KRISTY HENDERSON;
FALK MOUNTAIN STATES, LLC,

Defendants

Appeal from a Decision of the United States District Court for the District of Utah – Salt Lake City, Case No. 1:19-CV-00144-DBB-DBP • Honorable David Barlow, U.S. District Judge

**MOTION FOR STAY OF MANDATE PENDING
PETITION FOR WRIT OF CERTIORARI**

ARTEMIS D. VAMIANAKIS
TANNER J. BEAN
FABIAN VANCOTT
95 South State Street, Suite 2300
Salt Lake City, Utah 84111
(801) 531-8900
avamianakis@fabianvancott.com
tbean@fabianvancott.com
Counsel for Appellees

APRIL 25, 2023

Pursuant to Federal Rules of Appellate Procedure 27 and 41(d)(1) and 10th Circuit Rule 41.1(B), Appellees Falkbuilt Ltd., Falkbuilt Inc. and Mogens Smed (hereinafter collectively “Falkbuilt”) respectfully request this Court stay the issuance of its mandate pending filing and final disposition of appellees’ petition for a writ of certiorari in the United States Supreme Court. *See* Fed. R. App. P. 41(d)(2)(ii). Pursuant to 10th Cir. Rule 27.1, undersigned counsel consulted with counsel for Appellants DIRT Environmental Solutions, Inc. and DIRT Environmental Solutions, Ltd. (hereinafter collectively, “DIRT”), and counsel indicated that DIRT does not concur with a stay and reserves all rights to object to this motion.

INTRODUCTION

In this case, the Court reached a single issue and question of first impression: “Can a district court appropriately dismiss part of an action pursuant to the *forum non conveniens* doctrine while allowing the other part to proceed before it?” (Tenth Circuit Opinion, April 11, 2023 (“Opinion” or “Op.”) at 2.) The Court concluded that the answer is “no.” (*Id.*) The Court found that Canada was not an “available alternative forum” and that the Utah district court “clearly abused its discretion” because it “split” the cases when it dismissed DIRT’s claims against the Falkbuilt defendants to be heard in the first-filed and ongoing action in Canada, while allowing claims against Lance Henderson, Kristy Henderson, and their

company, Falk Mountain States LLC (hereinafter collectively the “Hendersons”) to proceed before it in Utah.

Importantly, however, in so holding and addressing the question of first impression, the Court created and applied a *per se* rule: “We therefore foreclose this possibility [of splitting cases in the manner employed by the district court] by expressly holding that *forum non conveniens* is not available as a tool to split or bifurcate cases.” (Op. at 13 (emphasis added.))

The creation and application of a *per se* rule in the *forum non conveniens* context is inconsistent with well-established Supreme Court decisions that have repeatedly rejected the creation of rigid, *per se* rules and have instead emphasized the need to retain flexibility and to allow district courts to make *forum non conveniens* determinations on a *case-by-case* basis. See e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249-50 (1981). Moreover, in creating and applying the *per se* rule, the Court reversed the district court without addressing the case-specific reasons for why it was appropriate to dismiss the Falkbuilt defendants while allowing the case against the Hendersons to remain. The *per se* rule also has negative policy implications that could encourage foreign plaintiffs to bring suit in the United States and join a domestic defendant in an effort to avoid dismissal to an appropriate, foreign forum.

Accordingly, and as set forth in detail below, the Court’s holding raises “substantial questions” meriting Supreme Court review and there is a substantial possibility that Falkbuilt’s petition for writ of certiorari will be granted and that the Supreme Court will reverse. Fed. R. App. P. 41(d)(1); 10th Cir. R. 41.1(B).

In addition, good cause exists to stay issuance of the mandate. The first-filed case has been proceeding in Canada since May 2019. That case was never stayed and all claims—including claims dismissed to Canada for *forum non conveniens*—continue to be litigated. To untangle the dismissed claims from the Canadian action and reset the litigation in the Utah district court would be complex and burdensome on the district court and the parties. Good cause therefore exists to grant a stay to definitively answer the substantial questions presented before requiring the parties to incur the burden and possibly unnecessary expense of untangling the complex Canadian action.

BACKGROUND

1. On March 30, 2021, the district court granted DIRTT’s motion to dismiss Falkbuilt’s Counterclaim under the doctrine of *forum non conveniens*, finding that the Counterclaim was better litigated in Canada where a first-filed (May 9, 2019) case involving the parties was ongoing. (Appellees’ Supp. Vol. 2 at 231-32, 402-15.)

2. Thereafter, on May 21, 2021, the district court granted Falkbuilt’s motion to dismiss DIRTT’s Amended Complaint, also based on the doctrine of *forum non conveniens*. (App. Vol. 5 at 1354-57, 1426-54.) The district court’s order left the claims against the Hendersons pending in the district court. (*Id.* at 1439, 1443-44, 1479.)

3. DIRTT appealed the district court’s order, as well as the district court’s denial of DIRTT’s motion for relief, to this Court. (Supp. Vol. 1 at 272-74; Appellees’ Supp. Vol. 2 at 328-29, 346-48, 358-61.) The district court stayed the case against the Hendersons pending appeal. (Appellees’ Supp. Vol. 2 at 336-44, 371-75.)

4. On April 11, 2023, this Court issued its Opinion, reversing and remanding the case to the district court. Although the parties briefed nearly every aspect of the district court’s *forum non conveniens* determination, the Court reached only the first prong of the first threshold question under the *forum non-conveniens* determination – whether Canada was an *available* alternative forum. (Op. at 2.) The Court resolved the case by answering a single question of first impression: Can a district court appropriately dismiss part of an action pursuant to the *forum non conveniens* doctrine while allowing the other part to proceed before it? (*Id.*) The Court answered that question as “no.” (*Id.*) Because the district court’s dismissal in the underlying case split the cases by sending the case against

Falkbuilt to Canada and while leaving the case against the Hendersons, the Court found that Canada was not an “available alternative forum” in this case. (Op. at 13.) The Court went further, foreclosing case splitting by expressly holding that “*forum non conveniens* is not available as a tool to split or bifurcate cases.” (Op. at 13.) The Court declined to reach any issues beyond the availability prong of the first threshold question of the *forum non conveniens* analysis but did clarify in a footnote that plaintiffs are “not ‘foreign’ if they are based in the United States.” (Op. at 12-13, n. 6.)

5. The first-filed Canadian case has been ongoing during this Appeal. As conditions of the dismissal, the Falkbuilt defendants agreed to consent to Canadian jurisdiction, (App. Vol. 5. at 1447), to be bound by the terms of the preliminary injunction, and to facilitate entry of the preliminary injunction in the Canadian litigation. (App. Vol. 5 at 1351-53, Supp. Vol. 1 at 175-83.) Together with the entry of the preliminary injunction in Canada, DIRTT filed the dismissed Utah claims against Falkbuilt in the Canadian action, adding DIRTT U.S. as a plaintiff and Falkbuilt U.S. as a defendant. (Supp. Vol. 1 at 156-73.) The Canadian action was never stayed and is ongoing.

ARGUMENT

To obtain a stay of the mandate pending filing a petition for writ of certiorari, a movant must show that “the petition would present a substantial

question and that there is good cause for a stay.” Fed. R. App. P. 41(d)(1). In addition, a movant in the Tenth Circuit must show that there is “a substantial possibility that the petition for writ of certiorari would be granted.” 10th Cir. R. 41.1(B); *see also Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (“To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent.”). This standard is met here.

I. Falkbuilt’s Petition for Writ of Certiorari Presents Substantial Questions and There Is a Substantial Possibility the Petition Will Be Granted.

A stay of the mandate is warranted here because a petition for writ will present substantial questions and there is a substantial possibility that the Supreme Court will grant the petition. First, the issue presented is one of first impression. Specifically, the Court styled the question as: “Can a district court appropriately dismiss part of an action pursuant to the *forum non conveniens* doctrine while allowing the other part to proceed before it?” While the Court described this as a question of first impression *in the Tenth Circuit*, the specific question, as

articulated and under the facts of this case, is one of first impression to the Supreme Court as well.

In analyzing the question of first impression, the Tenth Circuit cited to cases from other circuits for the proposition that “there is support among the various circuits for the idea that all parties (and by extension the entire case) must be subject to the jurisdiction of an alternative forum in order for it to be considered available under *forum non conveniens*.” (Op. at 11.) The cases cited, however, do not expressly answer the Tenth Circuit’s question and do not go so far as to create *per se* rule foreclosing application of *forum non conveniens*, as the Tenth Circuit did. *See e.g., Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 835 (5th Cir. 1987) (“a foreign forum is available with the entire case and all parties can come within the jurisdiction of that forum” but case splitting was not at issue; no *per se* rule was created; and dismissal upheld) (*citing In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1165 (5th Cir. 1987) (dismissal improper in case where U.S. did not agree to jurisdiction in alternative forum; no *per se* rule created)); *Kamel v. Hill-Rom Co., Inc.*, 108 F.3d 799, 803 (7th Cir. 1997) (*citing In Re Air Crash* but case splitting not at issue; no *per se* rule created); *Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847, 867 (7th Cir. 2015) (*citing Kamel*; no *per se* rule created); *Associação Brasileira de Medicina de Grupo v. Stryker Corp.*, 891 F.3d 615, 620 (6th Cir. 2018) (case splitting not at issue, no *per se* rule.) Thus,

in its Opinion, the Court answered a question of first impression and to the extent the Court has gone further in its application than the other cited circuits, the petition for writ of certiorari would present substantial questions for the Supreme Court to resolve.

Second, the Court’s act of articulating a *per se* rule governing and foreclosing *forum non conveniens* is inconsistent with Supreme Court precedent and presents a substantial question that is substantially likely to be addressed, and reversed, by the Supreme Court. While the doctrine of *forum non conveniens* has roots in European common law, it “was not fully crystalized” until the Supreme Court’s decision in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248-49, n. 13 (1981). There, the Supreme Court recognized: “Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts . . .” 330 U.S. at 508.

The Supreme Court added to the foundational precepts of *forum non conveniens* in another case it decided the same day as *Gilbert*. In *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, the Court described how it had rejected “laying down a rigid rule to govern discretion,” and instead pronounced that “[e]ach case turns on its facts.” 330 U.S. 518, 528 (1947) (quoting *Williams*, 326 U.S. at 557); *see*

also *Am. Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994) (“We have . . . repeatedly rejected the use of *per se* rules in applying the doctrine.”). The Court noted that to “trace in advance the precise line of demarcation between the controversies affecting a foreign corporation in which jurisdiction will be assumed and those in which jurisdiction will be declined would be a difficult and hazardous venture.” *Koster*, 330 U.S. at 530 (quoting *Travis v. Knox Terpezone Co.*, 215 N.Y. 259, 109 N.E. 250 (1915)).

Years later, the Supreme Court affirmed that “the central focus of the *forum non conveniens* inquiry is convenience” and that its previous decisions “have repeatedly emphasized the need to retain flexibility.” *Piper Aircraft Co.*, 454 U.S. at 249; see also *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988) (“the district court is accorded substantial flexibility”). “If central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable.” *Piper Aircraft Co.*, 454 U.S. at 249-50. Doing so may result in “practical problems,” such as “American courts, which are already extremely attractive to foreign plaintiffs, . . . becom[ing] even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts.” *Id.* at 252. To maintain the flexibility of the doctrine, the Court stated that the “*forum non conveniens* determination is committed to the sound discretion of the trial court.” *Id.* at 257; see also *Dietz v. Bouldin*, 579 U.S. 40, 46

(2016) (stating a district court’s authority to dismiss for *forum non conveniens* is derived from its inherent power to achieve “the just, speedy, and inexpensive resolution of disputes.”).

Piper Aircraft is particularly instructive here. There, as the Supreme Court explained, the Third Circuit had “decided that dismissal [under *forum non conveniens*] is automatically barred if it would lead to a change in the applicable law unfavorable to the plaintiff.” 454 U.S. at 246 (emphasis added). The Supreme Court, however, rejected creation of that *per se* rule, finding that it was “inconsistent” with the Court’s precedent that has “repeatedly emphasized the need to retain flexibility.” *Id.* at 249. While the Supreme Court noted that “[a]t the outset of a *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum” it declined to accept the Third Circuit’s holding that a plaintiff could automatically defeat that threshold merely by showing that substantively law in the alternate forum is less favorable to plaintiffs. *Id.* 247, 254 and n.22 (emphasis added). “[I]f conclusive or substantial weight were given to the possibility of a change of law, the *forum non conveniens* doctrine would become virtually useless.” *Id.* 250. Instead, the Supreme Court made clear that it was not itself creating a *per se* rule—it was not holding that “the possibility of an unfavorable change in the law should *never* be a relevant consideration.” *Id.* at 254 (emphasis in original). Rather, the analysis of that factor would be on a case-by-

case basis and indeed, the Supreme Court went on to find that the possibility of a change in law did not foreclose application of the *forum non conveniens* doctrine in that case, and ultimately upheld dismissal. *Id.* at 255.

Thus, the core principles articulated by the Supreme Court are undercut by the creation of the *per se* rule foreclosing *forum non conveniens*. It strips district courts of their inherent authority and necessary discretion to decide *forum non conveniens* on a case-by-case basis, and this issue presents a substantial question for the Supreme Court.

Third, similar to *Piper*, by creating and simply applying the *per se* rule that *forum non conveniens* cannot be used as a tool to split or bifurcate a case, the Court did not fully address the district court’s reasoning for allowing the split of cases here. The district court acknowledged *forum non conveniens*’ central purpose of convenience, (App. Vol. 5 at 1427), and reasoned that its decision to dismiss “would allow this case to proceed on its narrow Utah focus against [the Hendersons],” (*Id.* at 1439), and that “[j]udicial economy favors resolution of the bulk of th[e] claims against Falkbuilt and Mr. Smed in one trial” in Canada, (*Id.* at 1442-43). Further, the district court noted that while Utah “certainly has connection to the claims against the Hendersons,” and that DIRTT’s claims against them “are more directly tied to Utah,” (*Id.* at 1443), Canada “has a much stronger local interest in the broad dispute between DIRTT and Falkbuilt, while Utah has an

interest in the proceeding with respect to the Hendersons,” (*Id.* at 1444). All considered, the Court found the “Canadian court is best suited to handle all of the claims between Falkbuilt, DIRTT, and Mr. Smed in one proceeding, which includes Falkbuilt’s counterclaims which I previously dismissed at DIRTT’s request at the last hearing. Therefore, the litigation and trial will be more convenient there.” (*Id.* at 1447. *See also* App. Sup. Vol. I at 268.) This case-specific analysis, however, was not analyzed by the Court in reversing the case, and instead, like the Third Circuit in *Piper*, the Court issued a *per se* rule that automatically foreclosed *forum non conveniens* because the district court split the cases.

Finally, the *per se* rule also has negative policy implications which will lead to the type of “practical problems” the Supreme Court cautioned against. For example, the *per se* rule could embolden foreign plaintiffs to expand foreign litigation into the United States, naming American defendants as a strategic tool to avoid litigating abroad in an appropriate forum. Indeed, the rule could make United States courts even more attractive to foreign plaintiffs and invite further congestion to already crowded courts. *See Piper Aircraft Co.*, 454 U.S. at 252.

Moreover, adding a peripherally related U.S. party would likely invite the plaintiff to bring new, separable claims than brought against the main parties in a foreign forum. The result (as in the present case): a foreign forum with some

claims and parties, a U.S. forum with other claims and parties, and both forums with claims and parties common to each suit. Thus, while the Court's new *per se* rule would prevent splitting of a *United States case*, it would allow, as here, a foundational split of the overarching *international dispute*, opening that dispute to multiple battlefronts for foreign plaintiffs. This does not serve *forum non conveniens*' central purpose of convenience, *Gschwind*, 161 F.3d at 605 (quoting *Piper Aircraft Co.*, 454 U.S. at 256), which aims to *consolidate* the entire international *dispute*.

Additionally, the *per se* rule foreclosing *forum non conveniens* forces defendants to shoulder the burden of costly litigation as they await either the foreign or United States proceedings to become *res judicata* of the other. "There is no reason for identical suits to be proceeding in different courts in different countries thousands of miles apart. Such parallel proceedings incite a race to judgment in the hope that the judgment in the home forum will favor the home litigant and be usable to block the other suit by interposing a defense of *res judicata* in it." *U.S.O. Corp. v. Mizuho Holding Co.*, 547 F.3d 749, 750 (7th Cir. 2008). And there is no reason to suspect that a legitimate foreign judgment will not be recognized in the United States for the purposes of *res judicata*. See *Soc'y of Lloyd's v. Reinhart*, 402 F.3d 982, 999 (10th Cir. 2005) ("principles of comity require recognition of a [legitimate] foreign judgment"); *Smith v. Toronto-*

Dominion Bank, 166 F.3d 1222 at *2, 5 (10th Cir. 1999) (unpublished) (compiling cases of “the long history of other courts recognizing Canadian judgments under principles of comity” and holding two Canadian judgments estopped a plaintiff from asserting claims against a defendant); *Phillips USA, Inc. v. Allflex USA, Inc.*, 77 F.3d 354, 359-61 (10th Cir. 1996) (holding an Australian judgment’s *res judicata* effect barred a United States suit). The operation of *res judicata* is also is a burden on whatever court fails to reach a dispositive ruling first. The judicial resources are expended for no other reason than the court lost a race to judgment with a rival tribunal. *See Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 435 (2007) (“Judicial economy is disserved by continuing litigation in the Eastern District of Pennsylvania given the proceedings long launched in China.”).

Ultimately, this case presents a question of first impression and in answering that question, the Court’s creation and application of its *per se* rule departs from the well-established Supreme Court precedent and limits a district court’s ability to apply *forum non conveniens* on a case-by-case basis. The rule goes further than the other cited circuits, and could have significant, negative practical consequences. Accordingly, a petition for writ of certiorari on these issues would present substantial questions and there is a substantial possibility that the Supreme Court would grant certiorari and reverse.

II. There Is Good Cause for a Stay of This Court's Mandate.

Finally, in addition to the reasons set forth in Section I, there is good cause to grant a stay of the mandate while the petition for writ of certiorari is filed and considered. As this Court acknowledged, the first-filed case has been proceeding in Canada since May 2019. That case was never stayed during this appeal and instead, all those claims continue to be litigated together.

If the Court issues the mandate, the parties will have to begin the complicated process of untangling DIRTT's dismissed claims against Falkbuilt out of the Canadian action to be reset and litigated in Utah. This process will be complex, time consuming, and costly for all parties. For example, the district court and the parties will have to resolve issues such as the discovery that was already permitted and is ongoing in Canada and its impact on the remanded claims in Utah where Canadian discovery extends far beyond the limits permitted in the United States. The court and the parties will also have to resolve exactly how to untangle the litigation. The Canadian action includes claims and parties unique to the first-filed case, but also includes parties and facts that overlap both cases. The Canadian action includes Falkbuilt's counterclaims against DIRTT which were dismissed and DIRTT's claims against Falkbuilt and Mr. Smed, which were dismissed to Canada by the district court for *forum non conveniens*. All of these issues may be

moot, however, if the Supreme Court were to grant the petition for certiorari and uphold the district court's decision.

This motion is not brought for the purposes of delay. Falkbuilt's petition for writ of certiorari would present substantial questions to the Supreme Court for consideration. Staying this case until the questions are resolved definitively, and before the district court and the parties undergo the burdensome, complicated, and costly process of untangling and resetting the litigation, is an important consideration, demonstrates good cause, and supports a stay in this case. *See e.g., U.S. ex rel. Chandler v. Cook Cnty.*, 282 F.3d 448, 451 (7th Cir. 2002) (agreeing that party's desire not to be put to the further expense of preparing for trial until the legal question of immunity was decided, definitively, was an important consideration, and granting stay of mandate).

CONCLUSION

For the forgoing reasons, Falkbuilt respectfully requests that this Court stay the issuance of its mandate until the expiration of the time allowed for filing of a petition for certiorari and if a petition is filed within that time, that the stay remain in force until the final disposition of all proceedings before the Supreme Court.

Dated this 25th day of April, 2023. Respectfully submitted,

/s/ Artemis D. Vamianakis

Artemis D. Vamianakis

Tanner J. Bean

FABIAN VANCOTT

95 South State Street, Suite 2300

Salt Lake City, UT 84111

Telephone: (801) 531-8900

avamianakis@fabianvancott.com

tbean@fabianvancott.com

Counsel for Appellees

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

This document complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this document contains 3,850 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface with serifs using 14-point font size in Times New Roman.

/s/ Artemis D. Vamianakis

CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2023, I caused the foregoing **MOTION FOR STAY OF MANDATE PENDING PETITION FOR WRIT OF CERTIORARI** to be filed using the court’s CM/ECF system, which will send notification of such filing to the following:

Jeffrey J. Mayer
Catherine A. Miller
Akerman LLP
71 So. Wacker Drive, 47th Floor
Chicago, IL 60606
jeffrey.mayer@akerman.com
catherine.miller@akerman.com

Chad E. Nydegger
cnydegger@wnlaw.com
Workman Nydegger
60 East South Temple, Suite 1000
Salt Lake City, Utah 84111
cnydegger@wnlaw.com,

Attorneys for Appellants

/s/ Artemis D. Vamianakis

Case No. 21-4078

In the
United States Court of Appeals
for the
Tenth Circuit

DIRTT ENVIRONMENTAL SOLUTIONS, INC.;
DIRTT ENVIRONMENTAL SOLUTIONS, LTD,

Plaintiffs-Appellants,

v.

FALKBUILT LTD.; FALKBUILT, INC.; MOGENS SMED,

Defendants-Appellees,

and

LANCE HENDERSON; KRISTY HENDERSON;
FALK MOUNTAIN STATES, LLC,

Defendants.

*Appeal from a Decision of the United States District Court for the District of Utah – Salt Lake City,
Case No. 1:19-CV-00144-DBB-DBP • Honorable David Barlow, U.S. District Judge*

APPELLANTS' APPENDIX
VOLUME 1 OF 6 – Pages 1 - 298

JEFFREY J. MAYER
CATHERINE A. MILLER
AKERMAN LLP
71 South Wacker Drive, 47th Floor
Chicago, Illinois 60606
(312) 634-5700 Telephone
(312) 424-1900 Facsimile
jeffrey.mayer@akerman.com
catherine.miller@akerman.com

CHAD E. NYDEGGER
WORKMAN NYDEGGER
60 East South Temple
Suite 1000
Salt Lake City, Utah 84111
(801) 533-9800 Telephone
(801) 328-1707 Facsimile
cnydegger@wnlaw.com



TABLE OF CONTENTS

VOLUME 1 OF 6 (1 to 298)

Civil Docket Sheet, District of Utah, 1:19-cv-00144-DBB-DBP 1

2 Verified Complaint filed 12/11/1926

 Exhibit A – Correspondence dated May 21, 2009 from DIRTT
 to Lance Henderson.....60

 Exhibit B – DIRTT Computer/Data Security Policy63

 Exhibit C – Administrative Garnishment Order65

 Exhibit D – DIRTT Regional Partner Agreement (2018).....81

 Exhibit E (Filed Under Seal)
 (See full unredacted document at Volume 6 at 1455)112

 Exhibit F (Filed Under Seal)
 (See full unredacted document at Volume 6 at 1461)113

 Exhibit G (Filed Under Seal)
 (See full unredacted document at Volume 6 at 1472)114

 Exhibit H – Correspondence dated November 15, 2019
 from Metz Lewis to Amanda Buczynski115

 Exhibit I – (Filed Under Seal)
 (See full unredacted document at Volume 6 at 1480)118

 Exhibit J – Dropbox set up119

 Exhibit K – Dropbox set up.....122

 Exhibit L – Dropbox set up125

 Exhibit M – (Filed Under Seal)
 (See full unredacted document at Volume 6 at 1503)129

 Exhibit N – (Filed Under Seal)
 (See full unredacted document at Volume 6 at 1507)130

 Exhibit O – Declaration of Julian Grijns.....131

5 Plaintiff’s Motion for a Preservation Order and, Following Expedited Discovery, a Limited Preliminary Injunction to Preserve the Status Quo filed 12/12/19136

Exhibit A – Order Granting Motion for Preliminary Injunction161

Exhibit B – Order Granting Motion for Preservation Order164

40 Notice of Dismissal of Falkbuilt LLC filed 01/22/20166

42 Falkbuilt Ltd.’s Answer to Verified Complaint and Counterclaim filed 02/05/20168

Exhibit A – ICANN Doman Name Registration Data Lookup.....217

Exhibit B – Complaint at Website220

Exhibit C – Complaint.pdf Metadata.....254

Exhibit D – DIRTT Press Release from Website.....255

62 Falkbuilt Ltd.’s First Amended Counterclaim (Jury Demanded) filed 03/18/20259

64 Notice of Preliminary Injunction to Preserve the Status Quo filed 04/02/20 regarding Doc. 61 Order290

VOLUME 2 OF 6 (299 to 596)

72 Falkbuilt Ltd.’s Short Form Motion for Protective Order from Discovery until Plaintiff Identifies its Alleged Trade Secrets filed 06/15/20299

Exhibit A – Plaintiff’s First Requests for Production of Documents and Requests for Production of Documents and Request for Inspection to All Defendants304

Exhibit B – Notice of Subpoena318

Exhibit A – Notice of Preliminary Injunction to Preserve the Status Quo334

Exhibit C – Correspondence from Fabian VanCott to Akerman LLP dated April 23, 2020344

Exhibit D – Correspondence from Akerman to Fabian VanCott dated April 28, 2020350

Exhibit E – Email from Akerman to Jason Hardin and Bruce Badger dated May 4, 2020356

Exhibit F – Correspondence from Fabian VanCott to Akerman LLP dated May 5, 2020358

Exhibit G – Correspondence from Akerman to Fabian VanCott dated June 5, 2020377

Exhibit H – Correspondence from Fabian VanCott to Akerman LLP dated June 11, 2020390

73 Plaintiff’s Short Form Motion to Compel Falkbuilt’s Responses to Document Requests filed 06/16/20397

Exhibit D – Falkbuilt Ltd.’s First Disclosure Required by Stipulated Injunction to Preserve the Status Quo403

Exhibit E - Correspondence from Akerman LLP to Fabian VanCott dated June 5, 2020413

76 Plaintiff’s Response to Falkbuilt Ltd.’s Short Form Motion for Protective Order from Discovery filed 06/16/20.....426

77 Falkbuilt’s Short Form Motion for Protective Order and to Quash Subpoenas filed on 06/16/20431

Exhibit A – Notice of Subpoena.....436

Exhibit B – Notice of Subpoena462

Exhibit C – Declaration of Barrie Loberg488

Exhibit D – Email from Akerman to Jason Hardin and Bruce Badger dated June 16, 2020493

Exhibit E – Order Granting Falkbuilt Ltd.’s Short Form Motion for Protective Order and to Quash Subpoenas498

78 Henderson Defendants’ Short Form Motion to Require Plaintiff to Identify Its Alleged Trade Secrets filed 06/17/20500

Exhibit A – Defendants Lance Henderson, Kristy Henderson and Falk Mountain States, LLC’s Response to Plaintiff’s First Requests for Documents and Production506

79 Order Granting Falkbuilt Ltd.’s Short Form Motion for Protective Order from Discovery Until Plaintiff Identifies its Alleged Trade Secrets filed 06/17/20546

80 Order Granting Plaintiff’s Motion to Seal Exhibits B and C to its Motion to Compel filed 06/18/20548

81 Plaintiff’s Response to Falkbuilt’s Short Form Motion for Protective Order and to Quash Subpoenas filed on 06/16/20.....549

Exhibit A – Notice of Preliminary Injunction to Preserve the Status Quo554

Exhibit B – Amanda Buczysnki’s LinkedIn Profile.....564

Exhibit C – Correspondence from Akerman LLP to Fabian VanCott dated April 28, 2020581

Exhibit D – Correspondence from Akerman LLP to Fabian VanCott dated June 5, 2020587

82 Plaintiff’s Short Form Motion to Compel Production of Falkbuilt, Ltd.’s Information from Canadian Employees filed 06/18/20592

VOLUME 3 OF 6 (597 to 896)

Exhibits to Dkt. 82 continued

Exhibit A – Falkbuilt Ltd.’s Supplemental Responses to Plaintiff’s First Requests for Production of Documents.....597

Exhibit B – Filed Under Seal
(*See full unredacted document at Volume 6 at 1510*)640

Exhibit C – Order on Plaintiff’s Short Form Motion to Compel Production of Falkbuilt Ltd. Information from Canadian Employees641

85 Plaintiff’s Response to Henderson Defendants’ Short Form Motion to Require Plaintiff to Identify its Alleged Trade Secrets filed 06/22/20643

Exhibit A – Defendants Lance Henderson, Kristy Henderson and Falk Mountain States, LLC’s First Disclosure of Information Pursuant to Preliminary Injunction Order649

Exhibit B – Correspondence from Manning Curtis Bradshaw & Bednar to Akerman LLP dated June 17, 2020654

Exhibit C – DIRTT Environmental Solutions, Inc.’s Responses to Falkbuilt Ltd.’s First Set of Interrogatories658

86 Response to Plaintiff’s Short Form Motion to Compel Falkbuilt Ltd.’s Responses to Document Requests filed 06/23/20685

Exhibit A – Email strings between Jason Hardin to Akerman.....690

Exhibit B – Falkbuilt Ltd.’s Supplemental Responses to Plaintiff’s First Requests for Production of Documents.....704

Exhibit C – Email from Sonja Burdash to Akerman.....746

Exhibit D – Plaintiff’s First Requests for Production of Documents and Request for Inspection to All Defendants.....752

87 Corrected Exhibit A – Communications – Replacing Dkt. 86-1 filed 06/23/20 as Exhibit A to Response to Plaintiff’s Short Form Motion to Compel Falkbuilt Ltd.’s Responses to Document Requests (Filed 06/23/20 as Dkt. 86).....765

88 Plaintiff’s Short Form Motion to Compel Henderson Defendants’ Document Production filed 06/24/20784

Exhibit A – Correspondence from Manning Curtis Bradshaw & Bednar to Akerman LLP dated June 17, 2020789

Exhibit B – Plaintiff’s First Requests for Production of Documents and Request for Inspection to All Defendants.....793

Exhibit C – Defendants Lance Henderson, Kristy Henderson and Falk Mountain States, LLC’s First Disclosure of Information Pursuant to Preliminary Injunction Order807

Exhibit D – Filed Under Seal
(*See full unredacted document at Volume 6 at 1623*)812

Exhibit E – Correspondence from Akerman LLP to Manning Curtis dated June 5, 2020813

Exhibit F – Correspondence from Manning Curtis Bradshaw & Bednar to Akerman LLP dated June 15, 2020823

89	Plaintiff’s Motion to File Under Seal Exhibit D to its Short Form Motion to Compel Henderson Defendants’ Document Production filed 06/24/20	832
	Exhibit A – Order Granting Plaintiff’s Motion to File Under Seal Exhibit D to its Motion to Compel Henderson Defendants	834
90	Sealed Document regarding Redacted Motion to Expedite Plaintiff’s Short Form Motion to Compel Henderson Defendants’ Document Production and Memorandum in Support Filed by DIRTT filed on June 24, 2020	835
91	Falkbuilt, Ltd.’s (1) Response to Plaintiff’s Short Form Motion to Compel Production of Falkbuilt, Ltd. Information from Canadian Employees, and (2) Request for Extended Briefing filed 06/25/20	837
93	Notice of Newly Obtained Supplemental Information Relevant to Falkbuilt Ltd.’s Motion for Protective Order and to Quash Subpoenas filed on 07/01/20	842
	Exhibit A – Correspondence from Crawford & Bangs, LLP to Akerman regarding Objection to Subpoenas.....	846
	Exhibit B – Email string regarding Subpoenas	849
94	Henderson Defendants’ Response to Plaintiff’s Short Form Motion to Compel Henderson Defendants’ Document Production filed 07/01/20	853
	Exhibit A – Proposed Order Denying Plaintiff’s Short Form Motion to Compel Henderson Defendants’ Document Production	858
117	First Amended Complaint Jury Demanded filed 10/20/20	859

VOLUME 4 OF 6 (897 to 1188)

(continuation from Volume III)

117	First Amended Complaint Jury Demanded filed 10/20/20	897
	Exhibit A – Correspondence from DIRTT to Lance Henderson dated May 21, 2009	940
	Exhibit B – DIRTT Computer/Data Security Policy.....	943

Exhibit C – Administrative Garnishment Order/Office of State Debt Collection.....945

Exhibit D – DIRTT Regional Partner Agreement.....961

Exhibit E – Filed Under Seal Pursuant to Court Order
(*See full unredacted document at Volume 6 at 1455*)992

Exhibit F – Filed Under Seal Pursuant to Court Order
(*See full unredacted document at Volume 6 at 1461*)993

Exhibit G – Filed Under Seal Pursuant to Court Order
(*See full unredacted document at Volume 6 at 1472*)994

Exhibit H – Correspondence from Metz Lewis Brodman Must O’Keefe to Amanda Buczynski.....995

Exhibit I – Filed Under Seal Pursuant to Court Order
(*See full unredacted document at Volume 6 at 1480*)998

Exhibit J – Email regarding DropBox account.....999

Exhibit K – Email regarding DropBox account1002

Exhibit L – Email regarding DropBox account.....1005

Exhibit M – Filed Under Seal Pursuant to Court Order
(*See full unredacted document at Volume 6 at 1503*)1009

Exhibit N – Filed Under Seal Pursuant to Court Order
(*See full unredacted document at Volume 6 at 1507*)1010

Exhibit O – Declaration of Julian Grijns1011

Exhibit P – Filed Under Seal Pursuant to Court Order
(*See full unredacted document at Volume 6 at 1760*)1016

Exhibit Q – Falkbuilt Folding Glass Wall.....1017

Exhibit R – Falkbuilt Digital Component Construction.....1019

Exhibit S – Tweet Threads1038

124 Memorandum Decision and Order filed 10/23/20.....1048

129 Rule 72 Objection and Rule 60(b)(1) Motion to Reverse Magistrate Judge Pead’s Memorandum Decision and Order [Docket No. 124] filed 11/06/20.....1051

Exhibit A – Form 10 Amended Amended Statement of Claim1066

131 Answer of Defendant Lance Henderson to Amended Complaint
filed 11/19/20.....1086

132 Answer of Defendant Kristy Henderson to Amended Complaint
filed 11/19/20.....1120

133 Answer of Defendant Falk Mountain States, LLC to Amended
Complaint filed 11/19/20.....1155

VOLUME 5 OF 6 (1189 to 1454)

134 Motion to Dismiss First Amended Complaint as to Defendants
Falkbuilt Ltd., Falkbuilt, Inc. and Mogens Smed filed 11/19/201189

Exhibit 1 – Form 10 Statement of Claim.....1221

Exhibit 2 – Executive Employment Agreement Amendment between
DIRTT and Mogens Smed.....1240

135 Falkbuilt Ltd.’s Response to Plaintiffs’ Rule 72 Objection and
Rule 60(b)(1) Motion to Reverse Magistrate Judge Pead’s
Memorandum Decision and Order [Docket No. 124] filed 11/20/201258

138 Reply in Support of Rule 72 Objection and Rule 60(b)(1) Motion
to Reverse Magistrate Judge Pead’s Memorandum Decision and
Order [Docket No. 124] filed 11/30/201273

139 Opposition to Motion to Dismiss First Amended Complaint as to
Falkbuilt Ltd., Falkbuilt, Inc. and Mogens Smead [Dkt. 134]
filed 12/17/20.....1287

143 Reply Memorandum in Support of Motion to Dismiss First
Amended Complaint as to Falkbuilt, Ltd., Falkbuilt, Inc. and
Mogens Smed (Dkt. 134) filed 01/15/211319

145 Memorandum Decision and Order filed 01/25/211333

146 Memorandum Decision and Order Denying Motion to Compel
filed 01/27/211342

147 Memorandum Decision and Order Granting Motion to Compel
Production of Falkbuilt, Ltd., Information from Canadian Employees
filed 01/27/211345

162 Minute Entry for Proceedings held before Judge Barlow: Motion Hearing held on 05/19/21 regarding Motion to Dismiss and Memorandum in Support of First Amended Complaint as to Defendants Falkbuilt Ltd., Falkbuilt, Inc. and Mogens Smed filed by Falkbuilt Ltd., Mogens Smed, Falkbuilt, Inc.1349

163 Notice of Consent: (1) to Canadian Jurisdiction by Falkbuilt, Inc., and (2) To Entry of Stipulated Preliminary Injunction in the Court of Queen’s Bench, Alberta as to Falkbuilt Ltd., Falkbuilt, Inc. and Mogens Smed filed 05/21/21.....1351

164 Memorandum Decision and Order Granting [134] Motion to Dismiss First Amended Complaint as to Defendants Falkbuilt Ltd., Falkbuilt Inc. and Mogens Smed and Denying Plaintiffs’ Oral Motion to Amend filed 05/21/211354

168 Motion for Rule 54(b) Certification of Docket No. 164 filed 06/04/211358

178 Memorandum Decision and Order Granting [168] Motion for Rule 54(b) Certification of Docket No. 164 filed 07/01/211367

166 Motion Hearing Before Judge David Barlow on May 19, 20211369

**VOLUME 6 OF 6 (1455 to 1760)
(FILED UNDER SEAL)**

Exhibits to Verified Complaint, Dkt. 2:

2-5 Exhibit E – Employment Contract between DIRTT and a former employee.....1455

2-6 Exhibit F – Spreadsheet substantiating a former DIRTT employee taking confidential DIRTT electronic files1461

2-7 Exhibit G – Spreadsheet substantiating a former DIRTT employee’s upload of a “large clients” PowerPoint file to Dropbox1472

2-9 Exhibit I – String of emails from a former DIRTT employee to her personal email account attaching DIRTT’s pricing and estimates.....1480

2-13 Exhibit M – Email sent outside DIRTT containing a sensitive, confidential DIRTT document.....1503

2-14 Exhibit N – Email forwarded by a former DIRTT employee, who now works for defendant Falkbuilt, to her personal email account that contains DIRTT’s confidential business information1507

82-2 Exhibit B to DIRTT’s Motion to Compel Production of Falkbuilt Information from Canadian Employees – Email from a former DIRTT employee to his personal email account attaching DIRTT’s confidential pricing and project information1510

88-4 Exhibit D to DIRTT’s Motion to Compel Production of Henderson Defendants’ Document Production – Spreadsheet substantiating a former DIRTT employee’s taking confidential DIRTT electronic files1623

Exhibits to Amended Complaint, Dkt. 117:

117-5 Exhibit E – Employment Contract between DIRTT and a former employee1704

117-6 Exhibit F – Spreadsheet substantiating a former DIRTT employee taking confidential DIRTT electronic files1710

117-7 Exhibit G – Spreadsheet substantiating a former DIRTT employee’s upload of a “large clients” PowerPoint file to Dropbox1721

117-9 Exhibit I – String of emails from a former DIRTT employee to her personal email account attaching DIRTT’s pricing and estimates1729

117-13 Exhibit M – Email sent outside DIRTT containing a sensitive, confidential DIRTT document1752

117-14 Exhibit N – Email forwarded by a former DIRTT employee, who now works for defendant Falkbuilt, to her personal email account that contains DIRTT’s confidential business information1756

117-16 Exhibit P – listing of bids DIRTT lost to Falkbuilt and projects that have been flipped from DIRTT to Falkbuilt, and contains DIRTT’s sensitive, confidential business information, including client names and project locations1759

Chad E. Nydegger (USB 9962)
cnydegger@wnlaw.com
Workman Nydegger
60 East South Temple, Suite 1000
Salt Lake City, Utah 84111
Telephone: (801) 533-9800
Facsimile: (801) 328-1707

Jeffrey J. Mayer (*pro hac vice to be filed*)
Jeffrey.Mayer@akerman.com
Catherine A. Miller (*pro hac vice to be filed*)
Catherine.Miller@akerman.com
Timothy K. Sendek (*pro hac vice to be filed*)
Tim.Sendek@akerman.com
Akerman LLP
71 S. Wacker Drive, 47th Floor
Chicago, Illinois 60606
Telephone: (312) 634-5700
Facsimile: (312) 424-1934

Attorneys for Plaintiff, DIRTT Environmental Solutions, Inc.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, NORTHERN DIVISION**

DIRTT ENVIRONMENTAL SOLUTIONS,
INC.

Plaintiff,

v.

LANCE HENDERSON, KRISTY
HENDERSON, FALKBUILT, LLC,
FALKBUILT LTD., and FALK
MOUNTAIN STATES, LLC

Defendants.

VERIFIED COMPLAINT

Civil Case No: 1:19-cv-144-DB

District Judge Dee Benson

JURY DEMANDED

DIRTT Environmental Solutions, Inc. (“DIRTT”), by its undersigned counsel, files this
Complaint against Defendants Falkbuilt, LLC, Falkbuilt Ltd. and Falk Mountain States LLC

(collectively “Falkbuilt”), Lance Henderson and Kristy Henderson. As explained in further detail below, former employees of Plaintiff have taken and used DIRTT confidential information in an attempt to steal customers, opportunities, and business intelligence, with the aim of setting up a competing national business. Among other things: (1) Defendant Lance Henderson uploaded over 35 gigabytes of DIRTT data, which included confidential and proprietary information, to a personal cloud-based data storage location; (2) multiple former DIRTT employees, who are now working for or on behalf of Falkbuilt, all set up personal Dropbox accounts within a couple weeks, or even a few days, prior to leaving DIRTT’s employ; (3) Kristy Henderson, Lance Henderson’s wife and an employee of a former DIRTT partner, incorporated Defendant Falk Mountain States one month before Mr. Henderson left DIRTT’s employ; and (4) Amanda Buczynski, also a former DIRTT employee, immediately after her departure from DIRTT reached out to DIRTT customers on behalf of Falkbuilt in an effort to compete on ongoing projects and undercut DIRTT’s bids by utilizing DIRTT confidential information. In support of its Verified Complaint, DIRTT states as follows:

BACKGROUND OF THE PARTIES

1. Plaintiff DIRTT is a Colorado company, with its headquarters and principal place of business in Calgary, Alberta, Canada.
2. DIRTT is an innovative, technology-driven company that operates in Canada, the United States and other jurisdictions around the world. DIRTT’s sales offices in Salt Lake City, Phoenix, New York, Chicago, Calgary, and Toronto are supported by its factories and distribution centers across the United States and Canada.
3. DIRTT offers products and services for the digital design of component, prefabricated construction to build out interior spaces in buildings. Among many other services,

DIRTT offers clients the ability to utilize virtual-reality to design office, healthcare, and other interior spaces using modular components which can be rapidly and affordably assembled in DIRTT's factories and on-site.

4. DIRTT is an innovator and leader in the prefabricated, interior design and construction market space and has been granted over 300 U.S. and foreign patents for the technology in both its building products themselves and the technology to design and fabricate those products.

5. DIRTT is an inventive manufacturing company featuring a proprietary software and virtual-reality visualization platform coupled with vertically integrated manufacturing that designs, configures and manufactures prefabricated interior construction solutions used primarily in commercial spaces across a wide range of industries and businesses. DIRTT combines innovative product design with its industry-leading, proprietary ICE Software ("ICE Software" or "ICE"), and technology-driven, lean manufacturing practices and sustainable materials to provide an end-to-end solution for the traditionally inefficient and fragmented interior construction industry. DIRTT creates customized interiors with the aesthetics of conventional construction, but with greater cost and schedule certainty, shorter lead times, greater future flexibility, and better environmental sustainability than conventional construction.

6. DIRTT offers interior construction solutions throughout the United States and Canada, as well as in select international markets, through a network of independent distribution partners ("Distribution Partners") and an internal sales team. The Distribution Partners use the ICE Software to work with end users to envision and design their spaces. Orders are electronically transmitted through ICE to DIRTT's manufacturing facilities for production,

packing and shipping. DIRTT's Distribution Partners then coordinate the receipt and installations of DIRTT's interior construction solutions at the end users' locations.

7. ICE generates valuable proprietary information, including cost and margin information, the components of the bill of materials for individual companies, detailed plans and specifications for projects and customer requirements.

8. Apart from ICE, DIRTT's internal restricted information and communications network contains other sources of valuable information, including prospective and current customer databases that include information on potential projects as well as the status of all pending projects, and a restricted site for individual-approved users to access called "MyDIRTT", which contains confidential technical information.

9. When logging into ICE, the authorized user is directed to a statement regarding the confidential and proprietary nature of the ICE information, including specifically identifying the confidential nature of any "compilation" of information regarding a project or customer.

10. In addition to sales and marketing, Distribution Partners provide value throughout the planning, design and installation/construction process. At the pre-construction stage, Distribution Partners provide design assistance services to architects, designers and end clients. Through the installation/construction process, Distribution Partners act as specialty subcontractors to the general contractors and provide installation and other construction services. Post move-in, Distribution Partners provide warranty work, ongoing maintenance and repurposing support. The Distribution Partners operate under Distribution Partner agreements with DIRTT, which outline sales goals and marketing territories and provide the terms and conditions upon which the Distribution Partners market and sell DIRTT products.

11. DIRTТ also operates several “DIRTT Experience Centers” (“DXCs”) (previously referred to as “Green Learning Centers”), which are display areas used to showcase DIRTТ’s products and services. DIRTТ generally requires its Distribution Partners to construct and maintain a DXC in their local markets. There are currently over 80 DXCs showcasing DIRTТ’s products and services across North America, the Middle East and India.

12. DIRTТ’s principal place of business is located in Calgary, Alberta, Canada. DIRTТ also conducts aspects of its North American business in other cities, including Salt Lake City, Utah, Chicago, Illinois, New York, New York, and Phoenix, Arizona. It operates manufacturing facilities in Calgary, Alberta, Phoenix, Arizona and Savannah, Georgia. It currently has a manufacturing facility under construction near Charlotte, South Carolina.

13. Mr. Henderson is an individual and a resident of Davis County, Utah.

14. Mr. Henderson was a DIRTТ employee responsible for sales and marketing from at least May 2009 to August 2, 2019 when he departed DIRTТ of his own initiative.

15. Kristy Henderson is an individual and a resident of Davis County, Utah.

16. Falk Mountain States, LLC is a Utah Limited Liability Company incorporated in July 2019 by Kristy Henderson, with an address and registered agent in Logan, Utah.

17. Falkbuilt, LLC is a Texas Limited Liability Company incorporated in July 2019. Falkbuilt was established to emulate DIRTТ’s business model by departed DIRTТ employees, including Mr. Henderson and Mogens Smed.

18. Falkbuilt Ltd. is a Canadian company with offices in Calgary, Alberta, Canada.

19. Until January 2018, Mr. Smed was the Calgary-based CEO of DIRTТ. He subsequently left DIRTТ in September 2018. Pursuant to his obligations as a DIRTТ employee, including fiduciary obligations, and the executive employment agreement signed by him, Mr.

Smed agreed to, among other things, refrain from competing with DIRTT and refrain from soliciting DIRTT employees for a period of two years. Nevertheless, Mr. Smed has done, and continues to do, exactly what he is not permitted to do, namely, establishing a competing business, and soliciting DIRTT employees to leave DIRTT and join his competing business, Falkbuilt. As can be seen from Falkbuilt's website, (www.falkbuilt.com) (advertising interior component construction for healthcare, commercial and office, and education) Falkbuilt competes in the same general market as DIRTT (www.dirtt.com) (advertising projects in education, healthcare, office space, residential, government, and hospitality). Additionally, Falkbuilt's webpages and designs also mimic DIRTT's appearance. To date, over 50 DIRTT employees have joined Falkbuilt. The breach of Mr. Smed's common law employment obligations and express contractual obligations to DIRTT is the subject of ongoing litigation in Alberta, Canada and will be adjudicated by the Canadian courts. This particular action concerns the theft and improper use of DIRTT's confidential information in the United States.

JURISDICTION AND VENUE

20. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331, as this action arises under the following federal statutes: 18 U.S.C. § 1836, 18 U.S.C. § 1030 and 18 U.S.C. § 2701. This Court has jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367, as they are so related to the claims within the Court's original jurisdiction that they form part of the same case or controversy. The Court also has jurisdiction over the state law claims pursuant to 28 U.S.C. § 1332 as there is complete diversity and the amount in controversy exceeds the statutory minimum.

21. This Court has personal jurisdiction over Mr. Henderson and Mrs. Henderson because they are residents of Davis County, Utah.

22. This Court has personal jurisdiction over Falk Mountain States, LLC because it is incorporated in Utah.

23. This Court has personal jurisdiction over Falkbuilt, LLC because Falkbuilt, LLC regularly conducts business in the State of Utah, specifically with Falk Mountain States, Mr. Henderson works for Falkbuilt, LLC or on its behalf in the State of Utah, and Falkbuilt, LLC should have reasonably anticipated being hailed into a Utah court over claims based on the DIRTT confidential information it obtained from Mr. Henderson, a Utah resident.

24. This Court has personal jurisdiction over Falkbuilt Ltd. because Falkbuilt Ltd. regularly conducts business in the State of Utah, specifically with Falk Mountain States, Mr. Henderson works for Falkbuilt Ltd. or on its behalf in the State of Utah, and Falkbuilt Ltd. should have reasonably anticipated being hailed into a Utah court over claims based on the DIRTT confidential information it obtained from Mr. Henderson, a Utah resident.

25. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(2) as a substantial portion of the events giving rise to this action occurred in this district, and pursuant to §1391(b)(1) as the Hendersons and Falk Mountain States reside in this district.

FACTUAL BACKGROUND

26. Since his difficult departure from DIRTT in September 2018, Mr. Smed and those acting in concert with him, including the newly-formed Falk entities, have engaged in an ongoing attempt to replicate DIRTT's business, products and business model through improper means, including but not limited to utilizing DIRTT confidential information and trade secrets to identify and approach customers and potential customers, utilizing pricing and margin information to undercut DIRTT's quotes, and utilizing DIRTT's patented and trade secret technology to gain an unfair advantage in product offerings.

27. Despite public statements to the contrary by Mr. Smed that Falkbuilt is not a competitor of DIRTT, DIRTT recently determined, based on a forensic study of electronic information, that Falkbuilt was built upon, and is dependent on, both information and employees obtained from DIRTT. (Exhibit O at ¶¶ 6, 9). In fact, Falkbuilt would likely not be operating today but for the customer contact information, pricing, estimates and other DIRTT confidential information and trade secrets taken by former DIRTT employees, including Mr. Henderson, for use at their new business started by Mr. Smed. Based on information obtained by DIRTT, as well as publicly available information, Falkbuilt is directly competing with DIRTT.

28. Upon information and belief, Mr. Smed not only actively recruited DIRTT employees to join Falkbuilt, including meeting with certain DIRTT employees in advance of their leaving DIRTT's employ, but also encouraged them to solicit other DIRTT employees to work for Falkbuilt. Additionally, on information and belief, Mr. Smed emboldened those same individuals to take with them DIRTT information that they utilized while in DIRTT's employ, and to misappropriate DIRTT's designs and know-how in order to assist Falkbuilt in quickly getting up-to-speed and operational, and to undercut DIRTT's bids and estimates, with the end goal of ultimately taking DIRTT's customers and projects. It is no coincidence that Falkbuilt is bidding on the same projects as DIRTT and contacting DIRTT's customers and prospective customers. This conduct also entirely undercuts Mr. Smed's public statements that Falkbuilt is not competing with DIRTT.

A. The Hendersons' Utah Conspiracy

29. DIRTT hired Mr. Henderson as a sales representative. In that capacity, he was entrusted with a variety of significant confidential and proprietary information and trade secrets pertaining to DIRTT's business ("DIRTT Confidential Business Information") and owed DIRTT a fiduciary duty with respect to such DIRTT Confidential Business Information. At the time he

was hired, Mr. Henderson agreed in writing to maintain the confidentiality of DIRTT's trade secrets and confidential information.

30. In a May 21, 2009 agreement, Mr. Henderson agreed to DIRTT's terms and conditions regarding his employment, including that he "would not . . . divulge to any other person whatsoever and will use [his] best endeavors to prevent unauthorized publication or disclosure of any trade secret, manufacturing process or confidential information concerning the Company and related companies or the finances of the Company and related companies or any of their respective dealings, transactions or affairs which may come to [his] knowledge during or in the course of [his] employment." (Exhibit A).

31. On June 25, 2019, Mr. Henderson acknowledged DIRTT's Computer/Data Security Policy (Exhibit B), which states in relevant part that:

This document is not intended to displace any non-disclosure obligations, but rather to ensure proper data security. Please read the following provisions carefully and thoroughly before signing.

POLICIES / PROCEDURES

1. Personnel are prohibited from accessing any computer or network location for which they have not previously received proper authorization, and from altering any data or database other than that which is specifically authorized as required in the performance of his or her job functions.

2. Sensitive or confidential data/information may not be stored or referenced via systems or communication channels not controlled by DIRTT. For example, the use of external e-mail systems or data storage systems not hosted by or approved by DIRTT, is not allowed.

3. Secure passwords are to be used on all systems as per the DIRTT password policy. These credentials must be unique and must not be used on other external systems or services. Passwords or security codes are not to be disclosed to anyone else; do not allow others to use your IDs and/or passwords. Password(s) must be changed whenever the need exists; such as someone else learning your password, or the password becoming known during problem resolution or day-to-day functions, or when requested by DIRTT I.T.

4. DIRTT I.T. is to be notified immediately in the event that a company device is lost. (mobile phones, laptops etc).

5. In the event that a system or process is suspected as not being compliant with this policy, immediately notify your supervisor and/or DIRTT I.T. so they can take appropriate action.

6. Personnel assigned the ability to work remotely must take extra precautions to ensure that data is appropriately handled.

32. Mr. Henderson's responsibilities included interfacing with customers, understanding and promoting DIRTT's products, services, and technology, and identifying new potential customers and partners for DIRTT in the southwestern United States. In connection with his job, Mr. Henderson was provided with extensive access to DIRTT Confidential Business Information concerning those markets.

33. Mr. Henderson was also issued a company laptop with access to DIRTT computer resources, including other networked computers, shared file resources, and other repositories of electronically stored information.

34. Mr. Henderson was not authorized to access, store, or retrieve DIRTT Confidential Business Information other than using DIRTT computers and resources, and then only for bona fide business purposes for the benefit of DIRTT.

35. In May 2019, DIRTT's Human Resources department received an administrative garnishment order from the State of Utah for \$11.3 million, which DIRTT learned was related to Mr. Henderson's 2003 felony securities fraud convictions. (Exhibit C). Until receipt of the garnishment order, DIRTT's then current management team was unaware of Mr. Henderson's felony convictions.

36. Mr. Henderson's crimes were quite serious. According to press accounts of his sentencing, he pled guilty to a number of felony counts involving his stealing between \$6 million

and \$8 million from investors in fraudulent business ventures, ultimately serving time in prison based on his convictions. *See* “Swindler Sentenced,” KSL.com, 6/21/03 (available at <https://www.ksl.com/article/90261/swindler-sentenced>, last retrieved 12/11/19).

37. Press reports of Mr. Henderson’s sentencing hearing note that over 64 known victims, many of them senior citizens, lost their life savings and retirement pensions to Mr. Henderson’s fraudulent scheme. Mr. Henderson was ordered to repay those funds.

38. While Mr. Smed was aware of these convictions while acting as DIRTT’s CEO, he nonetheless regularly supported Mr. Henderson in his role at DIRTT. In fact, when the local Distribution Partner in Salt Lake City expressed a desire not to work with Mr. Henderson, Mr. Smed arranged for another Distribution Partner in Salt Lake City, Interior Solutions, to work specifically with Mr. Henderson. Importantly, Mr. Henderson’s wife, Defendant Kristy Henderson, was, and is, the branch manager of Interior Solutions’ Salt Lake City office.

39. The receipt of the wage garnishment order by DIRTT, of which Mr. Henderson quickly became aware, touched off a series of events for Mr. Henderson and DIRTT.

40. In 2019, after Mr. Smed’s departure but before receipt of the wage garnishment order, DIRTT’s senior management were considering Mr. Henderson for a promotion.

41. Upon learning about Mr. Henderson’s prior criminal convictions, current DIRTT management provided Mr. Henderson a number of opportunities to explain his actions and provide his version of events. During that process, his anticipated promotion was placed on hold.

42. Mr. Henderson apparently determined at that point in time to leave DIRTT and return working for his prior supporter, Mr. Smed, at Falkbuilt and to take valuable DIRTT Confidential Business Information with him.

43. After DIRTT received the garnishment order and placed Mr. Henderson's promotion on hold, Mr. Henderson commenced or continued a scheme to misappropriate DIRTT's confidential and propriety information and trade secrets by uploading DIRTT Confidential Business Information onto a personal, cloud-based data storage location. There was no legitimate business purpose for this activity.

44. On information and belief, in or around this same time period, Mr. Henderson either made contact or accelerated plans with Mr. Smed and Falkbuilt to assist them in launching a business in Utah to compete with DIRTT, utilizing DIRTT Confidential Business Information to do so.

45. The departure of his primary benefactor at DIRTT, Mr. Smed, coupled with the forthcoming garnishment (which would far exceed Mr. Henderson's DIRTT salary for over 100 years), likely accelerated Mr. Henderson's plans to misappropriate information from DIRTT for Mr. Smed's new venture.

46. Starting on Sunday, June 3, 2019, Mr. Henderson began uploading what would ultimately amount to over 35 gigabytes of data¹ from his DIRTT-issued laptop and account to Google "Google Drive" and/or Apple "iCloud" cloud computing servers.

47. DIRTT IT staff became aware of the unauthorized access to and exfiltration of information from DIRTT's systems on June 10, 2019.

48. When confronted by DIRTT, Mr. Henderson admitted to uploading the data but denied any improper motive, and purported to allow his cloud account to be removed of such data by DIRTT.

¹ On average, one gigabyte contains 4400 documents, depending on the file type.

49. Further investigation has revealed that, in addition to uploading DIRTT Confidential Business Information to a cloud server, Mr. Henderson had also likely mirrored DIRTT Confidential Business Information to a personal external hard disk drive, which was not authorized by DIRTT.

50. To date, the unauthorized hard disk drive remains unaccounted for. DIRTT reasonably believes that Mr. Henderson is in possession of and has access to the unauthorized hard disk drive containing DIRTT Confidential Business Information.

51. The files wrongfully taken by Mr. Henderson included materials which he would not have a need or reason to access in his day-to-day employment at DIRTT, including design and pricing information and proprietary ICE design files and Standard Factory Net (SFN) price lists for projects which had no connection to his employment at DIRTT.

52. The files obtained by Mr. Henderson also included hundreds of design, layout, pricing, and other files regarding projects, regions, and customers far outside of Mr. Henderson's responsibilities at DIRTT.

53. The files represent a laundry list of files that would prove extremely helpful in setting up a competing operation at what would become Falkbuilt, LLC, Falkbuilt Ltd. and Falk Mountain States.

54. Examples of the files misappropriated by Mr. Henderson include: (a) specific budget proposals for projects; and (b) ICE files and SFN summaries, which could be used against DIRTT in bidding for projects because they contain pricing information, among other valuable data.

55. In the weeks leading up to his departure, Mr. Henderson began separately affirmatively seeking out information from other DIRTT employees regarding internal company

processes, particularly pricing, testing, and structural calculations processes under the guise of improving his knowledge of DIRTT company practices for DIRTT's benefit. Mr. Henderson did so despite the fact that he already knew at the time that he would be leaving DIRTT and assisting Falkbuilt in creating a competing business in Utah.

56. Shortly after DIRTT's receipt of the garnishment order, Mr. Henderson indicated that DIRTT should terminate its relationship with Interior Solutions, the company where his wife works. DIRTT then terminated the relationship in a negotiated exit.

57. In her role at Interior Solutions, Kristy Henderson had access to DIRTT Confidential Business Information.

58. In entering into a Regional Partner Agreement with DIRTT, Interior Solutions agreed in March 2018 that it would not "copy, use, disclose or transfer" any DIRTT confidential information. (Exhibit D). The confidential information included ICE files, SFN pricing, ICE quotes, and final approved ICEcad files. Interior Solutions also agreed to adhere to the proprietary license with respect to its use of ICE software.

59. On July 8, 2019, Kristy Henderson, Mr. Henderson's wife, incorporated Falk Mountain States. Kristy Henderson, through her work at Interior Solutions as a DIRTT Regional Partner, possessed significant knowledge about DIRTT's operations.

60. On information and belief, Falk Mountain States was intended to be, and is an affiliate of Falkbuilt, a direct competitor of DIRTT set up by former DIRTT employees. Falk Mountain States' filings with the State of Utah indicate that Falk Mountain States is doing business as "Falkbuilt, Salt Lake City" and "Falkbuilt, St. George".

61. Mr. Henderson resigned from DIRTT effective August 2, 2019 on several weeks' notice.

62. Although Kristy Henderson had already formed Falk Mountain States at the time of his resignation, Mr. Henderson told DIRTT that he was leaving to launch a construction company with his wife, Kristy Henderson, and to develop some commercial property that had “been in the works” for 15 years. Mr. Henderson never informed anyone at DIRTT that he was actually going to work for Mr. Smed at Falkbuilt, but instead intentionally misled DIRTT regarding his plan to begin working for a direct competitor.

63. On August 8, 2019, Mr. Henderson contacted at least one prospective customer of DIRTT “announcing” his and other former DIRTT employees’ departures to launch a new competitor to DIRTT. Mr. Henderson’s email asked the prospective customer to allow the new entity to bid on an existing project with which he was familiar based on his employment with DIRTT.

64. While still employed by DIRTT, in direct violation of his fiduciary duties owed to DIRTT, Mr. Henderson conspired with Kristy Henderson and Falk Mountain States to obtain and misappropriate DIRTT Confidential Business Information, including trade secrets, to benefit himself, Kristy Henderson, Falkbuilt and Falk Mountain States.

B. Other Efforts to Misappropriate DIRTT Confidential Business Information

65. The Hendersons are not the only individuals engaged by Mr. Smed and Falkbuilt to gain access to DIRTT Confidential Business Information.

66. Amanda Buczynski was a DIRTT employee from October 17, 2016 to September 17, 2019. Ms. Buczynski was responsible for DIRTT sales in a territory that included Western Pennsylvania and West Virginia. She maintained an office on site at a DIRTT partner’s facility in Pittsburgh, Pennsylvania.

67. As part of her job responsibilities with DIRTT, Ms. Buczynski had access to proprietary databases of customer relationships, pricing, costing, and forecasts accessible only to herself, the CEO, and the COO of DIRTT's regional partner.

68. Ms. Buczynski, as part of her employment with DIRTT, agreed to a confidentiality agreement which provided, among other things, that she would not "without the prior written consent of DIRTT, either during the period of [her] employment or at any time thereafter, disclose or cause to be disclosed any of the Confidential Information in any manner ..." (Exhibit E).

69. Ms. Buczynski also agreed to confidentiality provisions in the DIRTT offer letter she executed on September 30, 2016.

70. Ms. Buczynski resigned from DIRTT effective September 17, 2019, as with Mr. Henderson, falsely stating to her colleagues that she was not leaving to work for Falkbuilt.

71. On Ms. Buczynski's last day, she plugged a USB device with a serial number that included 4A3BCF57-0 into her DIRTT-provided laptop. She also accessed a number of files and folders on her work computer's hard drive related to ongoing DIRTT projects. Ms. Buczynski did not possess authorization to undertake any of these acts. (Exhibit F; Exhibit O at ¶ 9).

72. On August 30, 2019, prior to her departure from DIRTT, Ms. Buczynski copied over 40 files, including one identified as "PPT 'Large Clients'" to a Dropbox directory/folder. (Exhibit G).

73. In fact, Ms. Buczynski started working on behalf of Falkbuilt immediately following her departure from DIRTT.

74. Immediately after her departure from DIRTT, Ms. Buczynski reached out to one or more DIRTT customers on behalf of Falkbuilt in an effort to compete on ongoing projects and

to underbid DIRTT by utilizing DIRTT's Confidential Business Information and information obtained from DIRTT's partner. (Exhibit H).

75. On information and belief, Ms. Buczynski also worked to advance Falkbuilt's interests to the detriment of DIRTT by either hiding or sitting on leads that she received in the time leading up to her departure, including inquiries from potential partners interested in working with DIRTT.

76. Ms. Buczynski has referred to Falkbuilt as the "new DIRTT" in communications with potential customers, contradicting Falkbuilt's public representations that Falkbuilt is not competing with DIRTT or building upon DIRTT technology and information.

77. After submitting her resignation to DIRTT, Ms. Buczynski also emailed to her personal email account DIRTT customer contact information, and DIRTT pricing and estimates. (Exhibit I).

78. Ms. Buczynski's and Mr. Henderson's conduct is part of a pattern of a larger number of former DIRTT employees solicited by Falkbuilt (*see* Exhibit O at ¶ 9):

(a) On December 28, 2018, Christina Engelbert, while a DIRTT employee, received an email from Dropbox instructing her to "Complete your Dropbox setup." The email indicated that Ms. Engelbert had created a Dropbox account. Ms. Engelbert left DIRTT on December 31, 2018 and subsequently went to work for Falkbuilt. (Exhibit J).

(b) On December 29, 2018 Clayton Smed, while a DIRTT employee, received an email from Dropbox instructing him to "Complete your Dropbox setup." The email indicated that Mr. Smed had created a Dropbox account. Clayton Smed changed the email associated with his Dropbox account from his DIRTT email to his personal email

on January 14, 2019. Clayton Smed left DIRTT on January 31, 2019 and subsequently went to work for Falkbuilt. (Exhibit K).

(c) On January 12, 2019 Laura Shadow, while a DIRTT employee, received an email from Dropbox instructing her to “Complete your Dropbox setup.” The email indicated Ms. Shadow had created a Dropbox account. Ms. Shadow left DIRTT’s employ on January 31, 2019 and subsequently went to work for Falkbuilt. (Exhibit L).

79. On September 19, 2018, David Weeks sent Mogens Smed a sensitive, confidential DIRTT document titled “Typical Headwall Cost Breakdown”. This information constitutes DIRTT Confidential Business Information. Mr. Weeks left DIRTT on Feb. 28, 2019 and went to work for Mr. Smed at Falkbuilt. (Exhibit M).

80. Ingrid Schoning (who left DIRTT on September 15, 2019) forwarded a DIRTT confidential document to her Gmail account. This information constitutes DIRTT Confidential Business Information. Ms. Schoning now works for Falkbuilt. Ms. Schoning also changed a Dropbox account to associate it with her personal email address on July 23, 2019. (Exhibit N).

81. Defendants are using and have misappropriated DIRTT Confidential Business Information and DIRTT has reason to believe that Defendants’ actions are ongoing and widespread and directed by Falkbuilt.

82. DIRTT seeks all relief available at law and in equity including, but not limited to, preliminary and permanent injunctive relief to restrain Defendants from using or disclosing DIRTT Confidential Business Information. DIRTT requests injunctive relief to protect itself from irreparable injuries caused by Defendants’ conduct and to prevent further harm. DIRTT also seeks an award of compensatory damages, exemplary damages, and attorney’s fees.

83. DIRTТ also seeks expedited discovery. Mr. Henderson and Ms. Buczynski made affirmative efforts to conceal the extent of their actions and DIRTТ requires court process to determine the full scope of their wrongdoing, and of misappropriation and use of DIRTТ Confidential Business Information by other former DIRTТ employees currently employed by or working on behalf of Falkbuilt. Falkbuilt has made public and misleading statements about the nature of its business and has attempted to impede the investigation into its activities. DIRTТ’s investigation into misappropriated information is ongoing and incomplete, and has been necessarily frustrated by misrepresentations made by Mr. Henderson, Ms. Buczynski, and Falkbuilt as to the nature, scope and use of misappropriated material.

C. DIRTТ Confidential Business Information Constitutes Trade Secrets

84. DIRTТ’s manufacturing approach is built on a foundation of technology, the center of which is the proprietary ICE Software. DIRTТ uses ICE Software to design, visualize, configure, price, communicate, engineer, specify, order and manage projects. The ICE Software was developed in or around 2005 as a custom interior design and construction software solution to integrate into DIRTТ’s offerings. The ICE Software makes manufactured, fully custom interiors both feasible and profitable while addressing challenges associated with traditional construction, including cost overruns, inconsistent quality, delays and significant material waste. The ICE Software is used throughout the sales process, ensuring consistency across DIRTТ’s services and products received by all of DIRTТ’s clients.

85. DIRTТ begins manufacturing custom DIRTТ products once a file (an “ICE File”) is generated and a purchase order is received. The ICE Software allows an entire project to be tracked and managed across the entire production cycle through design, sales, production, delivery and installation. The ICE File (containing a project’s engineering and manufacturing

data) generated during the design and specification process can be used for optimizing future reconfigurations, renovations, technology integration initiatives and changes to a client's space.

86. The ICE Software is licensed to unrelated companies and Distribution Partners of DIRTT, but only for certain limited information and only if the parties agree to be bound by a confidentiality agreement.

87. DIRTT's proprietary ICE Software is among a body of DIRTT's valuable intellectual property. The ICE Software is subject to a number of patents in Canada, the United States, Europe and Singapore. DIRTT also has a number of trademark and copyright protections.

88. ICE files generated by ICE software contain proprietary costing information that would be of substantial benefit to a competitor seeking to undercut DIRTT on price. Costing is a closely-guarded secret at DIRTT for this reason, and because of the substantial efforts utilized to generate it.

89. In addition to the ICE Software, during their employment with DIRTT, Mr. Henderson and Ms. Buczynski had access to DIRTT Confidential Business Information, including but not limited to:

- (a) DIRTT's job costing;
- (b) DIRTT's customer, supplier and Distribution Partner contacts and list of prospects and projects;
- (c) DIRTT's sales figures and projections;
- (d) DIRTT's customer presentations and marketing materials;
- (e) DIRTT's marketing and sales strategies;
- (f) DIRTT's customer, supplier and Distribution Partner order histories, needs, and preferences;
- (g) DIRTT's customer proposals, service agreements, contracts and purchase orders;

- (h) DIRTT's plans to expand and target new clients and markets;
- (i) design specifications and drawings of DIRTT products;
- (j) specialized methods and processes used to create custom prefabricated modular interior wall partitions, other ocular interior components and other DIRTT products;
- (k) research and development of new DIRTT products;
- (l) trade secrets and intellectual property strategy, including the ICE Software and ancillary programs;
- (m) strategic plans and business plans; and
- (n) such further and other confidential and proprietary information as may be proven at trial.

This information comprises DIRTT Confidential Business Information.

90. DIRTT devotes significant resources to developing DIRTT Confidential Business Information.

91. DIRTT Confidential Business Information constitutes trade secrets of DIRTT. It is vital to DIRTT's business success and enables it to compete effectively in an extremely competitive marketplace. DIRTT takes reasonable measures to protect and maintain the confidentiality of DIRTT Confidential Business Information, including the measures described above.

92. DIRTT derives substantial economic value from maintaining the secrecy of its DIRTT Confidential Business Information, including, among other things, its pricing, its customer, prospect and supplier information, its sales figures and projections, its marketing and sales strategies, its technical-know-how, its design specifications, and its strategic and business plans. Any of this information would be immensely valuable to a competitor, and a global theft of the information would allow a competitor to bid against DIRTT on projects. DIRTT has

incurred significant costs and expenses developing its DIRT Confidential Business Information.

93. DIRT Confidential Business Information, including, among other things, pricing, its customer, prospect and supplier information, its sales figures and projections, its marketing and sales strategies, its design specifications, and strategic and business plans, is neither generally known, nor is it readily ascertainable, to the general public, to DIRT's competitors, or to any other person or entity that could obtain value from such information.

94. DIRT takes reasonable measures to protect and maintain the secrecy of its DIRT Confidential Business Information, including, among other things, its pricing, its customer, prospect and supplier information, its sales figures and projections, its marketing and sales strategies, its design specifications, and its strategic and business plans.

95. DIRT limits access to DIRT Confidential Business Information, and requires network passwords to access DIRT Confidential Business Information on DIRT's computers, confidential agreements, warranty on ICE Software, and partner confidentiality agreements. DIRT also has policies and procedures in place governing the access to and use of DIRT Confidential Business Information, including efforts described above to identify attempts to improperly transfer DIRT Confidential Business Information.

**COUNT I - VIOLATION OF UTAH UNIFORM TRADE SECRETS ACT
(Utah. Code § 13-24-1 *et seq.*)(Against All Defendants)**

96. The allegations contained in the preceding paragraphs set forth above are incorporated as if fully set forth herein.

97. The Utah Uniform Trade Secrets Act ("UTSA") provides a private right of action for misappropriation of trade secrets.

98. A “trade secret” is defined as “information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” Utah. Code § 13-24-2.

99. The term “misappropriation” includes “(a) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or (b) disclosure or use of a trade secret of another without express or implied consent by a person who: (i) used improper means to acquire knowledge of the trade secret; or (ii) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was: (A) derived from or through a person who had utilized improper means to acquire it; (B) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or (iii) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.” Utah. Code § 13-24-2.

100. The term “improper means” includes “theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.” Utah. Code § 13-24-2.

101. While a DIRT employee, Mr. Henderson had access to DIRT’s trade secrets, including confidential customer and account information, such as marketing strategies and techniques, marketing and development plans for client contact information, price lists, specific

contract pricing and payment histories. Such information gives DIRTT a commercial competitive advantage and derives economic value from not being generally known to and not readily ascertainable by the public or any person who can obtain economic value from its disclosure or use.

102. As a DIRTT employee, Mr. Henderson was aware of the confidential nature of DIRTT's trade secrets and agreed to ensure the continued confidentiality of such information as set forth above.

103. As a DIRTT employee, Mr. Henderson was also aware that DIRTT placed confidence in him to maintain the confidentiality of DIRTT's trade secrets at least through the confidentiality agreement he signed.

104. At all relevant times, DIRTT made, and continues to make, reasonable efforts to maintain the secrecy of DIRTT's trade secrets, by, among other things, requiring Mr. Henderson to sign a confidentiality agreement in connection with his employment.

105. In violation of his duty to refrain from using or disclosing DIRTT's trade secrets, Mr. Henderson, on his own and as part of a conspiracy with all other Defendants, misappropriated DIRTT's trade secrets, including but not limited to, confidential and proprietary customer account information, marketing data and analysis, customer histories and payment histories, including marketing information and hundreds of DIRTT files and folders.

106. Defendants' violations of the Utah Uniform Trade Secrets Act caused DIRTT substantial damage. Among other things, DIRTT was required to hire attorneys and computer forensic experts to investigate and attempt to mitigate Defendants' misappropriation of DIRTT's trade secrets.

107. DIRTT also suffered damage as a result of the loss or diminishment of value of DIRTT Confidential Business Information and other confidential and proprietary information, and diminishment of business value and competitive standing.

108. In addition to Mr. Henderson, Falkbuilt, LLC, Falkbuilt Ltd., Falk Mountain States, and Kristy Henderson are directly liable for violations of the Utah Uniform Trade Secrets Act because they actively participated, through their conspiracy with each other and Mr. Henderson, in misappropriating DIRTT's trade secrets.

109. Falkbuilt, LLC, Falkbuilt Ltd. and Falk Mountain States are also directly liable for violations of the Utah Uniform Trade Secrets Act because they acquired DIRTT trade secret information through its agents, Mr. Henderson and Kristy Henderson, knowing that such information was obtained by improper means, including violations of Mr. Henderson's explicit and implied duties of confidentiality.

110. Falkbuilt, LLC, Falkbuilt Ltd., Falk Mountain States, Mr. Henderson, and Kristy Henderson are each liable for violations of the Utah Uniform Trade Secrets Act because they used DIRTT trade secrets (which include DIRTT Confidential Business Information) without express or implied permission from DIRTT, and Falkbuilt, LLC, Falkbuilt Ltd., Falk Mountain States, and Kristy Henderson knew or had reason to know that Mr. Henderson had acquired DIRTT's trade secrets under circumstances giving rise to a duty to maintain their secrecy or limit their use; and had divulged DIRTT's trade secrets when he owed a duty to DIRTT to maintain their secrecy or limit their use.

111. DIRTT has been and continues to be injured irreparably by Defendants' misappropriations of its trade secrets.

**COUNT II – FEDERAL DEFEND TRADE SECRETS ACT (18 U.S.C. § 1836)
(Against All Defendants)**

112. The allegations contained in the preceding paragraphs set forth above are incorporated as if fully set forth herein.

113. The Federal Defend Trade Secrets Act provides a private right of action for an “owner of a trade secret that is misappropriated . . . if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce.” 18 U.S.C. § 1836(b)(1).

114. A “trade secret” means:

all forms and types of financial, business, scientific, technical, economic or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically or in writing if (A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

18 U.S.C. § 1836(3).

115. The term “misappropriation” includes the “disclosure or use of a trade secret of another without express or implied consent by a person who . . . at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was . . . derived from or through a person who owed a duty to the person seeking relief to maintain the secrecy of the trade secret.” 18 U.S.C. § 1839(5)(B)(ii)(III).

116. The term “improper” includes “breach of a duty to maintain secrecy . . .” 18 U.S.C. § 1939(6).

117. DIRTT Confidential Business Information is a “trade secret” under the Federal Defend Trade Secrets Act because it comprises confidential and proprietary customer

information, including marketing plans, strategies and data, artwork, financial information, customer information, account histories and other information which DIRTT takes reasonable measures to maintain secret.

118. Such information derives independent economic value because it provides DIRTT with a commercial competitive advantage from not being known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

119. The DIRTT trade secrets misappropriated by Defendants are used in interstate commerce to bid for, design, and construct projects throughout the United States.

120. As a DIRTT employee, Mr. Henderson had contractual and fiduciary duties to maintain the secrecy of DIRTT's trade secrets and not misappropriate the information for his own use or for the use of DIRTT's competitors.

121. At all relevant times, Mr. Henderson was aware of the duty to maintain the secrecy of DIRTT's trade secrets and not misappropriate such information for his own use or for the use of DIRTT's competitors.

122. In violation of this duty, Mr. Henderson misappropriated DIRTT's trade secrets, marketing data and analyses, customer histories and payment histories, by taking such information without DIRTT's express or implied consent.

123. Defendants' violations of the Federal Defend Trade Secrets Act caused DIRTT substantial damage. Among other things, DIRTT was required to hire attorneys and computer forensic experts to investigate and attempt to mitigate Defendants' misappropriation of DIRTT's trade secrets.

124. DIRTT also suffered damage as a result of the loss or diminishment of value of DIRTT's trade secrets, and diminishment of business value and competitive standing.

125. In addition to Mr. Henderson, Falkbuilt, LLC, Falkbuilt Ltd., Falk Mountain States, and Kristy Henderson are directly liable for violations of the Defend Trade Secrets Act because they actively participated, through their conspiracy with other Defendants in misappropriating DIRTT's trade secrets.

126. Falkbuilt, LLC, Falkbuilt Ltd. and Falk Mountain States are also directly liable for violations of the Defend Trade Secrets Act because they acquired DIRTT trade secret information through its agents, the Hendersons, knowing that such information was obtained by improper means, including violations of Mr. Henderson's explicit and implied duties of confidentiality.

127. Falkbuilt, LLC, Falkbuilt Ltd., Falk Mountain States, Mr. Henderson, and Kristy Henderson are liable for violations of the Defend Trade Secrets Act because they used DIRTT trade secrets without express or implied permission from DIRTT and Falkbuilt, LLC, Falkbuilt Ltd., Falk Mountain States, and Kristy Henderson knew or had reason to know that Mr. Henderson had acquired the DIRTT trade secrets under circumstances giving rise to a duty to maintain their secrecy or limit their use; and had divulged DIRTT trade secrets when he owed a duty to DIRTT to maintain their secrecy or limit their use.

COUNT III – BREACHES OF CONTRACTS
(Against Mr. Henderson)

128. The allegations contained in the preceding paragraphs set forth above are incorporated as if fully set forth herein.

129. Mr. Henderson owed contractual duties to DIRTT based on his May 21, 2009 agreement to DIRTT's terms and conditions, and his June 25, 2019 execution of DIRTT's Computer/Data Security policy.

130. On information and belief, Mr. Henderson breached his obligations under the May 21, 2009 agreement by failing to prevent unauthorized publication and disclosure of (a) any trade secret, manufacturing process or confidential information concerning DIRTT, and (b) the finances of DIRTT and respective dealings, transactions or affairs of which Mr. Henderson was familiar during his employment.

131. For example, Mr. Henderson has used his knowledge of DIRTT dealings with customers and prospective customers for the benefit of Falkbuilt and himself.

132. On information and belief, Mr. Henderson has also damaged DIRTT by publishing and disclosing to Falkbuilt, DIRTT's competitor, DIRTT Confidential Business Information, including confidential electronic information, copied from DIRTT's computers and systems before his departure.

133. On information and belief, Mr. Henderson breached his obligations under the June 25, 2019 DIRTT Computer/Data Security Policy by (a) storing information on systems and channels not controlled by DIRTT (e.g., cloud computing services and a personal hard drive), and (b) accessing DIRTT computer or network locations and resources for which he was not previously authorized (e.g. projects outside of his market area, which on information and belief were accessed to benefit Falkbuilt).

**COUNT IV – VIOLATION OF PENNSYLVANIA UNIFORM TRADE SECRETS ACT
(12 P.S. § 5302) (Against Falkbuilt, LLC and Falkbuilt Ltd.)**

134. The allegations contained in the preceding paragraphs set forth above are incorporated as if fully set forth herein.

135. The Pennsylvania Uniform Trade Secrets Act (“PUTSA”) provides a private right of action for misappropriation of trade secrets.

136. A “trade secret” is defined as “information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” 12 P.S. § 5302.

137. The term “misappropriation” includes “(a) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or (b) disclosure or use of a trade secret of another without express or implied consent by a person who: (i) used improper means to acquire knowledge of the trade secret; or (ii) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was: (A) derived from or through a person who had utilized improper means to acquire it; (B) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or (iii) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.” 12 P.S. § 5302.

138. The term “improper means” includes “theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.” 12 P.S. § 5302.

139. While a DIRTT employee, Ms. Buczynski, working from Pennsylvania at the time, had access to DIRTT's trade secrets, including DIRTT Confidential Business Information, including confidential customer and account information, such as marketing strategies and techniques, marketing and development plans for client contact information, price lists, specific contract pricing and payment histories. Such information derives economic value because it gives DIRTT a commercial competitive advantage from not being generally known to and not readily ascertainable by the public or any person who can obtain economic value from its disclosure or use.

140. As a DIRTT employee, Ms. Buczynski was aware of the confidential nature of DIRTT's trade secrets and agreed to ensure the continued confidentiality of such information.

141. As a DIRTT employee, Ms. Buczynski was also aware that DIRTT placed confidence in her to maintain the confidentiality of DIRTT's trade secrets.

142. At all relevant times, DIRTT made, and continues to make, reasonable efforts to maintain the secrecy of DIRTT Confidential Business Information, by, among other things, requiring Ms. Buczynski to sign a confidentiality agreement.

143. In violation of her duty to refrain from using or disclosing DIRTT's trade secrets, Ms. Buczynski, on her own and as part of a conspiracy with Falkbuilt, misappropriated DIRTT's trade secrets.

144. Falkbuilt, LLC's and Falkbuilt Ltd.'s violations of the Pennsylvania Uniform Trade Secrets Act caused DIRTT substantial damage. Among other things, DIRTT was required to hire attorneys and computer forensic experts to investigate and attempt to mitigate Falkbuilt's misappropriation of DIRTT Confidential Business Information.

145. DIRTT also suffered damage as a result of the loss or diminishment of value of DIRTT Confidential Business Information and other confidential and proprietary information, and diminishment of business value and competitive standing.

146. Falkbuilt, LLC and Falkbuilt Ltd. are directly liable for violations of the Pennsylvania Uniform Trade Secrets Act because they actively participated with Ms. Buczynski in misappropriating DIRTT's trade secrets.

147. Falkbuilt, LLC and Falkbuilt Ltd. are also directly liable for violations of the Pennsylvania Uniform Trade Secrets Act because they acquired DIRTT trade secret information through its agent, Ms. Buczynski, knowing that such information was obtained by improper means, including violations of Ms. Buczynski's explicit and implied duties of confidentiality.

148. Falkbuilt, LLC and Falkbuilt Ltd. are liable for violations of the Pennsylvania Uniform Trade Secrets Act because they used DIRTT trade secrets without express or implied permission from DIRTT and Falkbuilt, LLC and Falkbuilt Ltd. knew or had reason to know that Ms. Buczynski had acquired the DIRTT trade secrets under circumstances giving rise to a duty to maintain their secrecy or limit their use; and had divulged DIRTT's trade secrets when she owed a duty to DIRTT to maintain their secrecy or limit their use.

149. DIRTT has been and continues to be injured irreparably by Falkbuilt, LLC's and Falkbuilt Ltd.'s misappropriations of DIRTT's trade secrets.

PRAYER FOR RELIEF

WHEREFORE, DIRTT respectfully requests the following relief against Defendants:

- a. Enter judgment for it and against all Defendants on Counts I and II, against Mr. Henderson on Count III, and against Falkbuilt, LLC and Falkbuilt Ltd. on Count IV;
- b. Enter a preservation order preventing the destruction of documents, an order that is necessary in light of the repeated taking and secretive access;

- c. Enter preliminary and permanent injunctions restraining and enjoining each Defendant, and all persons and entities in active concert with any of them, from disclosing, using or misappropriating any of DIRTT's trade secrets;
- d. Enter a mandatory injunction requiring each Defendant, and all persons and entities in active concert with any of them, to return to DIRTT any and all written materials, including copies thereof, and/or flash drives, thumb drives, external hard drives, USB storage drives, computer disks, diskettes, databases and/or other retrievable data which reflect, refer, or relate to DIRTT Confidential Business Information, and any copies that are in Defendants' possession, custody, or control;
- e. Order each Defendant, and all persons and entities in active concert with any of them, to provide a full accounting as to the whereabouts of all of DIRTT's trade secrets, DIRTT Confidential Business Information and other DIRTT property in their possession, custody, or control (including information on the personal cloud drives of Defendants' employees);
- f. Enter judgment that Defendants are jointly and severally liable to DIRTT for its actual damages for losses resulting from Defendants' misappropriation of DIRTT's trade secrets, including but not limited to lost profits proximately caused by Defendants' misappropriation, or in the alternative, a reasonable royalty for Defendants' misappropriation of DIRTT's trade secrets in violation of the Utah Uniform Trade Secrets Act and/or Federal Defend Trade Secrets Act;
- g. Enter judgment that Defendants are jointly and severally liable to DIRTT for disgorgement of all compensation paid to Mr. Henderson by DIRTT during and after his breaches, and disgorgement of any and all profits Defendants earned as a result of the misappropriation of DIRTT's trade secrets in violation of the Utah Uniform Trade Secrets Act and/or Federal Defend Trade Secrets Act;
- h. Enter judgment that Defendants are jointly and severally liable to DIRTT for exemplary damages for Defendants' willful, wanton or reckless disregard of DIRTT's rights under the Utah Uniform Trade Secrets Act and/or Federal Defend Trade Secrets Act;
- i. Enter judgment that Defendants are jointly and severally liable to DIRTT for DIRTT's attorneys' fees for Defendants' willful, wanton or reckless disregard of DIRTT's rights under the Utah Uniform Trade Secrets Act and/or Federal Defend Trade Secrets Act;
- j. Enter judgment that Falkbuilt, LLC and Falkbuilt Ltd. are jointly and severally liable to DIRTT for its actual damages for losses resulting from their misappropriation of DIRTT's trade secrets, including lost profits proximately caused by Falkbuilt, LLC's and Falkbuilt Ltd.'s misappropriation of DIRTT's trade secrets, or, in the alternative, a reasonable royalty for their misappropriation

of DIRTT's trade secrets in violation of the Pennsylvania Uniform Trade Secrets Act;

- k. Enter judgment that Falkbuilt, LLC and Falkbuilt Ltd. are jointly and severally liable to DIRTT for disgorgement of all compensation paid to Ms. Buczynski by DIRTT during and after her breaches, and disgorgement of any and all profits Falkbuilt, LLC and Falkbuilt Ltd. earned as a result of the misappropriation of DIRTT's trade secrets in violation of the Pennsylvania Uniform Trade Secrets Act;
- l. Enter judgment that Falkbuilt, LLC and Falkbuilt Ltd. are jointly and severally liable to DIRTT for exemplary damages for their willful, wanton or reckless disregard of DIRTT's rights under the Pennsylvania Uniform Trade Secrets Act;
- m. Enter judgment that Falkbuilt, LLC and Falkbuilt Ltd. are jointly and severally liable to DIRTT for DIRTT's attorneys' fees for their willful, wanton or reckless disregard of DIRTT's rights under the Pennsylvania Uniform Trade Secrets Act;
- n. Enter judgment that Mr. Henderson is liable to DIRTT for its actual damages and losses resulting from Mr. Henderson's breaches of contracts; and
- o. Award such other and further relief that this Court determines to be just and proper under the circumstances.

Dated: December 11, 2019

DIRTT ENVIRONMENTAL SOLUTIONS, INC.
Plaintiff,

By: /s/ Chad E. Nydegger
One of Its Attorneys

Chad E. Nydegger
Workman Nydegger
60 East South Temple, Suite 1000
Salt Lake City, Utah 84111
cnydegger@wnlaw.com

Jeffrey J. Mayer
Catherine A. Miller
Timothy K. Sendek
Akerman LLP
71 S. Wacker Drive, 47th Floor
Chicago, Illinois 60606
Jeffrey.Mayer@akerman.com
Catherine.Miller@akerman.com
Tim.Sendek@akerman.com

Attorneys for Plaintiff

P. Bruce Badger (A4791)
bbadger@fabianvancott.com
Jason W. Hardin (A8793)
jhardin@fabianvancott.com
FABIAN VANCOTT
215 South State Street, Suite 1200
Salt Lake City, UT 84111-2323
Telephone: (801) 531-8900

Attorneys for Defendant and Counterclaimant Falkbuilt Ltd.

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, NORTHERN DIVISION**

DIRTT ENVIRONMENTAL
SOLUTIONS, INC.,

Plaintiff,

vs.

LANCE HENDERSON, KRISTY
HENDERSON, FALKBUILT LTD.,
AND FALK MOUNTAIN STATES,
LLC,

Defendants.

Case No. 1:19CV00144-DBB-DBP

**FALKBUILT LTD.’S ANSWER TO
VERIFIED COMPLAINT AND
COUNTERCLAIM**

(JURY DEMANDED)

Honorable David B. Barlow
Magistrate Judge Dustin B. Pead

FALKBUILT LTD.

Counterclaimant,

vs.

DIRTT ENVIRONMENTAL
SOLUTIONS, INC.

Counterclaim Defendant.

Defendant Falkbuilt Ltd. (“Defendant”) answers the Verified Complaint as follows:

FIRST DEFENSE

The Verified Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Defendant answers the specific allegations in the Verified Complaint as follows:

Defendant denies the allegations contained in the introductory paragraph in the Verified Complaint.

1. In answer to paragraph 1, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.
2. In answer to paragraph 2, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.
3. In answer to paragraph 3, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.
4. In answer to paragraph 4, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

5. In answer to paragraph 5, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

6. In answer to paragraph 6, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

7. In answer to paragraph 7, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

8. In answer to paragraph 8, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

9. In answer to paragraph 9, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

10. In answer to paragraph 10, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

11. In answer to paragraph 11, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

12. In answer to paragraph 12, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

13. In answer to paragraph 13, Defendant admits that Lance Henderson is an individual residing in Utah, and is without sufficient knowledge to either admit or deny the remaining allegations in paragraph 13 and, therefore, denies the same.

14. In answer to paragraph 14, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

15. In answer to paragraph 15, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

16. In answer to paragraph 16, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

17. In answer to paragraph 17, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

18. In answer to paragraph 18, Defendant admits the allegations.

19. In answer to paragraph 19, Defendant admits that Mogens Smed has been joined as a party in ongoing litigation in Alberta, Canada. Defendant answers further that Mr. Smed's employment agreement and Defendant's website speak for themselves. Defendant denies each of the remaining allegations in paragraph 19 directed at Defendant and is without sufficient knowledge to either admit or deny the allegations of paragraph 19 directed at Mr. Smed and, therefore, denies the same.

20. In answer to paragraph 20, Defendant admits that this court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332 based upon diversity of citizenship. Defendant is without sufficient knowledge to either admit or deny the

remaining allegations in paragraph 20 and, therefore, denies the same. Defendant affirmatively alleges that it has not violated any statutes, including those enumerated in paragraph 20 and throughout the Verified Complaint, and does not have any liability to Plaintiff in any amount whatsoever.

21. In answer to paragraph 21, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

22. In answer to paragraph 22, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

23. In answer to paragraph 23, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

24. In answer to paragraph 24, Defendant denies the allegations.

25. In answer to paragraph 25, Defendant admits that venue is proper pursuant to 28 U.S.C. § 1391(b)(2) and denies that venue is proper pursuant to 28 U.S.C. § 1391(b)(1).

26. In answer to paragraph 26, Defendant denies the allegations.

27. In answer to paragraph 27, Defendant denies the allegations.

28. In answer to paragraph 28, Defendant denies the allegations.

29. In answer to paragraph 29, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

30. In answer to paragraph 30, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same. Further, Defendant answers that any agreements between Plaintiff and Lance Henderson that may exist speak for themselves.

31. In answer to paragraph 31, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same. Further, Defendant answers that any agreements between Plaintiff and Lance Henderson that may exist speak for themselves.

32. In answer to paragraph 32, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

33. In answer to paragraph 33, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

34. In answer to paragraph 34, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

35. In answer to paragraph 35, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same. Further, Defendant affirmatively alleges that paragraph 35 contains immaterial, impertinent, and/or scandalous matter that is inadmissible under the Federal Rules of Evidence, that appears to have been included in the Verified Complaint simply

to smear the defendants and interfere with Defendant's potential economic relations, and that should be stricken.

36. In answer to paragraph 36, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same. Further, Defendant affirmatively alleges that paragraph 36 contains immaterial, impertinent, and/or scandalous matter that is inadmissible under the Federal Rules of Evidence, that appears to have been included in the Verified Complaint simply to smear the defendants and interfere with Defendant's potential economic relations, and that should be stricken.

37. In answer to paragraph 37, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same. Further, Defendant affirmatively alleges that paragraph 37 contains immaterial, impertinent, and/or scandalous matter that is inadmissible under the Federal Rules of Evidence, that appears to have been included in the Verified Complaint simply to smear the defendants and interfere with Defendant's potential economic relations, and that should be stricken.

38. In answer to paragraph 38, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore denies the same. Further, Defendant affirmatively alleges that paragraph 38 contains immaterial,

impertinent, and/or scandalous matter that is inadmissible under the Federal Rules of Evidence, that appears to have been included in the Verified Complaint simply to smear the defendants and interfere with Defendant's potential economic relations, and that should be stricken.

39. In answer to paragraph 39, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

40. In answer to paragraph 40, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

41. In answer to paragraph 41, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same. Further, Defendant affirmatively alleges that paragraph 41 contains immaterial, impertinent, and/or scandalous matter that is inadmissible under the Federal Rules of Evidence, that appears to have been included in the Verified Complaint simply to smear the defendants and interfere with Defendant's potential economic relations, and that should be stricken.

42. In answer to paragraph 42, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

43. In answer to paragraph 43, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

44. In answer to paragraph 44, Defendant denies the allegations directed at Defendant and is without sufficient knowledge to either admit or deny the remaining allegations of paragraph 44 and, therefore, denies the same.

45. In answer to paragraph 45, Defendant denies the allegations directed at Defendant and is without sufficient knowledge to either admit or deny the remaining allegations of paragraph 45 and, therefore, denies the same.

46. In answer to paragraph 46, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

47. In answer to paragraph 47, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

48. In answer to paragraph 48, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

49. In answer to paragraph 49, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

50. In answer to paragraph 50, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

51. In answer to paragraph 51, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

52. In answer to paragraph 52, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

53. In answer to paragraph 53, Defendant denies the allegations directed at Defendant and is without sufficient knowledge to either admit or deny the remaining allegations of paragraph 53 and, therefore, denies the same.

54. In answer to paragraph 54, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

55. In answer to paragraph 55, Defendant denies that Defendant is a competing business with Plaintiff in Utah, and is without sufficient knowledge to either admit or deny the remaining allegations in paragraph 55 and, therefore, denies the same.

56. In answer to paragraph 56, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

57. In answer to paragraph 57, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

58. In answer to paragraph 58, Defendant is without sufficient knowledge to either admit or deny the allegations and affirmatively alleges that the Regional Partner Agreement speaks for itself.

59. In answer to paragraph 59, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

60. In answer to paragraph 60, Defendant is without sufficient knowledge to either admit or deny whether Falk Mountain States' filings with the State of Utah indicate that Falk Mountain States is doing business as "Falkbuilt, Salt Lake City" and "Falkbuilt, St. George". Defendant denies the remaining allegations in paragraph 60.

61. In answer to paragraph 61, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

62. In answer to paragraph 62, Defendant denies that Lance Henderson is Defendant's employee and that Defendant and Plaintiff are direct competitors. Defendant is without sufficient knowledge to either admit or deny the remaining allegations in paragraph 62 and, therefore, denies the same.

63. In answer to paragraph 63, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

64. In answer to paragraph 64, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

65. In answer to paragraph 65, Defendant denies the allegations directed at Defendant and affirmatively states that Defendant never engaged anyone,

including Lance Henderson, Kristy Henderson or any other individual(s), to gain access to DIRTT Confidential Business Information. Defendant is without sufficient knowledge to either admit or deny the remaining allegations in paragraph 65 and, therefore, denies the same

66. In answer to paragraph 66, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

67. In answer to paragraph 67, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

68. In answer to paragraph 68, Defendant is without sufficient knowledge to either admit or deny the allegations and affirmatively alleges that any confidentiality agreement that Ms. Buczynski had with Plaintiff speaks for itself.

69. In answer to paragraph 69, Defendant is without sufficient knowledge to either admit or deny the allegations and affirmatively alleges that the terms of any offer letter executed by Ms. Buczynski speak for themselves.

70. In answer to paragraph 70, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

71. In answer to paragraph 71, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

72. In answer to paragraph 72, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

73. In answer to paragraph 73, Defendant denies the allegations.

74. In answer to paragraph 74, Defendant denies the allegations.

75. In answer to paragraph 75, Defendant denies the allegations.

76. In answer to paragraph 76, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

77. In answer to paragraph 77, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

78. In answer to paragraph 78, Defendant denies the allegations. With respect to subpart (a), Defendant denies that Ms. Engelbert went to work for Defendant, and is without sufficient knowledge to either admit or deny the remaining allegations in subpart (a) and, therefore, denies the same. With respect to subpart (b), Defendant admits that Clayton Smed went to work for Defendant, and is without sufficient knowledge to either admit or deny the remaining allegations in subpart (b) and, therefore, denies the same. With respect to subpart (c), Defendant denies that Laura Shadow went to work for Defendant, and is without sufficient knowledge to either admit or deny the remaining allegations in subpart (c) and, therefore, denies the same.

79. In answer to paragraph 79, Defendant is without sufficient knowledge to either admit or deny whether Mr. Weeks was ever employed by Plaintiff and, if so, when he left that employment and, therefore, denies the allegations. Defendant denies the remaining allegations in paragraph 79.

80. In answer to paragraph 80, Defendant denies that Ingrid Schoning now works for Defendant. Defendant is without sufficient knowledge to either admit or deny the remaining allegations in paragraph 80 and, therefore, denies the same.

81. In answer to paragraph 81, Defendant denies the allegations.

82. In answer to paragraph 82, Defendant denies the allegations and affirmatively alleges that Plaintiff is not entitled to any relief against Defendant, whatsoever.

83. In answer to paragraph 83, Defendant denies the allegations.

84. In answer to paragraph 84, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

85. In answer to paragraph 85, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

86. In answer to paragraph 86, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

87. In answer to paragraph 87, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

88. In answer to paragraph 88, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

89. In answer to paragraph 89, including subparts (a) through (n), Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

90. In answer to paragraph 90, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

91. In answer to paragraph 91, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

92. In answer to paragraph 92, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

93. In answer to paragraph 93, Defendant denies the allegations with respect to pricing, and is without sufficient knowledge to either admit or deny the remaining allegations in paragraph 93 and, therefore, denies the same.

94. In answer to paragraph 94, Defendant denies the allegations with respect to pricing, and is without sufficient knowledge to either admit or deny the remaining allegations in paragraph 94 and, therefore, denies the same.

95. In answer to paragraph 95, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

96. In answer to paragraph 96, Defendant incorporates all of its other response in this Answer as though fully set forth herein.

97. In answer to paragraph 97, Defendant answers that the Utah Uniform Trade Secrets Act speaks for itself and affirmatively alleges that Defendant has not violated the Utah Uniform Trade Secrets Act in any respect.

98. In answer to paragraph 98, Defendant answers that the Utah Uniform Trade Secrets Act speaks for itself.

99. In answer to paragraph 99, Defendant answers that the Utah Uniform Trade Secrets Act speaks for itself.

100. In answer to paragraph 100, Defendant answers that the Utah Uniform Trade Secrets Act speaks for itself.

101. In answer to paragraph 101, Defendant denies that Plaintiff's price lists constitute trade secrets, and is without sufficient knowledge to either admit or deny the remaining allegations in paragraph 101 and, therefore, denies the same.

102. In answer to paragraph 102, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

103. In answer to paragraph 103, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

104. In answer to paragraph 104, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

105. In answer to paragraph 105, Defendant denies the allegations.

106. In answer to paragraph 106, Defendant denies the allegations.

107. In answer to paragraph 107, Defendant denies the allegations.

108. In answer to paragraph 108, Defendant denies the allegations.

109. In answer to paragraph 109, Defendant denies the allegations.

110. In answer to paragraph 110, Defendant denies the allegations.

111. In answer to paragraph 111, Defendant denies the allegations.

112. In answer to paragraph 112, Defendant incorporates all of its other responses in this Answer as though fully set forth herein.

113. In answer to paragraph 113, Defendant answers that 18 U.S.C. § 1836(b)(1) speaks for itself.

114. In answer to paragraph 114, Defendant answers that to the extent Plaintiff intended to quote 18 U.S.C. § 1836(3), the allegation is denied. To the extent Plaintiff intended to quote 18 U.S.C. § 1839(3), Defendant answers that 18 U.S.C. § 1839(3) speaks for itself.

115. In answer to paragraph 115, Defendant answers that 18 U.S.C. § 1839(5)(B)(ii)(III) speaks for itself.

116. In answer to paragraph 116, Defendant answers that to the extent Plaintiff intended to quote from 18 U.S.C. § 1939(6), the allegation is denied. To the extent that Plaintiff intended to quote from 18 U.S.C. § 1839(6), Defendant answers that 18 U.S.C. § 1839(6) speaks for itself.

117. In answer to paragraph 117, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

118. In answer to paragraph 118, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

119. In answer to paragraph 119, Defendant denies the allegations.

120. In answer to paragraph 120, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

121. In answer to paragraph 121, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

122. In answer to paragraph 122, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

123. In answer to paragraph 123, Defendant denies the allegations.

124. In answer to paragraph 124, Defendant denies the allegations.

125. In answer to paragraph 125, Defendant denies the allegations.

126. In answer to paragraph 126, Defendant denies the allegations.

127. In answer to paragraph 127, Defendant denies the allegations.

128. In answer to paragraph 128, Defendant incorporates all of its other responses in this Answer as though fully set forth herein.

129. In answer to paragraph 129, Defendant is without sufficient knowledge to either admit or deny the allegations and affirmatively alleges that Lance Henderson's May 21, 2009 agreement and Plaintiff's Computer/Data Security policy speak for themselves.

130. In answer to paragraph 130, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

131. In answer to paragraph 131, Defendant denies the allegations.

132. In answer to paragraph 132, Defendant denies the allegations.

133. In answer to paragraph 133, Defendant denies that Lance Henderson accessed Plaintiff's computer or network locations and resources to benefit Defendant. Defendant is without sufficient knowledge to either admit or deny the remaining allegations in paragraph 133 and, therefore, denies the same.

134. In answer to paragraph 134, Defendant incorporates all of its other responses in this Answer as though fully set forth herein.

135. In answer to paragraph 135, Defendant answers that the Pennsylvania Uniform Trade Secrets Act speaks for itself.

136. In answer to paragraph 136, Defendant answers that 12 Pa. C.S. § 5302 speaks for itself.

137. In answer to paragraph 137, Defendant answers that 12 Pa. C.S. § 5302 speaks for itself.

138. In answer to paragraph 138, Defendant answers that 12 Pa. C.S. § 5302 speaks for itself.

139. In answer to paragraph 139, Defendant denies that Plaintiff's price lists were confidential and not generally known to, or readily ascertainable by, the public. Defendant is without sufficient knowledge to either admit or deny the remaining allegations in paragraph 139 and, therefore, denies the same.

140. In answer to paragraph 140, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

141. In answer to paragraph 141, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

142. In answer to paragraph 142, Defendant is without sufficient knowledge to either admit or deny the allegations and, therefore, denies the same.

143. In answer to paragraph 143, Defendant denies the allegations.

144. In answer to paragraph 144, Defendant denies the allegations.
145. In answer to paragraph 145, Defendant denies the allegations.
146. In answer to paragraph 146, Defendant denies the allegations.
147. In answer to paragraph 147, Defendant denies the allegations.
148. In answer to paragraph 148, Defendant denies the allegations.
149. In answer to paragraph 149, Defendant denies the allegations.
150. Defendant is without sufficient knowledge to either admit or deny, or otherwise denies, all other allegations in the Verified Complaint.
151. Defendant denies the Prayer for Relief contained in the Verified Complaint in its entirety and affirmatively states that Plaintiff is entitled to nothing herein.

THIRD DEFENSE

This court lacks personal jurisdiction over Defendant.

FOURTH DEFENSE

Plaintiff has failed to join one or more parties under Fed. R. Civ. P. 19, including the real party in interest.

FIRST AFFIRMATIVE DEFENSE

Defendant affirmatively alleges that Plaintiff's claims are barred by waiver, estoppel, assumption of risk, comparative fault, license, release, ratification, statute

of frauds, laches, consent, privilege, and legal insufficiency or unenforceability of any claim for damages or other relief.

SECOND AFFIRMATIVE DEFENSE

Defendant affirmatively alleges that Plaintiff's claims are barred by the doctrines of res judicata, collateral estoppel, claim splitting and international comity.

THIRD AFFIRMATIVE DEFENSE

Defendant affirmatively alleges that Plaintiff's claims are barred by the doctrine of unclean hands to the extent it has misappropriated confidential information and trade secrets from any of the defendants and is equitably barred from alleging that Defendant engaged in the lawful conduct alleged in the Verified Complaint.

FOURTH AFFIRMATIVE DEFENSE

Defendant affirmatively alleges that Plaintiff fails to articulate the existence of any valid trade secret subject to protection under any state or federal law.

FIFTH AFFIRMATIVE DEFENSE

Defendant affirmatively alleges that Plaintiff cannot demonstrate any willful misappropriation of confidential information or trade secret.

SIXTH AFFIRMATIVE DEFENSE

Defendant affirmatively alleges that the Utah Uniform Trade Secrets Act preempts one or more of Plaintiff's claims.

SEVENTH AFFIRMATIVE DEFENSE

Defendant affirmatively alleges that the information Plaintiff claims was misappropriated was neither confidential nor trade secret.

EIGHTH AFFIRMATIVE DEFENSE

Defendant affirmatively alleges that the information Plaintiff claims was misappropriated was in the public domain.

NINTH AFFIRMATIVE DEFENSE

Defendant affirmatively alleges that Plaintiff has failed to take reasonable precautions to protect against the disclosure of information it claims is confidential or trade secret.

TENTH AFFIRMATIVE DEFENSE

Defendant affirmatively alleges that Plaintiff cannot demonstrate that it has suffered any damages as a result of Defendant's conduct.

ELEVENTH AFFIRMATIVE DEFENSE

Defendant affirmatively alleges that Plaintiff's claims are barred because any of Defendant's allegedly infringing work product is the result of independent development.

TWELFTH AFFIRMATIVE DEFENSE

Defendant affirmatively alleges that Plaintiff's alleged trade secrets and/or confidential information is readily ascertainable through lawful means.

THIRTEENTH AFFIRMATIVE DEFENSE

Defendant affirmatively alleges that Plaintiff has failed to mitigate its damages.

FOURTEENTH AFFIRMATIVE DEFENSE

Defendant affirmatively alleges that Plaintiff lacks standing to assert some or all of the claims contained in the Verified Complaint and/or is not the real party in interest with respect to such claims.

FIFTEENTH AFFIRMATIVE DEFENSE

Defendant affirmatively alleges the occurrence of intervening and supervening causes.

SIXTEENTH AFFIRMATIVE DEFENSE

Defendant affirmatively alleges that Plaintiff's own conduct is the sole cause of any alleged injury in Plaintiff's Verified Complaint.

SEVENTEENTH AFFIRMATIVE DEFENSE

Defendant affirmatively alleges that Plaintiff was negligent, reckless, or was otherwise at fault, that such fault was a proximate cause of the occurrence giving rise to this case and to any injuries sustained by Plaintiff, and that Plaintiff's fault was equal to or greater than the fault, if any, of defendants, including Falkbuilt Ltd.

EIGHTEENTH AFFIRMATIVE DEFENSE

Defendant affirmatively alleges that the occurrence giving rise to this case and any injuries and damages to Plaintiff were caused by the negligence, acts or omission of third-parties over whom Defendant exercised no control and for whom Defendant is not responsible or liable, including, but not limited to, each co-defendant named in this action, and non-parties Amanda Buczynski, Ingrid Schoning, and those as yet to be identified. Each of these co-defendants and non-parties should be placed on the special verdict form for purposes of apportionment of fault as permitted by the Utah Liability Reform Act.

NINETEENTH AFFIRMATIVE DEFENSE

Defendant affirmatively alleges that, pursuant to the Utah Liability Reform Act, it can only be held responsible for its own percentage of fault, if any, and Defendant demands an apportionment of fault on the special verdict form.

TWENTIETH AFFIRMATIVE DEFENSE

Defendant affirmatively alleges that Plaintiff's claims are barred in part or in whole because any recovery would constitute unjust enrichment.

TWENTY-FIRST AFFIRMATIVE DEFENSE

Defendant affirmatively alleges that Plaintiff has an adequate remedy at law and is, therefore, not entitled to equitable relief, including injunctive relief.

TWENTY-SECOND AFFIRMATIVE DEFENSE

Defendant affirmatively alleges that Plaintiff is not entitled to an injunction because its alleged injuries are neither immediate nor irreparable.

TWENTY-THIRD AFFIRMATIVE DEFENSE

Defendant affirmatively alleges that Plaintiff is not entitled to injunctive relief because it has failed to identify any specific conduct subject to an injunction.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

Defendant affirmatively alleges that Plaintiff's non-contract claims are barred by the economic loss rule.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

Defendant affirmatively alleges that no alleged act or omission was done willfully, maliciously, wantonly, or with reckless indifference or reckless disregard

to any right of Plaintiff and, therefore, any claim for exemplary or punitive damages and attorney fees is barred.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

Defendant affirmatively alleges that Plaintiffs' claim for punitive damages is barred by the one-year limitations period applicable to penalty statutes set forth in Utah Code Ann. § 78B-2-302.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

Defendant affirmatively alleges that Plaintiff's claim for punitive and/or exemplary damages is not recoverable and is barred by at least the following provisions of the United States Constitution and the Utah Constitution: (1) the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 9 of the Utah Constitution; (2) the Takings Clause of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 22 of the Utah Constitution; (3) the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and Article I, Section 24 of the Utah Constitution; (4) the prohibitions against excessive fines and punishments contained in the Eighth Amendment to the United States Constitution, and Article I, Section 9 of the Utah Constitution; and (5) any such

claims are further limited by Utah Code Ann. § 76-3-302 and Utah Code Ann. § 78B-8-201, *et seq.*

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

Defendant is entitled to recover its attorney fees and costs incurred in defending this action pursuant to Utah Code. Ann. § 78B-5-825 and § 13-24-5; 18 U.S.C. § 1836(b)(3)(C); and, 12 Pa. C.S. § 5305.

TWENTY-NINTH AFFIRMATIVE DEFENSE

Defendant affirmatively alleges that the Verified Complaint contains immaterial, impertinent, and/or scandalous matter that is inadmissible under the Federal Rules of Evidence, that appears to have been included in the Verified Complaint simply to smear the defendants and interfere with Defendant's potential economic relations, and that should be stricken.

THIRTIETH AFFIRMATIVE DEFENSE

Defendant reserves the right to amend this Answer to Verified Complaint to add such further and other avoidances and affirmative defenses as may be determined to be applicable on the basis of further discovery.

WHEREFORE, Defendant demands that the Verified Complaint be dismissed with prejudice, that it be awarded its costs and reasonable attorney fees incurred in defending this action, and for such other relief as the court deems just.

COUNTERCLAIM

Pursuant to Rule 13 of the Federal Rules of Civil Procedure, Defendant Falkbuilt, Ltd. hereby counterclaims against Plaintiff DIRT Environmental Solutions, Inc.

PARTIES

1. Defendant Falkbuilt, Ltd. ("Falkbuilt") is a body corporate, incorporated under the laws of Alberta, Canada with offices in Calgary, Alberta.

2. Plaintiff DIRT Environmental Solutions, Inc. ("DIRT") is a Colorado corporation, with its headquarters and principal place of business in Calgary, Alberta, Canada.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332 because there is complete diversity of citizenship and because the amount in controversy exceeds \$75,000.00, exclusive of interest and costs. This Court also has supplemental jurisdiction over this Counterclaim pursuant to 28 U.S.C. § 1367.

4. Venue is proper pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to this Counterclaim occurred within this judicial district and were a direct result of the Verified Complaint filed by DIRT in the original action herein.

FACTUAL BACKGROUND

5. Falkbuilt is a relatively new company that provides innovative construction and design solutions for modern building and renovation projects with a focus in digital component construction, which combines proven construction methods with next-gen technology to build beautiful, high-performing and cost-effective environments.

6. In late 2019, Falkbuilt was engaged in raising additional capital for the company. To that end, in mid-November 2019, Falkbuilt scheduled a closing of the first tranche of significant new investments of capital for December 12, 2019, (the “Planned Closing”).

7. On information and belief, DIRTT somehow learned of the Planned Closing (far in advance of its occurrence) and thereafter plotted to interfere with and scuttle the Planned Closing by filing its scandalous and defamatory Verified Complaint and widely disseminating it to numerous media outlets just before the Planned Closing.

8. More specifically, less than two days prior to the Planned Closing, on December 10, 2019 at approximately 7:53 p.m. Mountain Standard Time (or, said another way, December 11, 2019, at approximately 02:52:48 Universal Time Coordinated (UTC)), DIRTT or someone acting on DIRTT’s behalf used Domains

By Proxy, LLC, which is an affiliate of GoDaddy.com, LLC, to create and register the domain doc-dir.com. (ICANN Domain Name and Registration Data Lookup, attached hereto as Exhibit A.)

9. The next day, December 11, 2019, DIRTT’s counsel filed its Verified Complaint in this matter. (Dkt. 2.)

10. On that same day, someone acting on DIRTT’s behalf uploaded the Verified Complaint (sans exhibits) to the doc-dir.com website, more specifically to <http://doc-dir.com/uploads/complaint.pdf>.¹ A copy of the Verified Complaint located at this hyperlink is attached as Exhibit B.

11. The metadata on the copy of the Verified Complaint that is located at <http://doc-dir.com/uploads/complaint.pdf> shows it was “Created: 12/11/2019 11:25:44 AM” and “Modified: 12/11/2019 1:34:15 PM.” (Document Properties for complaint.pdf, which is attached as Exhibit C.)

12. Almost immediately after its Verified Complaint was uploaded to the doc-dir.com website on the afternoon of December 11, 2019, DIRTT finalized a press release entitled “DIRTT Makes Statement Regarding U.S. Litigation,

¹ See also Google search results for “inurl:doc.dir.com inurl:uploads” located at https://www.google.com/search?rlz=1C1GCEA_enUS853US853&biw=1707&bih=818&ei=6nk4XpyjCsq4tAaVuqrYAg&q=inurl%3Adoc.dir.com+inurl%3Auploads&oq=inurl%3Adoc.dir.com+inurl%3Auploads&gs_l=psy-ab.3...699094.701435..701593...0.0..0.76.944.16.....0....1..gws-wiz.6_gEhyqgP_Y&ved=0ahUKEwicwJWSILbnAhVKHM0KHRWdCisQ4dUDCAs&uact=5 (showing “Dec 11, 2019” as the upload date) (website last visited on February 5, 2020).

December 11, 2019,” (the “Press Release”), which is attached as Exhibit D, and then disseminated the Press Release to one or more members of the press or news organizations.²

13. The Press Release specifically referenced and provided the hyperlink to the Verified Complaint that had been uploaded at <http://doc-dir.com/uploads/complaint.pdf>. (Ex. D.)

14. DIRTT’s Press Release was quickly re-published on at least the following news organization websites:

<https://www.nasdaq.com/press-release/dirtt-makes-statement-regarding-u.s.-litigation-2019-12-11>

<https://www.bloomberg.com/press-releases/2019-12-11/dirtt-makes-statement-regarding-u-s-litigation>

<https://www.nbc-2.com/story/41440093/dirtt-makes-statement-regarding-us-litigation>

<https://www.barrons.com/articles/PR-CO-20191211-914086?tesla=y&tesla=y>

<https://finance.yahoo.com/news/dirtt-makes-statement-regarding-u-211800433.html>

<https://markets.businessinsider.com/news/stocks/dirtt-makes-statement-regarding-u-s-litigation-1028756757>

² A copy of the Press Release also is still available as of the date of this filing on DIRTT’s website, located at <https://www.dirtt.com/news/2019-dirtt-makes-statement-regarding-u-s-litigation/> (website last visited on February 5, 2020).

<http://www.kake.com/story/41440093/dirtt-makes-statement-regarding-us-litigation>

<https://www.weny.com/story/41440093/dirtt-makes-statement-regarding-us-litigation>

<https://www.benzinga.com/pressreleases/19/12/g14975366/dirtt-makes-statement-regarding-u-s-litigation>

<https://www.streetinsider.com/Globe+Newswire/DIRTT+Makes+Statement+Regarding+U.S.+Litigation/16234746.html>

<http://www.publicnow.com/view/19F6EEA823AD00A2FF0E9154C1EDD6E93B235B20?2019-12-11-22:00:22+00:00-xxx9384>

https://www.einnews.com/pr_news/504629500/dirtt-makes-statement-regarding-u-s-litigation

<https://www.einpresswire.com/article/504629500/dirtt-makes-statement-regarding-u-s-litigation>

<https://ceo.ca/@nasdaq/dirtt-makes-statement-regarding-us-litigation>

<https://www.cbj.ca/dirtt-makes-statement-regarding-u-s-litigation/>

<https://www.wallstreet-online.de/nachricht/11980217-dirtt-makes-statement-regarding-u-s-litigation>

<http://www.wicz.com/story/41440093/dirtt-makes-statement-regarding-us-litigation>

https://www.marketwatch.com/press-release/dirtt-makes-statement-regarding-us-litigation-2019-12-11?mod=mw_quote_news

<https://www.globenewswire.com/news-release/2019/12/11/1959546/0/en/DIRTT-Makes-Statement-Regarding-U-S-Litigation.html>

<https://www.financialbuzz.com/dirtt-makes-statement-regarding-u-s-litigation-2/>

<https://www.marketscreener.com/DIRTT-ENVIRONMENTAL-SOLUT-15057849/news/DIRTT-Makes-Statement-Regarding-U-S-Litigation-29714952/>

<https://menafn.com/1099409517/DIRTT-Makes-Statement-Regarding-US-Litigation-Toronto-Stock-ExchangeDRT>

https://web.tmxmoney.com/article.php?newsid=8801156747651990&qm_symbol=DRT

<http://crweworld.com/article/news-provided-by-globenewswire/1347800/dirtt-makes-statement-regarding-us-litigation>

(Websites last visited on February 3, 2020.)

15. All of the aforementioned republications of the Press Release specifically referenced and provided the hyperlink to the Verified Complaint that had been uploaded at <http://doc-dir.com/uploads/complaint.pdf>.

16. Multiple Canadian television news channels then picked up the story from DIRTT's Press Release and discussed it during news broadcasts.

17. And in response to DIRTT's Press Release, multiple Canadian news organizations followed-up with articles of their own (or republished articles of others), referencing and discussing the contents of the now widely disseminated Verified Complaint. See for example:

<https://calgaryherald.com/business/local-business/dirtt-sues-former-employee-for-theft-of-company-intelligence>

<https://vancouversun.com/business/local-business/dirtt-sues-former-employee-for-theft-of-company-intelligence/wcm/3a49c040-0044-4afe-95f1-7c792c048eaa>

<https://edmontonjournal.com/business/local-business/dirtt-sues-former-employee-for-theft-of-company-intelligence/wcm/3a49c040-0044-4afe-95f1-7c792c048eaa>

<https://calgarysun.com/business/local-business/dirtt-sues-former-employee-for-theft-of-company-intelligence/wcm/d554dd22-2ed7-497b-bb94-b5bf594578b3>

(Websites last visited on February 5, 2020.)

18. On information and belief, DIRTT disseminated the Press Release and its uploaded Verified Complaint affirmatively, intentionally and on its own initiative and not in response to any particular inquiry from the press or others.

19. On information and belief, DIRTT disseminated the Press Release and its uploaded Verified Complaint as part of a planned smear campaign, in an effort to broadly damage Falkbuilt's reputation and also to interfere with and hopefully scuttle the Planned Closing, which DIRTT previously had learned was set to occur on December 12, 2019, and which led DIRTT to issue the Press Release and spread its Verified Complaint on December 11, 2019.

20. DIRTT's Press Release and its uploaded Verified Complaint had the effects intended by DIRTT, to wit, Falkbuilt's reputation was considerably damaged and a substantial investment banker (of over \$3,000,000 USD) dropped

out of the proposed transactions, specifically telling Falkbuilt that it had seen DIRTT's Press Release and uploaded Verified Complaint and, as a result, was concerned by several of the alleged untrue and scandalous facts contained therein.

21. These results were not surprising given that DIRTT's widely disseminated Press Release and uploaded Verified Complaint contained numerous false and defamatory statements of fact and numerous inadmissible, immaterial, impertinent and scandalous matters.

22. More specifically, the Press Release contained multiple false statements of fact, including:

- "DIRTT Environmental Solutions **Ltd.** ... filed a federal lawsuit in the U.S. District Court of Utah against Falkbuilt Ltd....";
- "[D]efendants [are] ... misappropriating DIRTT's confidential information, trade secrets, business intelligence and customer information";
- Falkbuilt is "using that information to advance Falkbuilt's U.S. businesses to the detriment of DIRTT"; and
- "[T]hese efforts to interfere with our Company...."

(Press Release, Ex. D.)

23. The statements in the preceding paragraph are false because DIRTT Environmental Solutions **Inc.**, the U.S. subsidiary of the Canadian company DIRTT Environmental Solutions **Ltd.**, actually brought this lawsuit; because

Falkbuilt has not misappropriated DIRTT's confidential information, trade secrets, business intelligence or customer information; because Falkbuilt has not used that information to advance Falkbuilt's U.S. businesses to the detriment of DIRTT; and because Falkbuilt has not interfered with DIRTT.

24. Additionally, the latter three of the preceding false statements of fact in paragraph 22 are material and defamatory in that they call into question Falkbuilt's honesty, integrity, virtue and reputation.

25. The Press Release contained numerous additional false and defamatory statements because it linked to the Verified Complaint that had been uploaded by DIRTT or someone on DIRTT's behalf and because the Verified Complaint contains at least the following false statements of fact:

- The defendants have "the aim of setting up a competing business," (Ex. B at 2);
- "Amanda Buczynski ... immediately after her departure from DIRTT reached out to DIRTT customers on behalf of Falkbuilt," (Ex. B at 2);
- "Nevertheless, Mr. Smed has ... establish[ed] a competing business, and solicit[ed] DIRTT employees to leave DIRTT and join his competing business," (Ex. B ¶ 19);
- "Falkbuilt competes in the same general market as DIRTT," (Ex. B ¶ 19);
- "Falkbuilt's webpages and designs also mimic DIRTT's appearance," (Ex. B ¶ 19);

- “Mr. Henderson works for Falkbuilt Ltd.,” (Ex. B ¶ 24);
- “[T]he newly-formed Falk entities, have engaged in an ongoing attempt to replicate DIRTT’s business, products and business model through improper means, including but not limited to utilizing DIRTT confidential information and trade secrets to identify and approach customers and potential customers, utilizing pricing and margin information to undercut DIRTT’s quotes, and utilizing DIRTT’s patented and trade secret technology to gain an unfair advantage in product offerings,” (Ex. B ¶ 26);
- “Falkbuilt was built upon, and is dependent on, both information and employees obtained from DIRTT,” (Ex. B ¶ 27);
- “Falkbuilt would likely not be operating today but for the customer contact information, pricing, estimates and other DIRTT confidential information and trade secrets taken by former DIRTT employees, including Mr. Henderson, for use at their new business started by Mr. Smed,” (Ex. B ¶ 27);
- “Falkbuilt is directly competing with DIRTT,” (Ex. B ¶ 27);
- “Mr. Smed not only actively recruited DIRTT employees to join Falkbuilt, ... but also encouraged them to solicit other DIRTT employees to work for Falkbuilt,” (Ex. B ¶ 28);
- “Mr. Smed emboldened those same individuals to take with them DIRTT information that they utilized while in DIRTT’s employ, and to misappropriate DIRTT’s designs and know-how in order to assist Falkbuilt in quickly getting up-to-speed and operational, and to undercut DIRTT’s bids and estimates, with the end goal of ultimately taking DIRTT’s customers and projects,” (Ex. B ¶ 28);
- “Falkbuilt is bidding on the same projects as DIRTT and contacting DIRTT’s customers and prospective customers,” (Ex. B ¶ 28);
- “Mr. Henderson either made contact or accelerated plans with Mr. Smed and Falkbuilt to assist them in launching a business in Utah

to compete with DIRTT, utilizing DIRTT Confidential Business Information to do so,” (Ex. B ¶ 44);

- “Falk Mountain States was intended to be, and is an affiliate of Falkbuilt, a direct competitor of DIRTT set up by former DIRTT employees,” (Ex. B ¶ 60);
- “Ms. Buczynski started working on behalf of Falkbuilt immediately following her departure from DIRTT,” (Ex. B ¶ 73);
- “Ms. Buczynski reached out to one or more DIRTT customers on behalf of Falkbuilt,” (Ex. B ¶ 74);
- “Ms. Engelbert left DIRTT on December 31, 2018 and subsequently went to work for Falkbuilt,” (Ex. B ¶ 78(a));
- “Ms. Shadow left DIRTT’s employ on January 31, 2019 and subsequently went to work for Falkbuilt,” (Ex. B ¶ 78(c));
- “Mr. Weeks left DIRTT on Feb. 28, 2019 and went to work for Mr. Smed at Falkbuilt,” (Ex. B ¶ 79);
- “Ms. Schoning now works for Falkbuilt,” (Ex. B ¶ 80);
- “Falkbuilt has made public and misleading statements about the nature of its business and has attempted to impede the investigation into its activities,” (Ex. B ¶ 83);
- “Falkbuilt Ltd. ... acquired DIRTT trade secret information through its agents, Mr. Henderson and Kristy Henderson, knowing that such information was obtained by improper means,” (Ex. B ¶ 109);
- “Falkbuilt Ltd. ... knew or had reason to know that Mr. Henderson had acquired DIRTT’s trade secrets under circumstances giving rise to a duty to maintain their secrecy or limit their use; and had divulged DIRTT’s trade secrets when he owed a duty to DIRTT to maintain their secrecy or limit their use,” (Ex. B ¶ 110);

- “Falkbuilt Ltd. ... actively participated, through their conspiracy with other Defendants in misappropriating DIRTT’s trade secrets,” (Ex. B ¶ 125);
- “Falkbuilt Ltd. ... acquired DIRTT trade secret information through its agents, the Hendersons, knowing that such information was obtained by improper means,” (Ex. B ¶ 126);
- “Falkbuilt Ltd. ... knew or had reason to know that Mr. Henderson had acquired the DIRTT trade secrets under circumstances giving rise to a duty to maintain their secrecy or limit their use; and had divulged DIRTT trade secrets when he owed a duty to DIRTT to maintain their secrecy or limit their use,” (Ex. B ¶ 127);
- “Falkbuilt Ltd. actively participated with Ms. Buczynski in misappropriating DIRTT’s trade secrets,” (Ex. B ¶ 146);
- “Falkbuilt Ltd. ... acquired DIRTT trade secret information through its agent, Ms. Buczynski, knowing that such information was obtained by improper means,” (Ex. B ¶ 147); and
- “Falkbuilt Ltd. knew or had reason to know that Ms. Buczynski had acquired the DIRTT trade secrets under circumstances giving rise to a duty to maintain their secrecy or limit their use; and had divulged DIRTT’s trade secrets when she owed a duty to DIRTT to maintain their secrecy or limit their use,” (Ex. B ¶ 148).

26. All of the statements in the preceding paragraph are false, among other reasons, because Falkbuilt does not directly compete with DIRTT; because Falkbuilt has not sought to replicate DIRTT’s business; because Falkbuilt has not misappropriated DIRTT’s confidential information, trade secrets, business intelligence or customer information; because Falkbuilt has not acquired DIRTT’s trade secret information by improper means; because Falkbuilt has not used any

such information to advance Falkbuilt's business to the detriment of DIRTT; and because Falkbuilt has not interfered with DIRTT.

27. Additionally, the preceding false statements of fact in paragraph 25 are material and defamatory in that they call into question Falkbuilt's honesty, integrity, virtue and reputation.

28. In addition to the false and defamatory statements described above, DIRTT's widely disseminated Press Release and uploaded Verified Complaint contained the following inadmissible, immaterial, impertinent and scandalous matters:

- "Mr. Henderson's 2003 felony securities fraud convictions," (Ex. B ¶ 35);
- "Mr. Henderson's crimes were quite serious. According to press accounts of his sentencing, he pled guilty to a number of felony counts involving his stealing between \$6 million and \$8 million from investors in fraudulent business ventures, ultimately serving time in prison based on his convictions. *See* "Swindler Sentenced," KSL.com, 6/21/03 (available at <https://www.ksl.com/article/90261/swindler-sentenced>, last retrieved 12/11/19)," (Ex. B ¶ 36);
- "Press reports of Mr. Henderson's sentencing hearing note that over 64 known victims, many of them senior citizens, lost their life savings and retirement pensions to Mr. Henderson's fraudulent scheme. Mr. Henderson was ordered to repay those funds," (Ex. B ¶ 37);

- “While Mr. Smed was aware of these convictions while acting as DIRTT’s CEO, he nonetheless regularly supported Mr. Henderson in his role at DIRTT,” (Ex. B ¶ 38); and
- “Mr. Henderson’s prior criminal convictions...,” (Ex. B ¶ 41).

29. There is no justifiable basis, let alone a good faith basis, for DIRTT to have included the aforementioned inadmissible, immaterial, impertinent and scandalous matters in its Verified Complaint, particularly the details listed in paragraphs 36 and 37 of the Verified Complaint.

30. On information and belief, DIRTT included the inadmissible, immaterial, impertinent and scandalous matters set forth above in paragraph 28 solely for the purpose of smearing Mr. Henderson and Falkbuilt, thereby damaging their reputations, and hoping to scuttle the Planned Closing in the process.

31. And DIRTT’s tactics worked—the previously mentioned investment banker that dropped out of the planned investment transactions on December 11, 2019, specifically referenced at that time concerns over the false and defamatory statements and the inadmissible, immaterial, impertinent and scandalous matters concerning Mr. Henderson’s prior conviction that DIRTT had included in its uploaded Verified Complaint.

32. Although the inclusion of these inadmissible, immaterial, impertinent and scandalous matters in the Verified Complaint are clear violations of Federal

Rule of Civil Procedure 12(f), the damage already caused by the widespread dissemination of the Verified Complaint cannot be undone by simply striking these allegations from the Verified Complaint.

33. The false and defamatory statements and inadmissible, immaterial, impertinent and scandalous matters included in DIRTT's Press Release and uploaded Verified Complaint directly and proximately caused significant damage to Falkbuilt, in an amount to be proven at trial but in excess of \$3,000,000 USD and including, among other things, damage to Falkbuilt's reputation, loss of business value, loss of capital investments, and lost profits.

COUNT I
(Defamation)

34. By this reference, Falkbuilt incorporates into this cause of action all of the other paragraphs of this Counterclaim as if fully set forth herein.

35. With its widely disseminated Press Release and uploaded, hyperlinked Verified Complaint, DIRTT authored and then published numerous statements about Falkbuilt to a wide audience across Canada and the United States.

36. As detailed above, numerous statements in the Press Release and uploaded, hyperlinked Verified Complaint were false.

37. The numerous statements in the Press Release and uploaded, hyperlinked Verified Complaint that were false also were material and defamatory.

38. The numerous statements in the Press Release and uploaded, hyperlinked Verified Complaint that were false are not and were not privileged. To the extent there was any privilege, it was lost through DIRTT's intentional, widespread publication of the Press Release and uploaded, hyperlinked Verified Complaint.

39. The numerous untrue statements in the Press Release and uploaded, hyperlinked Verified Complaint detailed above expressly or implicitly referred to and were meant by DIRTT to apply to Falkbuilt.

40. DIRTT intended the numerous untrue statements in the Press Release and uploaded, hyperlinked Verified Complaint described above to specifically refer to Falkbuilt.

41. Many recipients of the numerous untrue statements in the Press Release and uploaded, hyperlinked Verified Complaint detailed above actually understood the statements to be referring to Falkbuilt.

42. At the time that DIRTT published the statements, DIRTT knew the statements were false or at least published them with the negligent or reckless disregard of the truth and with the malicious intent to damage Falkbuilt's character and reputation.

43. The numerous false and defamatory statements in the Press Release and uploaded, hyperlinked Verified Complaint described above have directly and proximately caused damage to Falkbuilt in an amount to be proven at trial, but in excess of \$3,000,000 USD and including, among other things, damage to Falkbuilt's reputation, loss of business value, loss of capital investments, and lost profits.

44. In addition, Falkbuilt is entitled to recover punitive damages because DIRTT's conduct described herein was willful and malicious and manifested a knowing and reckless indifference toward, and a disregard of, the rights of others, including Falkbuilt.

45. Finally, because DIRTT is not innocent in these matters and instead intentionally and knowingly acted, Falkbuilt is entitled to a mandatory injunction requiring removal of the uploaded Verified Complaint and retraction and correction of the Press Release.

COUNT II
(Intentional Interference with Economic Relations)

46. By this reference, Falkbuilt incorporates into this cause of action all of the other paragraphs of this Counterclaim as if fully set forth herein.

47. DIRTT knew, or should have known, of the economic relationships or potential relationships between Falkbuilt and Falkbuilt's existing and prospective

investors and investment bankers, specifically in relation to the Planned Closing and more generally otherwise.

48. DIRTТ intentionally interfered with and continues to interfere with Falkbuilt's existing and potential economic relationships that Falkbuilt has and hoped to have with its investors and investment bankers.

49. DIRTТ knowingly and intentionally interfered with Falkbuilt's existing and potential economic relationships with its investors and investment bankers through improper means, including but not limited to (1) authoring and widely disseminating its Press Release and uploaded Verified Complaint, which contained numerous false, defamatory and damaging statements as described above, and (2) including numerous inadmissible, immaterial, impertinent and scandalous matters as described above in its Verified Complaint in clear violation of Federal Rule of Civil Procedure 12(f).

50. DIRTТ acted for the purpose of interfering with the economic relationships or potential relationships between Falkbuilt and Falkbuilt's existing and prospective investors and investment bankers, or DIRTТ acted knowing that the interference was substantially certain to occur as a result of DIRTТ's actions.

51. DIRTТ's intentional interference with Falkbuilt's economic relationships has directly and proximately caused damage to Falkbuilt in an

amount to be proven at trial, but in excess of \$3,000,000 USD and including, among other things, damage to Falkbuilt's reputation, loss of business value, loss of capital investments, and lost profits.

52. In addition, Falkbuilt is entitled to recover punitive damages because DIRTT's conduct described herein was willful and malicious and manifested a knowing and reckless indifference toward, and a disregard of, the rights of others, including Falkbuilt.

53. Finally, because DIRTT is not innocent in these matters and instead intentionally and knowingly acted, Falkbuilt is entitled to a mandatory injunction requiring removal of the uploaded Verified Complaint and retraction and correction of the Press Release.

PRAYER FOR RELIEF

Wherefore, Falkbuilt respectfully prays for the following relief:

a. For damages in an amount to be proven at trial, but in excess of \$3,000,000 USD and including, among other things, damage to Falkbuilt's reputation, loss of business value, loss of capital investments, and lost profits;

b. For punitive damages in an amount to be proven at trial;

- c. For a mandatory injunction requiring removal of the uploaded Verified Complaint and retraction and correction of the Press Release;
- d. For pre- and post-judgment interest at the highest rate allowed by law; and
- e. For reasonable attorney fees and costs incurred herein, together with such other and further relief as the Court may deem appropriate.

JURY DEMAND

Falkbuilt demands a jury trial on all issues triable by a jury.

DATED this 5th day of February, 2020.

/s/ P. Bruce Badger _____
P. Bruce Badger
Jason W. Hardin
FABIAN VANCOTT
*Attorneys for Defendant and
Counterclaimant Falkbuilt Ltd.*

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of February, 2020, a true and correct copy of the foregoing **FALKBUILT LTD.’S ANSWER TO VERIFIED COMPLAINT AND COUNTERCLAIM** was served via the Court’s electronic filing system as follows:

Chad E. Nydegger
cnydegger@wnlaw.com
WORKMAN NYDEGGER
60 East South Temple, Suite 1000
Salt Lake City, Utah 84111
Attorneys for Plaintiff

Jeffrey J. Mayer (*pro hac vice*)
Jeffrey.mayer@akerman.com
Catherine A. Miller (*pro hac vice*)
Catherine.miller@akerman.com
Timothy K. Sendek (*pro hac vice*)
Tim.sendek@akerman.com
AKERMAN LLP
71 So. Wacker Drive, 47th Floor
Chicago, IL 60606
Attorneys for Plaintiff

Alan C. Bradshaw
abradshaw@mc2b.com
Chad R. Derum
cderum@mc2b.com
Jack T. Nelson
jnelson@mc2b.com
MANNING CURTIS BRADSHAW & BEDNAR PLLC
136 E. South Temple, Suite 1300
Salt Lake City, Utah 84111
*Attorneys for Defendants Lance Henderson,
Kristy Henderson and Falk Mountain States, LLC*

/s/ P. Bruce Badger

P. Bruce Badger (A4791)
bbadger@fabianvancott.com
Jason W. Hardin (A8793)
jhardin@fabianvancott.com
FABIAN VANCOTT
215 South State Street, Suite 1200
Salt Lake City, UT 84111-2323
Telephone: (801) 531-8900

Attorneys for Defendant and Counterclaimant Falkbuilt Ltd.

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, NORTHERN DIVISION**

DIRTT ENVIRONMENTAL
SOLUTIONS, INC.,

Plaintiff,

vs.

LANCE HENDERSON, KRISTY
HENDERSON, FALKBUILT LTD.,
AND FALK MOUNTAIN STATES,
LLC,

Defendants.

Case No. 1:19CV00144-DBB-DBP

**FALKBUILT LTD.'S
FIRST AMENDED
COUNTERCLAIM**

(JURY DEMANDED)

Honorable David B. Barlow
Magistrate Judge Dustin B. Pead

FALKBUILT LTD.

Counterclaimant,

vs.

DIRTT ENVIRONMENTAL
SOLUTIONS, INC.

Counterclaim Defendant.

Pursuant to Rules 13 and 15(a)(1)(B) of the Federal Rules of Civil Procedure, Defendant and Counterclaimant Falkbuilt, Ltd. hereby submits its First Amended Counterclaim against Plaintiff and Counterclaim Defendant DIRT Environmental Solutions, Inc.

PARTIES

1. Defendant and Counterclaimant Falkbuilt, Ltd. (“Falkbuilt”) is a body corporate, incorporated under the laws of Alberta, Canada, with offices in Calgary, Alberta. Falkbuilt has its headquarters and principal place of business in Calgary, Alberta, Canada, but Falkbuilt conducts its business internationally, including throughout Canada, and in multiple states within the United States, including but not limited to Utah.

2. Plaintiff and Counterclaim Defendant DIRT Environmental Solutions, Inc. (“DIRT”) is a Colorado corporation, with its headquarters and principal place of business in Calgary, Alberta, Canada. DIRT conducts its business internationally, including throughout Canada, and in multiple states within the United States, including but not limited to Utah.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332 because there is complete diversity of citizenship and because the amount

in controversy exceeds \$75,000.00, exclusive of interest and costs. This Court also has supplemental jurisdiction over this Counterclaim pursuant to 28 U.S.C. § 1367.

4. Venue is proper pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to this First Amended Counterclaim occurred within this judicial district and were a direct result of the Verified Complaint filed by DIRTT in the original action herein (the “Utah Verified Complaint”).

FACTUAL BACKGROUND

5. Falkbuilt is a relatively new company that provides innovative construction and design solutions for modern building and renovation projects with a focus in digital component construction, which combines proven construction methods with next-gen technology to build beautiful, high-performing and cost-effective environments.

6. Falkbuilt has a network of independently owned and operated dealers throughout the United States, including in Utah.

7. In late 2019, Falkbuilt was engaged in raising additional capital for the company. To that end, in mid-November 2019, Falkbuilt scheduled a closing of the first tranche of significant new investments of capital for December 12, 2019, (the “Planned Closing”).

8. The Planned Closing ultimately was set to deposit funds into Falkbuilt's bank account at Falkbuilt's bank in Calgary, Alberta, Canada.

9. Falkbuilt had intended for the funds generated at the Planned Closing to be used for further expanding its facilities as well as its marketing efforts and business in the United States where the large majority of its customers are located, including but not limited to Utah.

10. On information and belief, DIRTT somehow learned of the Planned Closing (far in advance of its occurrence) and thereafter plotted to interfere with and scuttle the Planned Closing by filing its scandalous and defamatory Utah Verified Complaint and thereafter widely disseminating it on the internet and to numerous media outlets just before the Planned Closing. DIRTT could have learned of such information, for example, secondhand from one of its own investors, who also may have been a potential investor in Falkbuilt and who inappropriately leaked the information. Falkbuilt expects that further investigation and discovery from DIRTT and third parties will reveal the identities of those at DIRTT who learned about the Planned Closing, from whom they learned about the Planned Closing, and how the information about the Planned Closing was disseminated within DIRTT. Falkbuilt does not know or have access to such information at the time of filing this First Amended Counterclaim.

11. More specifically, less than two days prior to the Planned Closing, on December 10, 2019 at approximately 7:53 p.m. Mountain Standard Time (or, said another way, December 11, 2019, at approximately 02:52:48 Universal Time Coordinated (UTC)), DIRTT or someone acting on DIRTT's behalf used Domains By Proxy, LLC, which is an affiliate of GoDaddy.com, LLC, to create and register the domain doc-dir.com. (ICANN Domain Name and Registration Data Lookup, attached hereto as Exhibit A.) At the time of filing this First Amended Counterclaim, Falkbuilt does not know exactly who at DIRTT or on DIRTT's behalf created and registered the domain doc-dir.com, but Falkbuilt expects that further investigation and discovery from DIRTT or third parties will reveal the identity of this person (or persons) and the location where the actions alleged in this paragraph occurred.

12. The domain doc-dir.com returns an IP address of 104.27.148.103, which is geolocated (using iplocation.net) to either San Francisco, California, or Chicago, Illinois, which also happens to be the location of the offices of DIRTT's legal counsel at Akerman LLP in this matter. The organization associated with the IP address of 104.27.148.103 (using iplocation.net) is Cloudflare, Inc., a content-delivery-network that acts as a reverse proxy for websites that masks a website's hosting provider and other details. As a result of DIRTT's use of Cloudflare, Inc.,

Falkbuilt is unable to determine as of the filing of this First Amended Counterclaim the actual location or IP address of the server hosting the domain doc-dir.com, but Falkbuilt expects that further investigation and discovery from DIRTT or third parties will reveal this information.

13. On December 11, 2019, less than a day after the domain doc-dir.com had been created and registered, DIRTT's Utah-based legal counsel at Workman Nydegger filed the Utah Verified Complaint in the United States District Court for the District of Utah. (Dkt. 2.)

14. On that same day, someone acting on DIRTT's behalf uploaded the Utah Verified Complaint (sans exhibits) to the doc-dir.com website, more specifically to <http://doc-dir.com/uploads/complaint.pdf>.¹ A copy of the Utah Verified Complaint located at this hyperlink is attached as Exhibit B.

15. The metadata on the copy of the Utah Verified Complaint that is located at <http://doc-dir.com/uploads/complaint.pdf> shows it was "Created: 12/11/2019 11:25:44 AM" and "Modified: 12/11/2019 1:34:15 PM." (Document Properties for complaint.pdf, which is attached as Exhibit C.)

¹ See also Google search results for "inurl:doc.dir.com inurl:uploads" located at https://www.google.com/search?rlz=1C1GCEA_enUS853US853&biw=1707&bih=818&ei=6nk4XpyjCsq4tAaVuqrYAg&q=inurl%3Adoc.dir.com+inurl%3Auploads&oq=inurl%3Adoc.dir.com+inurl%3Auploads&gs_l=psy-ab.3...699094.701435..701593...0.0..0.76.944.16.....0....1..gws-wiz.6_gEhyqgP_Y&ved=0ahUKEwicwJWSILbnAhVKHM0KHRWdCisQ4dUDCAs&uact=5 (showing "Dec 11, 2019" as the upload date) (website last visited on March 17, 2020).

16. As of the time of filing this First Amended Counterclaim, Falkbuilt does not know exactly who on DIRTT's behalf downloaded the Utah Verified Complaint from the Utah court's website and then uploaded that version of the Utah Verified Complaint (sans exhibits) to the doc-dir.com website or where that person was located, but the uploaded copy of the Utah Verified Complaint unquestionably originated from this Utah litigation filed in Salt Lake City and from the Utah court's website. Falkbuilt also expects that further investigation and discovery from DIRTT or third parties will reveal additional relevant information.

17. Almost immediately after its Utah Verified Complaint was uploaded to the doc-dir.com website on the afternoon of December 11, 2019, DIRTT finalized a press release entitled "DIRTT Makes Statement Regarding U.S. Litigation, December 11, 2019," (the "[Press Release](#)"), which is attached as [Exhibit D](#), and then disseminated the Press Release to one or more members of the press or news organizations. The Press Release specifically referenced and provided the hyperlink to the Utah Verified Complaint that had been uploaded at <http://doc-dir.com/uploads/complaint.pdf>. (Ex. D.)

18. A copy of the Press Release is still available as of the date of this filing on DIRTT's website, located at <https://www.dirtt.com/news/2019-dirtt-makes-statement-regarding-u-s-litigation/> (website last visited on March 17, 2020).

The DIRTT website for this Press Release returns an IP address of 52.38.93.139, which is geolocated (using iplocation.net) to Portland, Oregon. The organization associated with the IP address of 52.38.93.139 (using iplocation.net) is Amazon Technologies, Inc.

19. The Press Release on DIRTT’s website also contained and still contains a hyperlink titled “View Press Release,” which linked and still links to a version of the Press Release located at <http://www.globenewswire.com/news-release/2019/12/11/1959546/0/en/DIRTT-Makes-Statement-Regarding-U-S-Litigation.html> (last visited March 17, 2020).

20. The Press Release on DIRTT’s website also contained and still contains a hyperlink titled “View the Filing,” which linked and still links to the version of the Utah Verified Complaint filed in this Utah-based litigation located at <http://doc-dir.com/uploads/complaint.pdf> (last visited March 17, 2020), which is detailed and discussed above.

21. DIRTT has now widely published the Utah Verified Complaint on the internet throughout the United States, in Canada and throughout the world.

22. As of the time of filing this First Amended Counterclaim, Falkbuilt does not know exactly who on DIRTT’s behalf drafted the Press Release, uploaded the Press Release to DIRTT’s website, distributed the Press Release to the press

and media outlets, or created the hyperlink in the Press Release to the Utah Verified Complaint from the Utah court's website, or where that person was located when those actions were taken, but unquestionably: (1) the copy of the Utah Verified Complaint linked in the Press Release originated from this Utah litigation and from the Utah court's website, and (2) DIRTT or someone acting on DIRTT's behalf initially created and disseminated the Press Release and linked to the Utah Verified Complaint in the process. Falkbuilt expects that further investigation and discovery from DIRTT or third parties will reveal additional information.

23. DIRTT's Press Release was quickly re-published on at least the following news organization websites located throughout North America:

<https://www.nasdaq.com/press-release/dirtt-makes-statement-regarding-u.s.-litigation-2019-12-11>

<https://www.bloomberg.com/press-releases/2019-12-11/dirtt-makes-statement-regarding-u-s-litigation>

<https://www.nbc-2.com/story/41440093/dirtt-makes-statement-regarding-us-litigation>

<https://www.barrons.com/articles/PR-CO-20191211-914086?tesla=y&tesla=y>

<https://finance.yahoo.com/news/dirtt-makes-statement-regarding-u-211800433.html>

<https://markets.businessinsider.com/news/stocks/dirtt-makes-statement-regarding-u-s-litigation-1028756757>

<http://www.kake.com/story/41440093/dirtt-makes-statement-regarding-us-litigation>

<https://www.weny.com/story/41440093/dirtt-makes-statement-regarding-us-litigation>

<https://www.benzinga.com/pressreleases/19/12/g14975366/dirtt-makes-statement-regarding-u-s-litigation>

<https://www.streetinsider.com/Globe+Newswire/DIRTT+Makes+Statement+Regarding+U.S.+Litigation/16234746.html>

<http://www.publicnow.com/view/19F6EEA823AD00A2FF0E9154C1EDD6E93B235B20?2019-12-11-22:00:22+00:00-xxx9384>

https://www.einnews.com/pr_news/504629500/dirtt-makes-statement-regarding-u-s-litigation

<https://www.einpresswire.com/article/504629500/dirtt-makes-statement-regarding-u-s-litigation>

<https://ceo.ca/@nasdaq/dirtt-makes-statement-regarding-us-litigation>

<https://www.cbj.ca/dirtt-makes-statement-regarding-u-s-litigation/>

<https://www.wallstreet-online.de/nachricht/11980217-dirtt-makes-statement-regarding-u-s-litigation>

<http://www.wicz.com/story/41440093/dirtt-makes-statement-regarding-us-litigation>

https://www.marketwatch.com/press-release/dirtt-makes-statement-regarding-us-litigation-2019-12-11?mod=mw_quote_news

<https://www.globenewswire.com/news-release/2019/12/11/1959546/0/en/DIRTT-Makes-Statement-Regarding-U-S-Litigation.html>

<https://www.financialbuzz.com/dirtt-makes-statement-regarding-u-s-litigation-2/>

<https://www.marketscreener.com/DIRTT-ENVIRONMENTAL-SOLUT-15057849/news/DIRTT-Makes-Statement-Regarding-U-S-Litigation-29714952/>

<https://menafn.com/1099409517/DIRTT-Makes-Statement-Regarding-US-Litigation-Toronto-Stock-ExchangeDRT>

https://web.tmxmoney.com/article.php?newsid=8801156747651990&qm_symbol=DRT

<http://crweworld.com/article/news-provided-by-globenewswire/1347800/dirtt-makes-statement-regarding-us-litigation>

(Websites last visited on February 3, 2020.)

24. All of the aforementioned republications of the Press Release specifically referenced and provided the hyperlink to the Utah Verified Complaint that originated in this Utah court and had been uploaded by DIRTT or someone on DIRTT's behalf to <http://doc-dir.com/uploads/complaint.pdf>.

25. Multiple Canadian television news channels also picked up the story from DIRTT's Press Release and discussed it during news broadcasts.

26. And in response to DIRTT's Press Release, multiple Canadian news organizations followed-up with articles of their own (or republished articles of

others), referencing and discussing the contents of the now widely disseminated

Utah Verified Complaint. See for example:

<https://calgaryherald.com/business/local-business/dirtt-sues-former-employee-for-theft-of-company-intelligence>

<https://vancouver.sun.com/business/local-business/dirtt-sues-former-employee-for-theft-of-company-intelligence/wcm/3a49c040-0044-4afe-95f1-7c792c048eaa>

<https://edmontonjournal.com/business/local-business/dirtt-sues-former-employee-for-theft-of-company-intelligence/wcm/3a49c040-0044-4afe-95f1-7c792c048eaa>

<https://calgarysun.com/business/local-business/dirtt-sues-former-employee-for-theft-of-company-intelligence/wcm/d554dd22-2ed7-497b-bb94-b5bf594578b3>

(Websites last visited on February 5, 2020.)

27. The members of the press and media organizations to whom DIRTT published the Press Release and the linked uploaded Utah Verified Complaint had neither any relationship to this pending judicial proceeding nor any apparent legal interest in the outcome of this litigation. They simply received the Press Release and linked Utah Verified Complaint from DIRTT and distributed them, as DIRTT hoped and intended.

28. The Press Release and Utah Verified Complaint were clearly and most certainly published by DIRTT to more persons than necessary to resolve this dispute or further any legitimate objective of this litigation.

29. On information and belief, DIRTT disseminated the Press Release and the linked Utah Verified Complaint affirmatively, intentionally and on its own initiative and not in response to any particular inquiry from the press or others.

30. DIRTT or someone on its behalf initially disseminated the Press Release and the link to the uploaded Utah Verified Complaint, which originated in this Utah-based litigation and the Utah court, affirmatively, intentionally and on its own initiative.

31. On information and belief, DIRTT disseminated the Press Release and the link to the uploaded Utah Verified Complaint as part of a planned smear campaign, in an effort to broadly damage Falkbuilt's reputation and business with its dealers, customers and employees, including dealers and customers in Utah, and also to interfere with and hopefully scuttle the Planned Closing, which DIRTT previously had learned was set to occur on December 12, 2019, and which led DIRTT to issue the Press Release and spread its Utah Verified Complaint on December 11, 2019.

32. DIRTT's Press Release with its link to the uploaded Utah Verified Complaint had the effects intended by DIRTT, to wit: Falkbuilt's reputation and business was considerably damaged, including in Utah, and a substantial investment bank dropped out of the Planned Closing and proposed transactions (of

over \$3,000,000 USD, which as noted above had been planned to fund in Calgary, Alberta), specifically telling Falkbuilt that it had seen DIRTT's Press Release and linked/uploaded Utah Verified Complaint and was scared off by several of the alleged untrue and scandalous facts contained therein.

33. These results were not surprising given that DIRTT's widely disseminated Press Release and linked/uploaded Utah Verified Complaint contained numerous false and defamatory statements of fact and numerous inadmissible, immaterial, impertinent and scandalous matters that had no possible or logical connection to the subject matter of the controversy.

34. More specifically, the Press Release contained multiple false statements of fact, including:

- “[D]efendants [are] ... misappropriating DIRTT's confidential information, trade secrets, business intelligence and customer information”;
- Falkbuilt is “using that information to advance Falkbuilt's U.S. businesses to the detriment of DIRTT”; and
- “[T]hese efforts to interfere with our Company....”

(Press Release, Ex. D.)

35. Taken together as well as individually, the statements in the preceding paragraph are false because Falkbuilt has not misappropriated DIRTT's confidential information, trade secrets, business intelligence or customer

information; because Falkbuilt has not used that information to advance Falkbuilt's U.S. businesses to the detriment of DIRTT; and because Falkbuilt has not interfered with DIRTT.

36. Additionally, the preceding false statements of fact in paragraph 34, taken together as well as individually, are material and defamatory in that they call into question Falkbuilt's honesty, integrity, virtue and reputation and also are incompatible with the exercise of Falkbuilt's lawful business in Utah and elsewhere by, among other things, negatively reflecting on Falkbuilt's fitness to engage in its business through false claims of misappropriation and interference, meaning that damages are and can be presumed (in addition to actual economic damages having in fact occurred).

37. The Press Release contained numerous additional false and defamatory statements because it linked to the Utah Verified Complaint that had been uploaded by DIRTT or someone on DIRTT's behalf and because the Utah Verified Complaint contains at least the following false statements of fact:

- The defendants have "the aim of setting up a competing business," (Ex. B at 2);
- "Amanda Buczynski ... immediately after her departure from DIRTT reached out to DIRTT customers on behalf of Falkbuilt," (Ex. B at 2);

- “Nevertheless, Mr. Smed has ... establish[ed] a competing business, and solicit[ed] DIRTT employees to leave DIRTT and join his competing business,” (Ex. B ¶ 19);
- “Falkbuilt competes in the same general market as DIRTT,” (Ex. B ¶ 19);
- “Falkbuilt’s webpages and designs also mimic DIRTT’s appearance,” (Ex. B ¶ 19);
- “Mr. Henderson works for Falkbuilt Ltd.,” (Ex. B ¶ 24);
- “[T]he newly-formed Falk entities, have engaged in an ongoing attempt to replicate DIRTT’s business, products and business model through improper means, including but not limited to utilizing DIRTT confidential information and trade secrets to identify and approach customers and potential customers, utilizing pricing and margin information to undercut DIRTT’s quotes, and utilizing DIRTT’s patented and trade secret technology to gain an unfair advantage in product offerings,” (Ex. B ¶ 26);
- “Falkbuilt was built upon, and is dependent on, both information and employees obtained from DIRTT,” (Ex. B ¶ 27);
- “Falkbuilt would likely not be operating today but for the customer contact information, pricing, estimates and other DIRTT confidential information and trade secrets taken by former DIRTT employees, including Mr. Henderson, for use at their new business started by Mr. Smed,” (Ex. B ¶ 27);
- “Falkbuilt is directly competing with DIRTT,” (Ex. B ¶ 27);
- “Mr. Smed not only actively recruited DIRTT employees to join Falkbuilt, ... but also encouraged them to solicit other DIRTT employees to work for Falkbuilt,” (Ex. B ¶ 28);
- “Mr. Smed emboldened those same individuals to take with them DIRTT information that they utilized while in DIRTT’s employ, and to misappropriate DIRTT’s designs and know-how in order to assist Falkbuilt in quickly getting up-to-speed and operational, and

to undercut DIRTT's bids and estimates, with the end goal of ultimately taking DIRTT's customers and projects," (Ex. B ¶ 28);

- "Falkbuilt is bidding on the same projects as DIRTT and contacting DIRTT's customers and prospective customers," (Ex. B ¶ 28);
- "Mr. Henderson either made contact or accelerated plans with Mr. Smed and Falkbuilt to assist them in launching a business in Utah to compete with DIRTT, utilizing DIRTT Confidential Business Information to do so," (Ex. B ¶ 44);
- "Falk Mountain States was intended to be, and is an affiliate of Falkbuilt, a direct competitor of DIRTT set up by former DIRTT employees," (Ex. B ¶ 60);
- "Ms. Buczynski started working on behalf of Falkbuilt immediately following her departure from DIRTT," (Ex. B ¶ 73);
- "Ms. Buczynski reached out to one or more DIRTT customers on behalf of Falkbuilt," (Ex. B ¶ 74);
- "Ms. Engelbert left DIRTT on December 31, 2018 and subsequently went to work for Falkbuilt," (Ex. B ¶ 78(a));
- "Ms. Shadow left DIRTT's employ on January 31, 2019 and subsequently went to work for Falkbuilt," (Ex. B ¶ 78(c));
- "Mr. Weeks left DIRTT on Feb. 28, 2019 and went to work for Mr. Smed at Falkbuilt," (Ex. B ¶ 79);
- "Ms. Schoning now works for Falkbuilt," (Ex. B ¶ 80);
- "Falkbuilt has made public and misleading statements about the nature of its business and has attempted to impede the investigation into its activities," (Ex. B ¶ 83);
- "Falkbuilt Ltd. ... acquired DIRTT trade secret information through its agents, Mr. Henderson and Kristy Henderson, knowing

that such information was obtained by improper means,” (Ex. B ¶ 109);

- “Falkbuilt Ltd. ... knew or had reason to know that Mr. Henderson had acquired DIRTT’s trade secrets under circumstances giving rise to a duty to maintain their secrecy or limit their use; and had divulged DIRTT’s trade secrets when he owed a duty to DIRTT to maintain their secrecy or limit their use,” (Ex. B ¶ 110);
- “Falkbuilt Ltd. ... actively participated, through their conspiracy with other Defendants in misappropriating DIRTT’s trade secrets,” (Ex. B ¶ 125);
- “Falkbuilt Ltd. ... acquired DIRTT trade secret information through its agents, the Hendersons, knowing that such information was obtained by improper means,” (Ex. B ¶ 126);
- “Falkbuilt Ltd. ... knew or had reason to know that Mr. Henderson had acquired the DIRTT trade secrets under circumstances giving rise to a duty to maintain their secrecy or limit their use; and had divulged DIRTT trade secrets when he owed a duty to DIRTT to maintain their secrecy or limit their use,” (Ex. B ¶ 127);
- “Falkbuilt Ltd. actively participated with Ms. Buczynski in misappropriating DIRTT’s trade secrets,” (Ex. B ¶ 146);
- “Falkbuilt Ltd. ... acquired DIRTT trade secret information through its agent, Ms. Buczynski, knowing that such information was obtained by improper means,” (Ex. B ¶ 147); and
- “Falkbuilt Ltd. knew or had reason to know that Ms. Buczynski had acquired the DIRTT trade secrets under circumstances giving rise to a duty to maintain their secrecy or limit their use; and had divulged DIRTT’s trade secrets when she owed a duty to DIRTT to maintain their secrecy or limit their use,” (Ex. B ¶ 148).

38. Taken together as well as individually, all of the statements in the preceding paragraph are false, among other reasons, because Falkbuilt does not

directly compete with DIRTT; because Falkbuilt has not sought to replicate DIRTT's business; because Falkbuilt has not misappropriated DIRTT's confidential information, trade secrets, business intelligence or customer information; because Falkbuilt has not acquired DIRTT's trade secret information by improper means; because Falkbuilt has not used any such information to advance Falkbuilt's business to the detriment of DIRTT; and because Falkbuilt has not interfered with DIRTT.

39. Additionally, the preceding false statements of fact in paragraph 37, taken together as well as individually, are material and defamatory in that they call into question Falkbuilt's honesty, integrity, virtue and reputation and also are incompatible with the exercise of Falkbuilt's lawful business in Utah and elsewhere by, among other things, negatively reflecting on Falkbuilt's fitness to engage in its business through false claims of direct competition, misappropriation and interference, meaning that damages are and can be presumed (in addition to actual economic damages having in fact occurred).

40. In addition to the false and defamatory statements described above, DIRTT's widely disseminated Press Release and linked/uploaded Utah Verified Complaint contained the following inadmissible, immaterial, impertinent and

scandalous matters that are entirely unrelated to the controversy and are prejudicial:

- “Mr. Henderson’s 2003 felony securities fraud convictions,” (Ex. B ¶ 35);
- “Mr. Henderson’s crimes were quite serious. According to press accounts of his sentencing, he pled guilty to a number of felony counts involving his stealing between \$6 million and \$8 million from investors in fraudulent business ventures, ultimately serving time in prison based on his convictions. *See* “Swindler Sentenced,” KSL.com, 6/21/03 (available at <https://www.ksl.com/article/90261/swindler-sentenced>, last retrieved 12/11/19),” (Ex. B ¶ 36);
- “Press reports of Mr. Henderson’s sentencing hearing note that over 64 known victims, many of them senior citizens, lost their life savings and retirement pensions to Mr. Henderson’s fraudulent scheme. Mr. Henderson was ordered to repay those funds,” (Ex. B ¶ 37);
- “While Mr. Smed was aware of these convictions while acting as DIRTT’s CEO, he nonetheless regularly supported Mr. Henderson in his role at DIRTT,” (Ex. B ¶ 38); and
- “Mr. Henderson’s prior criminal convictions...,” (Ex. B ¶ 41).

41. There is no justifiable basis, let alone a good faith basis, for DIRTT to have included the aforementioned inadmissible, immaterial, impertinent and scandalous matters in its Verified Complaint, particularly the details listed in paragraphs 36 and 37 of the Utah Verified Complaint.

42. On information and belief, DIRTT included the inadmissible, immaterial, impertinent and scandalous matters set forth above in paragraph 40

solely for the malicious purpose of smearing Mr. Henderson and Falkbuilt, thereby damaging their reputations and businesses, and hoping to scuttle the Planned Closing and other prospective business deals in the process.

43. Although the inclusion of the inadmissible, immaterial, impertinent and scandalous matters in the Utah Verified Complaint (as set forth above in paragraph 40) are entirely unrelated to the controversy between the parties and are prejudicial, the damage already caused by the widespread dissemination of the Utah Verified Complaint cannot be undone by simply striking these allegations from the Utah Verified Complaint.

44. On information and belief, DIRTT had and continues to have the malicious intent to harm Falkbuilt, among other reasons, because some DIRTT senior management and board members have a personal vendetta against Mogens Smed, the founder of DIRTT who was ousted after the company went public and changed strategies, lawfully started a new business, Falkbuilt, that has been succeeding whereas DIRTT's business has been in financial freefall since Mr. Smed's departure. DIRTT has misperceived that its own business failures have been caused by Mr. Smed and Falkbuilt when such is not the case.

45. Unfortunately, DIRTT's malicious tactics have worked. For example, the previously mentioned investment bank that dropped out of the Planned Closing

on December 11, 2019, specifically referenced at that time concerns over the false and defamatory statements and the inadmissible, immaterial, impertinent and scandalous matters concerning Mr. Henderson's prior conviction that DIRTТ had included in its linked/uploaded Utah Verified Complaint.

46. In addition, the Utah Verified Complaint that was widely disseminated by DIRTТ reached numerous customers and potential customers of Falkbuilt, numerous employees and potential employees of Falkbuilt, and numerous dealers and installers of Falkbuilt materials in the United States, including in Utah.

47. And many of those who were reached, including but not limited to persons located in Utah, now have significantly lowered opinions of Falkbuilt; some potential customers, including but not limited to potential customers located in Utah, (on information and belief) have chosen not to conduct business with Falkbuilt (with Falkbuilt having not been selected for approximately 2 to 5 jobs in Utah that seemed obtainable before DIRTТ's dissemination of the Utah Verified Complaint); and some potential employees, including but not limited to potential employees located in Utah, (on information and belief) have decided not to accept offers of employment to work for Falkbuilt or its dealers, all as a direct and proximate result of DIRTТ widely disseminating the Utah Verified Complaint.

48. The false and defamatory statements as well as the inadmissible, immaterial, impertinent and scandalous matters included in DIRTT's Press Release and linked/uploaded Utah Verified Complaint directly and proximately caused significant damage to Falkbuilt throughout Canada and multiple states within the United States, including but not limited to damages in Utah, in an amount to be proven at trial but in excess of \$3,000,000 USD and including, among other things, (1) noneconomic damages such as harm to Falkbuilt's reputation and standing in its industry, and (2) economic damages such as the loss of business and customers, the loss of business value, the loss of capital investments, and lost profits.

49. Moreover, the primary conduct that caused the damage to Falkbuilt occurred within the State of Utah through the false, defamatory, immaterial, impertinent and scandalous matters described above that were included in DIRTT's Utah Verified Complaint, which was filed by DIRTT's Utah-based legal counsel in the United States District Court for the District of Utah. The secondary conduct that caused the damage to Falkbuilt was DIRTT's subsequent, intentional, widespread, mass distribution of the Utah Verified Complaint throughout North America. No pleading filed in any other jurisdiction was used by DIRTT to cause the multi-district damage to Falkbuilt alleged herein

50. Clearly, DIRTT should anticipate being held liable for its wrongful conduct as alleged herein according to the laws of the State of Utah because it utilized this Court situated in Utah to effectuate its wrongful conduct.

51. Utah law will more appropriately address the basic policies of the law of defamation and privilege, and the application of Utah law will provide predictability and uniformity where, as here, DIRTT has defamed Falkbuilt in the United States (including in Utah) and Canada through the misuse and excessive publication of the Utah Verified Complaint filed in a Utah court.

52. The State of Utah has the most significant relationship to the occurrence and the parties as herein alleged because the considerable damages caused to Falkbuilt, in Utah and elsewhere, arose from and were directly and proximately caused by the misuse of a Utah court process, more specifically the false, defamatory, immaterial, impertinent and scandalous matters set forth in DIRTT's Utah Verified Complaint filed in the United States District Court for the District of Utah, which was then promptly downloaded by DIRTT from the Utah court's website and widely disseminated by DIRTT throughout North America.

COUNT I
(Defamation)

53. By this reference, Falkbuilt incorporates into this cause of action all of the other paragraphs of this Counterclaim as if fully set forth herein.

54. With its widely disseminated Press Release and uploaded, hyperlinked Utah Verified Complaint, DIRT T authored and then excessively published numerous statements about Falkbuilt to a wide audience across Canada and the United States, including in Utah.

55. As detailed above, numerous statements in the Press Release and uploaded, hyperlinked Utah Verified Complaint were false.

56. The numerous statements in the Press Release and uploaded, hyperlinked Utah Verified Complaint that were false also were material, defamatory and incompatible with the exercise of Falkbuilt's lawful business in Utah and elsewhere and negatively reflected on Falkbuilt's fitness to engage in its business, meaning that damages are and can be presumed (in addition to actual economic damages having in fact occurred).

57. The numerous statements in the Press Release and uploaded, hyperlinked Utah Verified Complaint that were false also lowered and harmed Falkbuilt's reputation in the eyes of a reasonable person.

58. The numerous statements in the Press Release and uploaded, hyperlinked Utah Verified Complaint that were false are not and were not privileged. To the extent there was any privilege, it was lost through DIRT T's

intentional, widespread, excessive, mass publication of the Press Release and uploaded, hyperlinked Utah Verified Complaint.

59. The numerous untrue statements in the Press Release and uploaded, hyperlinked Utah Verified Complaint detailed above in fact, expressly or implicitly referred to and were meant by DIRTT to apply to Falkbuilt.

60. DIRTT intended the numerous untrue statements in the Press Release and uploaded, hyperlinked Utah Verified Complaint described above to specifically refer to Falkbuilt.

61. Many recipients of the numerous untrue statements in the Press Release and uploaded, hyperlinked Utah Verified Complaint detailed above, including but not limited to recipients in Utah, actually understood the statements to be referring to Falkbuilt.

62. At the time that DIRTT published the statements, DIRTT knew the statements were false or at least published them with the negligent or reckless disregard of the truth and with the malicious intent to damage Falkbuilt's character and reputation.

63. The numerous false and defamatory statements in the Press Release and uploaded, hyperlinked Utah Verified Complaint described above have directly and proximately caused damage to Falkbuilt in an amount to be proven at trial, but

in excess of \$3,000,000 USD and including, among other things, (1) noneconomic damages such as harm to Falkbuilt's reputation and standing in its industry, and (2) economic damages such as the loss of business and customers, the loss of business value, the loss of capital investments, and lost profits.

64. In addition, Falkbuilt is entitled to recover punitive damages because DIRTT's conduct described herein was willful and malicious and manifested a knowing and reckless indifference toward, and a disregard of, the rights of others, including Falkbuilt.

65. Finally, because DIRTT is not innocent in these matters and instead intentionally and knowingly acted, Falkbuilt is entitled to a mandatory injunction requiring removal of the uploaded Utah Verified Complaint and retraction and correction of the Press Release.

COUNT II
(Intentional Interference with Economic Relations)

66. By this reference, Falkbuilt incorporates into this cause of action all of the other paragraphs of this Counterclaim as if fully set forth herein.

67. DIRTT knew, or should have known, of the economic relationships or potential relationships between Falkbuilt and Falkbuilt's existing and prospective customers, investors and investment bankers, most specifically in relation to the Planned Closing and more generally otherwise.

68. DIRTТ intentionally interfered with and continues to interfere with Falkbuilt's existing and potential economic relationships that Falkbuilt has and hoped to have with its customers, investors and investment bankers.

69. DIRTТ knowingly and intentionally interfered with Falkbuilt's existing and potential economic relationships with its customers, investors and investment bankers through improper means, including but not limited to (1) authoring and widely disseminating its Press Release and uploaded Utah Verified Complaint, which contained numerous false, defamatory and damaging statements as described above, and (2) including numerous inadmissible, immaterial, impertinent and scandalous matters that were entirely unrelated to the controversy, were prejudicial and also were clear violations of established standards, such as but not limited to Federal Rule of Civil Procedure 12(f) and existing case law.

70. DIRTТ acted for the purpose of interfering with the economic relationships or potential relationships between Falkbuilt and Falkbuilt's existing and prospective investors, investment bankers, actual and potential customers, actual and potential employees, and actual or potential dealers and installers, or DIRTТ acted knowing that the interference was substantially certain to occur as a result of DIRTТ's actions.

71. DIRTT's intentional interference with Falkbuilt's economic relationships has directly and proximately caused damage to Falkbuilt in an amount to be proven at trial, but in excess of \$3,000,000 USD and including, among other things, (1) noneconomic damages such as harm to Falkbuilt's reputation and standing in its industry, and (2) economic damages such as the loss of business and customers, the loss of business value, the loss of capital investments, and lost profits.

72. In addition, Falkbuilt is entitled to recover punitive damages because DIRTT's conduct described herein was willful and malicious and manifested a knowing and reckless indifference toward, and a disregard of, the rights of others, including Falkbuilt.

73. Finally, because DIRTT is not innocent in these matters and instead intentionally and knowingly acted, Falkbuilt is entitled to a mandatory injunction requiring removal of the uploaded Utah Verified Complaint and retraction and correction of the Press Release.

PRAYER FOR RELIEF

Wherefore, Falkbuilt respectfully prays for the following relief:

- a. For damages in an amount to be proven at trial, but in excess of \$3,000,000 USD and including, among other things, (1) noneconomic

damages such as harm to Falkbuilt's reputation and standing in its industry, and (2) economic damages such as the loss of business and customers, the loss of business value, the loss of capital investments, and lost profits;

- b. For punitive damages in an amount to be proven at trial;
- c. For a mandatory injunction requiring removal of the uploaded Verified Complaint and retraction and correction of the Press Release;
- d. For pre- and post-judgment interest at the highest rate allowed by law; and
- e. For reasonable attorney fees and costs incurred herein, together with such other and further relief as the Court may deem appropriate.

JURY DEMAND

Falkbuilt demands a jury trial on all issues triable by a jury.

DATED this 18th day of March, 2020.

/s/ Jason W. Hardin
P. Bruce Badger
Jason W. Hardin
FABIAN VANCOTT
*Attorneys for Defendant and
Counterclaimant Falkbuilt Ltd.*

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of March, 2020, a true and correct copy of the foregoing **FALKBUILT LTD.’S FIRST AMENDED COUNTERCLAIM** was served via the Court’s electronic filing system as follows:

Chad E. Nydegger
cnydegger@wnlaw.com
WORKMAN NYDEGGER
60 East South Temple, Suite 1000
Salt Lake City, Utah 84111
Attorneys for Plaintiff

Jeffrey J. Mayer (*pro hac vice*)
Jeffrey.mayer@akerman.com
Catherine A. Miller (*pro hac vice*)
Catherine.miller@akerman.com
Timothy K. Sendek (*pro hac vice*)
Tim.sendek@akerman.com
AKERMAN LLP
71 So. Wacker Drive, 47th Floor
Chicago, IL 60606
Attorneys for Plaintiff

Alan C. Bradshaw
abradshaw@mc2b.com
Chad R. Derum
cderum@mc2b.com
Jack T. Nelson
jnelson@mc2b.com
MANNING CURTIS BRADSHAW & BEDNAR PLLC
136 E. South Temple, Suite 1300
Salt Lake City, Utah 84111
*Attorneys for Defendants Lance Henderson,
Kristy Henderson and Falk Mountain States, LLC*

/s/ Jason W. Hardin

P. Bruce Badger (A4791)
bbadger@fabianvancott.com
Jason W. Hardin (A8793)
jhardin@fabianvancott.com
FABIAN VANCOTT
215 South State Street, Suite 1200
Salt Lake City, UT 84111-2323
Telephone: (801) 531-8900

Attorneys for Defendant Falkbuilt Ltd.

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, NORTHERN DIVISION**

DIRTT ENVIRONMENTAL
SOLUTIONS, INC.,

Plaintiff,

vs.

LANCE HENDERSON, KRISTY
HENDERSON, FALKBUILT, LLC,
FALKBUILT LTD., AND FALK
MOUNTAIN STATES, LLC,

Defendants.

FALKBUILT, LTD.,

Counterclaimant,

vs.

DIRTT ENVIRONMENTAL
SOLUTIONS, INC.,

Counterclaim Defendant.

Case No. 1:19CV00144-DBB-DBP

**NOTICE OF PRELIMINARY
INJUNCTION TO PRESERVE
THE STATUS QUO**

Honorable David B. Barlow
Magistrate Judge Dustin B. Pead

TO: BRANCHES
SEE ATTACHED LIST

NOTICE is hereby given that the attached Preliminary Injunction to Preserve the Status Quo has been entered by the above-entitled court.

DATED this 2nd day of April, 2020.

/s/ P. Bruce Badger

P. Bruce Badger
Jason W. Hardin
FABIAN VANCOTT
Attorneys for Defendant Falkbuilt Ltd.

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of April, 2020, I caused a true and correct copy of the foregoing **NOTICE OF PRELIMINARY INJUNCTION TO PRESERVE THE STATUS QUO** to be served as follows:

EMAIL VIA THE COURT'S ELECTRONIC FILING SYSTEM:

Alan C. Bradshaw
abradshaw@mc2b.com

Chad R. Derum
cderum@mc2b.com

Jack T. Nelson
jnelson@mc2b.com

*Manning Curtis Bradshaw & Bednar
PLLC
136 E. South Temple, Suite 1300
Salt Lake City, Utah 84111
Attorneys for Defendants Lance
Henderson, Kristy Henderson and Falk
Mountain States, LLC*

Chad E. Nydegger
cnydegger@wnlaw.com
*Workman Nydegger
60 East South Temple, Suite 1000
Salt Lake City, Utah 84111
Attorneys for Plaintiff*

Jeffrey J. Mayer (*pro hac vice*)
Jeffrey.mayer@akerman.com
Catherine A. Miller (*pro hac vice*)
Catherine.miller@akerman.com
Timothy K. Sendek (*pro hac vice*)
Tim.sendek@akerman.com

*Akerman LLP
71 So. Wacker Drive, 47th Floor
Chicago, IL 60606
Attorneys for Plaintiff*

BRANCHES VIA EMAIL: SEE ATTACHED LIST

/s/ P. Bruce Badger

Anchorage Branch
Lynn Barrett
Lynn.barrett@falkbuilt.com

Atlanta Branch
Alicia Farrington
Alicia.farrington@falkbuilt.com

Austin Branch
Michael Lamar
Michael.lamar@falkbuilt.com

Bakersfield Branch
David Teper
David.teper@falkbuilt.com

Chicago Branch
Kristen Eboh
Kristen.eboh@falkbuilt.com

Cincinnati Branch
Justin Reboulet
Justin.reboulet@falkbuilt.com

Cleveland Branch
Lindsey Ray
Lindsey.ray@falkbuilt.com

Columbus Branch
Don Smith
Don.smith@falkbuilt.com

Dallas – North Branch
Sheila McCarter
Sheila.mccarter@falkbuilt.com

Dallas Branch
Becky Valdez
Becky.valdez@falkbuilt.com

Des Moines Branch
Kim Augspurgen
Kim.augspurgen@falkbuilt.com

Detroit Branch
Jennifer Henson-Pecic
Jennifer.henson-pecic@falkbuilt.com

Fresno Branch
David Teper
David.teper@falkbuilt.com

Houston Branch
Crystal Lowe
Crystal.lowe@falkbuilt.com

Indianapolis Branch
Justin Reboulet
Justin.reboulet@falkbuilt.com

Kansas City Branch
Trisha Allenbrand
Trisha.allenbrand@falkbuilt.com

Laguna Beach Branch
George Zoumer
George.zoumer@falkbuilt.com

Las Vegas Branch
John “Sonny” Latham
Sonny.latham@falkbuilt.com

Los Angeles Branch
David Teper
David.teper@falkbuilt.com

Louisville Branch
Justin Reboulet
Justin.reboulet@falkbuilt.com

Morristown New Jersey Branch
Akua Lesesne
Akua.lesesne@falkbuilt.com

New York Branch
Gregory F. Burke
Greg.burke@falkbuilt.com

Newport Beach Branch
David Teper
David.teper@falkbuilt.com

Philadelphia Branch
John Mason Baer
Johnm.baer@falkbuilt.com

Pittsburgh Branch
Amanda Buczynski
Amanda.buczynski@falkbuilt.com

Salt Lake City Branch
Lance Henderson
Lance.henderson@falkbuilt.com

San Diego Coastal Branch
Karla Arana
Karla.arana@falkbuilt.com

San Diego, Inland Empire Branch
Kevin Fox
Kevin.fox@falkbuilt.com

Seattle Branch
Lynn Barrett
Lynn.barrett@falkbuilt.com

Toledo Branch
Steve Essig
Steve.essig@falkbuilt.com

Tulsa Branch
Sheila McCarter
Sheila.mccarter@falkbuilt.com

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

DIRTT ENVIRONMENTAL SOLUTIONS,
INC.,

Plaintiff,

vs.

LANCE HENDERSON, KRISTY
HENDERSON, FALKBUILT, LLC,
FALKBUILT LTD., AND FALK
MOUNTAIN STATES, LLC,

Defendants.

ORDER:

- **GRANTING IN PART [5] MOTION FOR PRELIMINARY INJUNCTION TO PRESERVE THE STATUS QUO; AND**
- **FINDING AS MOOT [6] MOTION TO EXPEDITE DISCOVERY**

Civil No. 1:19-CV-00144-DBB-DBP

District Judge David B. Barlow

Magistrate Judge Dustin B. Pead

Before the court is Plaintiff's Motion for a Preservation Order and, Following Expedited Discovery, a Limited Preliminary Injunction to Preserve The Status Quo (the "Motion").¹ Based upon the stipulation and consent of the parties,² and for good cause appearing:

IT IS HEREBY ORDERED that the Motion is GRANTED IN PART as to the entry of a preliminary injunction that preserves the status quo. Pursuant to the stipulation of the parties,³ IT IS FURTHER ORDERED AS FOLLOWS:

1. Pursuant to Fed. R. Civ. P. 65(d)(1)(A), this Preliminary Injunction to Preserve the Status Quo is issued based upon Defendants' Consent to its issuance and based upon a

¹ Plaintiff's Motion for a Preservation Order and, Following Expedited Discovery, a Limited Preliminary Injunction to Preserve The Status Quo, [ECF No. 5](#), filed December 12, 2019.

² See Status Report at 1, [ECF No. 57](#), filed March 2, 2020.

³ *Id.*

finding by this Court that entry of this Preliminary Injunction to Preserve the Status Quo will serve to economize the resources of the parties and the Court and maintain the status quo pending resolution of the Lawsuit.

2. Pursuant to Fed. R. Civ. P. 65(d)(2), this Preliminary Injunction to Preserve the Status Quo binds the following parties and individuals upon receipt of actual notice of the injunction by personal service, electronic mail, or otherwise:

- a. Defendants Falkbuilt, Ltd., Lance Henderson, Kristy Henderson and Falk Mountain States, LLC, and for purposes of this Preliminary Injunction, Falkbuilt Ltd.'s U.S. subsidiary, Falkbuilt, Inc.;
- b. Defendants' officers, agents, servants, employees and attorneys, which for purposes of this Preliminary Injunction include those of Falkbuilt Ltd.'s U.S. subsidiary, Falkbuilt, Inc.; and
- c. Other persons who are in active concert or participation with anyone described in the preceding subparagraphs 2.a. and 2.b., which for purposes of this Stipulated Preliminary Injunction include the companies identified on Falkbuilt Ltd.'s website (www.falkbuilt.com) under the "Contact" tab as the Anchorage Branch, Atlanta Branch, Bakersfield Branch, Chicago Branch, Cincinnati Branch, Columbus Branch, Dallas-North Branch, Dallas Branch, Des Moines Branch, Fresno Branch, Indianapolis Branch, Kansas City Branch, Los Angeles Branch, Louisville Branch, Morristown New Jersey Branch, Newport Beach Branch, Philadelphia Branch, Phoenix Branch, Pittsburgh Branch, Salt Lake City Branch, San Diego Branch, Inland Empire Branch, Seattle Branch, and Tulsa Branch, and their employees and agents, including any new or additional Falkbuilt Ltd. branches in the United States.

Plaintiff may seek to add new or additional parties if such information is developed during discovery.

- d. For purposes of enforcing this Order, each Defendant will, within twenty-eight (28) days, either disclose or itemize all information in its possession, custody or control that any of the enjoined parties removed from DIRTT Environmental Solutions, Inc., including but not limited to customer contact information, prospective or current customer projects or preferences, pricing, estimates, ICE files, Standard Factory Net (“SFN”) summaries, job costing, sales figures and projections, marketing and sales strategies, design specifications and drawings, and strategic and business plans, whether or not any Defendant considers such information confidential (hereafter, “DIRTT Information”). To the extent any Defendant is unable to complete this task within twenty-eight (28) days, it will disclose or itemize such information that it does have and continue to supplement its disclosure on an ongoing basis. All such disclosures will be treated as attorneys’ eyes only under the Standard Protective Order.

3. Pursuant to Fed. R. Civ.P. 65(d)(1)(B) and (C), the specifically stated terms of this Preliminary Injunction to Preserve the Status Quo, and the description of the acts restrained are as follows:

- a. All individuals and entities identified in Paragraph 2 above are enjoined from using (except for purposes of this Lawsuit), relying upon, disclosing, disseminating, deleting or disposing of any DIRTT Information within their possession, custody or control; and
- b. This Preliminary Injunction to Preserve the Status Quo shall remain in effect until

such time as it is modified or vacated by further order of the Court.

4. Falkbuilt Ltd. shall provide actual notice of this preliminary injunction to all entities identified in Paragraph 2 (c) and provide copies of all such notices to all other parties.

IT IS ALSO ORDERED that the entry of this stipulated preliminary injunction that preserves the status quo MOOTS the Plaintiff's pending Motion for Expedited Discovery.⁴

Signed March 12, 2020

BY THE COURT



David Barlow
United States District Judge

⁴ Plaintiff's Motion for Expedited Discovery, [ECF No. 6](#), filed December 12, 2019.

Case No. 21-4078

In the
United States Court of Appeals
for the
Tenth Circuit

DIRTT ENVIRONMENTAL SOLUTIONS, INC.;
DIRTT ENVIRONMENTAL SOLUTIONS, LTD,

Plaintiffs-Appellants,

v.

FALKBUILT LTD.; FALKBUILT, INC.; MOGENS SMED,

Defendants-Appellees,

and

LANCE HENDERSON; KRISTY HENDERSON;
FALK MOUNTAIN STATES, LLC,

Defendant.

*Appeal from a Decision of the United States District Court for the District of Utah – Salt Lake City,
Case No. 1:19-CV-00144-DBB-DBP • Honorable David Barlow, U.S. District Judge*

APPELLANTS' APPENDIX
VOLUME 3 OF 6 – Pages 597 - 896

JEFFREY J. MAYER
CATHERINE A. MILLER
AKERMAN LLP
71 South Wacker Drive, 47th Floor
Chicago, Illinois 60606
(312) 634-5700 Telephone
(312) 424-1900 Facsimile
jeffrey.mayer@akerman.com
catherine.miller@akerman.com

CHAD E. NYDEGGER
WORKMAN NYDEGGER
60 East South Temple
Suite 1000
Salt Lake City, Utah 84111
(801) 533-9800 Telephone
(801) 328-1707 Facsimile
cnydegger@wnlaw.com



TABLE OF CONTENTS

VOLUME 1 OF 6 (1 to 298)

Civil Docket Sheet, District of Utah, 1:19-cv-00144-DBB-DBP 1

2 Verified Complaint filed 12/11/1926

 Exhibit A – Correspondence dated May 21, 2009 from DIRTT
 to Lance Henderson.....60

 Exhibit B – DIRTT Computer/Data Security Policy63

 Exhibit C – Administrative Garnishment Order65

 Exhibit D – DIRTT Regional Partner Agreement (2018).....81

 Exhibit E (Filed Under Seal)
 (See full unredacted document at Volume 6 at 1455)112

 Exhibit F (Filed Under Seal)
 (See full unredacted document at Volume 6 at 1461)113

 Exhibit G (Filed Under Seal)
 (See full unredacted document at Volume 6 at 1472)114

 Exhibit H – Correspondence dated November 15, 2019
 from Metz Lewis to Amanda Buczynski115

 Exhibit I – (Filed Under Seal)
 (See full unredacted document at Volume 6 at 1480)118

 Exhibit J – Dropbox set up119

 Exhibit K – Dropbox set up.....122

 Exhibit L – Dropbox set up125

 Exhibit M – (Filed Under Seal)
 (See full unredacted document at Volume 6 at 1503)129

 Exhibit N – (Filed Under Seal)
 (See full unredacted document at Volume 6 at 1507)130

 Exhibit O – Declaration of Julian Grijns.....131

5 Plaintiff’s Motion for a Preservation Order and, Following Expedited Discovery, a Limited Preliminary Injunction to Preserve the Status Quo filed 12/12/19136

Exhibit A – Order Granting Motion for Preliminary Injunction161

Exhibit B – Order Granting Motion for Preservation Order164

40 Notice of Dismissal of Falkbuilt LLC filed 01/22/20166

42 Falkbuilt Ltd.’s Answer to Verified Complaint and Counterclaim filed 02/05/20168

Exhibit A – ICANN Doman Name Registration Data Lookup.....217

Exhibit B – Complaint at Website220

Exhibit C – Complaint.pdf Metadata.....254

Exhibit D – DIRTT Press Release from Website.....255

62 Falkbuilt Ltd.’s First Amended Counterclaim (Jury Demanded) filed 03/18/20259

64 Notice of Preliminary Injunction to Preserve the Status Quo filed 04/02/20 regarding Doc. 61 Order290

VOLUME 2 OF 6 (299 to 596)

72 Falkbuilt Ltd.’s Short Form Motion for Protective Order from Discovery until Plaintiff Identifies its Alleged Trade Secrets filed 06/15/20299

Exhibit A – Plaintiff’s First Requests for Production of Documents and Requests for Production of Documents and Request for Inspection to All Defendants304

Exhibit B – Notice of Subpoena318

Exhibit A – Notice of Preliminary Injunction to Preserve the Status Quo334

Exhibit C – Correspondence from Fabian VanCott to Akerman LLP dated April 23, 2020344

Exhibit D – Correspondence from Akerman to Fabian VanCott dated April 28, 2020350

Exhibit E – Email from Akerman to Jason Hardin and Bruce Badger dated May 4, 2020356

Exhibit F – Correspondence from Fabian VanCott to Akerman LLP dated May 5, 2020358

Exhibit G – Correspondence from Akerman to Fabian VanCott dated June 5, 2020377

Exhibit H – Correspondence from Fabian VanCott to Akerman LLP dated June 11, 2020390

73 Plaintiff’s Short Form Motion to Compel Falkbuilt’s Responses to Document Requests filed 06/16/20397

Exhibit D – Falkbuilt Ltd.’s First Disclosure Required by Stipulated Injunction to Preserve the Status Quo403

Exhibit E - Correspondence from Akerman LLP to Fabian VanCott dated June 5, 2020413

76 Plaintiff’s Response to Falkbuilt Ltd.’s Short Form Motion for Protective Order from Discovery filed 06/16/20.....426

77 Falkbuilt’s Short Form Motion for Protective Order and to Quash Subpoenas filed on 06/16/20431

Exhibit A – Notice of Subpoena.....436

Exhibit B – Notice of Subpoena462

Exhibit C – Declaration of Barrie Loberg488

Exhibit D – Email from Akerman to Jason Hardin and Bruce Badger dated June 16, 2020493

Exhibit E – Order Granting Falkbuilt Ltd.’s Short Form Motion for Protective Order and to Quash Subpoenas498

78 Henderson Defendants’ Short Form Motion to Require Plaintiff to Identify Its Alleged Trade Secrets filed 06/17/20500

Exhibit A – Defendants Lance Henderson, Kristy Henderson and Falk Mountain States, LLC’s Response to Plaintiff’s First Requests for Documents and Production506

79 Order Granting Falkbuilt Ltd.’s Short Form Motion for Protective Order from Discovery Until Plaintiff Identifies its Alleged Trade Secrets filed 06/17/20546

80 Order Granting Plaintiff’s Motion to Seal Exhibits B and C to its Motion to Compel filed 06/18/20548

81 Plaintiff’s Response to Falkbuilt’s Short Form Motion for Protective Order and to Quash Subpoenas filed on 06/16/20.....549

Exhibit A – Notice of Preliminary Injunction to Preserve the Status Quo554

Exhibit B – Amanda Buczysnki’s LinkedIn Profile.....564

Exhibit C – Correspondence from Akerman LLP to Fabian VanCott dated April 28, 2020581

Exhibit D – Correspondence from Akerman LLP to Fabian VanCott dated June 5, 2020587

82 Plaintiff’s Short Form Motion to Compel Production of Falkbuilt, Ltd.’s Information from Canadian Employees filed 06/18/20592

VOLUME 3 OF 6 (597 to 896)

Exhibits to Dkt. 82 continued

Exhibit A – Falkbuilt Ltd.’s Supplemental Responses to Plaintiff’s First Requests for Production of Documents.....597

Exhibit B – Filed Under Seal
(*See full unredacted document at Volume 6 at 1510*)640

Exhibit C – Order on Plaintiff’s Short Form Motion to Compel Production of Falkbuilt Ltd. Information from Canadian Employees641

85 Plaintiff’s Response to Henderson Defendants’ Short Form Motion to Require Plaintiff to Identify its Alleged Trade Secrets filed 06/22/20643

Exhibit A – Defendants Lance Henderson, Kristy Henderson and Falk Mountain States, LLC’s First Disclosure of Information Pursuant to Preliminary Injunction Order649

Exhibit B – Correspondence from Manning Curtis Bradshaw & Bednar to Akerman LLP dated June 17, 2020654

Exhibit C – DIRTT Environmental Solutions, Inc.’s Responses to Falkbuilt Ltd.’s First Set of Interrogatories658

86 Response to Plaintiff’s Short Form Motion to Compel Falkbuilt Ltd.’s Responses to Document Requests filed 06/23/20685

Exhibit A – Email strings between Jason Hardin to Akerman.....690

Exhibit B – Falkbuilt Ltd.’s Supplemental Responses to Plaintiff’s First Requests for Production of Documents.....704

Exhibit C – Email from Sonja Burdash to Akerman.....746

Exhibit D – Plaintiff’s First Requests for Production of Documents and Request for Inspection to All Defendants.....752

87 Corrected Exhibit A – Communications – Replacing Dkt. 86-1 filed 06/23/20 as Exhibit A to Response to Plaintiff’s Short Form Motion to Compel Falkbuilt Ltd.’s Responses to Document Requests (Filed 06/23/20 as Dkt. 86).....765

88 Plaintiff’s Short Form Motion to Compel Henderson Defendants’ Document Production filed 06/24/20784

Exhibit A – Correspondence from Manning Curtis Bradshaw & Bednar to Akerman LLP dated June 17, 2020789

Exhibit B – Plaintiff’s First Requests for Production of Documents and Request for Inspection to All Defendants.....793

Exhibit C – Defendants Lance Henderson, Kristy Henderson and Falk Mountain States, LLC’s First Disclosure of Information Pursuant to Preliminary Injunction Order807

Exhibit D – Filed Under Seal
(*See full unredacted document at Volume 6 at 1623*)812

Exhibit E – Correspondence from Akerman LLP to Manning Curtis dated June 5, 2020813

Exhibit F – Correspondence from Manning Curtis Bradshaw & Bednar to Akerman LLP dated June 15, 2020823

89 Plaintiff’s Motion to File Under Seal Exhibit D to its Short Form Motion to Compel Henderson Defendants’ Document Production filed 06/24/20832

Exhibit A – Order Granting Plaintiff’s Motion to File Under Seal Exhibit D to its Motion to Compel Henderson Defendants834

90 Sealed Document regarding Redacted Motion to Expedite Plaintiff’s Short Form Motion to Compel Henderson Defendants’ Document Production and Memorandum in Support Filed by DIRTT filed on June 24, 2020835

91 Falkbuilt, Ltd.’s (1) Response to Plaintiff’s Short Form Motion to Compel Production of Falkbuilt, Ltd. Information from Canadian Employees, and (2) Request for Extended Briefing filed 06/25/20837

93 Notice of Newly Obtained Supplemental Information Relevant to Falkbuilt Ltd.’s Motion for Protective Order and to Quash Subpoenas filed on 07/01/20842

Exhibit A – Correspondence from Crawford & Bangs, LLP to Akerman regarding Objection to Subpoenas.....846

Exhibit B – Email string regarding Subpoenas849

94 Henderson Defendants’ Response to Plaintiff’s Short Form Motion to Compel Henderson Defendants’ Document Production filed 07/01/20853

Exhibit A – Proposed Order Denying Plaintiff’s Short Form Motion to Compel Henderson Defendants’ Document Production858

117 First Amended Complaint Jury Demanded filed 10/20/20859

VOLUME 4 OF 6 (897 to 1188)

(continuation from Volume III)

117 First Amended Complaint Jury Demanded filed 10/20/20897

Exhibit A – Correspondence from DIRTT to Lance Henderson dated May 21, 2009940

Exhibit B – DIRTT Computer/Data Security Policy.....943

Exhibit C – Administrative Garnishment Order/Office of State Debt Collection.....	945
Exhibit D – DIRT Regional Partner Agreement.....	961
Exhibit E – Filed Under Seal Pursuant to Court Order (See full unredacted document at Volume 6 at 1455)	992
Exhibit F – Filed Under Seal Pursuant to Court Order (See full unredacted document at Volume 6 at 1461)	993
Exhibit G – Filed Under Seal Pursuant to Court Order (See full unredacted document at Volume 6 at 1472)	994
Exhibit H – Correspondence from Metz Lewis Brodman Must O’Keefe to Amanda Buczynski.....	995
Exhibit I – Filed Under Seal Pursuant to Court Order (See full unredacted document at Volume 6 at 1480)	998
Exhibit J – Email regarding DropBox account.....	999
Exhibit K – Email regarding DropBox account	1002
Exhibit L – Email regarding DropBox account.....	1005
Exhibit M – Filed Under Seal Pursuant to Court Order (See full unredacted document at Volume 6 at 1503)	1009
Exhibit N – Filed Under Seal Pursuant to Court Order (See full unredacted document at Volume 6 at 1507)	1010
Exhibit O – Declaration of Julian Grijns	1011
Exhibit P – Filed Under Seal Pursuant to Court Order (See full unredacted document at Volume 6 at 1760)	1016
Exhibit Q – Falkbuilt Folding Glass Wall.....	1017
Exhibit R – Falkbuilt Digital Component Construction.....	1019
Exhibit S – Tweet Threads	1038
124 Memorandum Decision and Order filed 10/23/20.....	1048
129 Rule 72 Objection and Rule 60(b)(1) Motion to Reverse Magistrate Judge Pead’s Memorandum Decision and Order [Docket No. 124] filed 11/06/20.....	1051

Exhibit A – Form 10 Amended Amended Statement of Claim1066

131 Answer of Defendant Lance Henderson to Amended Complaint
filed 11/19/20.....1086

132 Answer of Defendant Kristy Henderson to Amended Complaint
filed 11/19/20.....1120

133 Answer of Defendant Falk Mountain States, LLC to Amended
Complaint filed 11/19/20.....1155

VOLUME 5 OF 6 (1189 to 1454)

134 Motion to Dismiss First Amended Complaint as to Defendants
Falkbuilt Ltd., Falkbuilt, Inc. and Mogens Smed filed 11/19/201189

Exhibit 1 – Form 10 Statement of Claim.....1221

Exhibit 2 – Executive Employment Agreement Amendment between
DIRTT and Mogens Smed.....1240

135 Falkbuilt Ltd.’s Response to Plaintiffs’ Rule 72 Objection and
Rule 60(b)(1) Motion to Reverse Magistrate Judge Pead’s
Memorandum Decision and Order [Docket No. 124] filed 11/20/201258

138 Reply in Support of Rule 72 Objection and Rule 60(b)(1) Motion
to Reverse Magistrate Judge Pead’s Memorandum Decision and
Order [Docket No. 124] filed 11/30/201273

139 Opposition to Motion to Dismiss First Amended Complaint as to
Falkbuilt Ltd., Falkbuilt, Inc. and Mogens Smead [Dkt. 134]
filed 12/17/20.....1287

143 Reply Memorandum in Support of Motion to Dismiss First
Amended Complaint as to Falkbuilt, Ltd., Falkbuilt, Inc. and
Mogens Smed (Dkt. 134) filed 01/15/211319

145 Memorandum Decision and Order filed 01/25/211333

146 Memorandum Decision and Order Denying Motion to Compel
filed 01/27/211342

147 Memorandum Decision and Order Granting Motion to Compel
Production of Falkbuilt, Ltd., Information from Canadian Employees
filed 01/27/211345

162 Minute Entry for Proceedings held before Judge Barlow: Motion Hearing held on 05/19/21 regarding Motion to Dismiss and Memorandum in Support of First Amended Complaint as to Defendants Falkbuilt Ltd., Falkbuilt, Inc. and Mogens Smed filed by Falkbuilt Ltd., Mogens Smed, Falkbuilt, Inc.1349

163 Notice of Consent: (1) to Canadian Jurisdiction by Falkbuilt, Inc., and (2) To Entry of Stipulated Preliminary Injunction in the Court of Queen’s Bench, Alberta as to Falkbuilt Ltd., Falkbuilt, Inc. and Mogens Smed filed 05/21/21.....1351

164 Memorandum Decision and Order Granting [134] Motion to Dismiss First Amended Complaint as to Defendants Falkbuilt Ltd., Falkbuilt Inc. and Mogens Smed and Denying Plaintiffs’ Oral Motion to Amend filed 05/21/211354

168 Motion for Rule 54(b) Certification of Docket No. 164 filed 06/04/211358

178 Memorandum Decision and Order Granting [168] Motion for Rule 54(b) Certification of Docket No. 164 filed 07/01/211367

166 Motion Hearing Before Judge David Barlow on May 19, 20211369

VOLUME 6 OF 6 (1455 to 1760)
(FILED UNDER SEAL)

Exhibits to Verified Complaint, Dkt. 2:

2-5 Exhibit E – Employment Contract between DIRTT and a former employee.....1455

2-6 Exhibit F – Spreadsheet substantiating a former DIRTT employee taking confidential DIRTT electronic files1461

2-7 Exhibit G – Spreadsheet substantiating a former DIRTT employee’s upload of a “large clients” PowerPoint file to Dropbox1472

2-9 Exhibit I – String of emails from a former DIRTT employee to her personal email account attaching DIRTT’s pricing and estimates.....1480

2-13 Exhibit M – Email sent outside DIRTT containing a sensitive, confidential DIRTT document.....1503

2-14 Exhibit N – Email forwarded by a former DIRTT employee, who now works for defendant Falkbuilt, to her personal email account that contains DIRTT’s confidential business information1507

82-2 Exhibit B to DIRTT’s Motion to Compel Production of Falkbuilt Information from Canadian Employees – Email from a former DIRTT employee to his personal email account attaching DIRTT’s confidential pricing and project information1510

88-4 Exhibit D to DIRTT’s Motion to Compel Production of Henderson Defendants’ Document Production – Spreadsheet substantiating a former DIRTT employee’s taking confidential DIRTT electronic files1623

Exhibits to Amended Complaint, Dkt. 117:

117-5 Exhibit E – Employment Contract between DIRTT and a former employee1704

117-6 Exhibit F – Spreadsheet substantiating a former DIRTT employee taking confidential DIRTT electronic files1710

117-7 Exhibit G – Spreadsheet substantiating a former DIRTT employee’s upload of a “large clients” PowerPoint file to Dropbox1721

117-9 Exhibit I – String of emails from a former DIRTT employee to her personal email account attaching DIRTT’s pricing and estimates1729

117-13 Exhibit M – Email sent outside DIRTT containing a sensitive, confidential DIRTT document1752

117-14 Exhibit N – Email forwarded by a former DIRTT employee, who now works for defendant Falkbuilt, to her personal email account that contains DIRTT’s confidential business information1756

117-16 Exhibit P – listing of bids DIRTT lost to Falkbuilt and projects that have been flipped from DIRTT to Falkbuilt, and contains DIRTT’s sensitive, confidential business information, including client names and project locations1759

Chad E. Nydegger (USB 9962)
cnydegger@wnlaw.com
Workman Nydegger
60 East South Temple, Suite 1000
Salt Lake City, Utah 84111
Telephone: (801) 533-9800

Jeffrey J. Mayer (admitted *pro hac vice*)
Jeffrey.Mayer@akerman.com
Catherine A. Miller (admitted *pro hac vice*)
Catherine.Miller@akerman.com
Akerman LLP
71 S. Wacker Drive, 47th Floor
Chicago, Illinois 60606
Telephone: (312) 634-5700
Attorneys for Plaintiff, DIRTT Environmental Solutions, Inc.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, NORTHERN DIVISION**

DIRTT ENVIRONMENTAL
SOLUTIONS, INC.; DIRTT
ENVIRONMENTAL SOLUTIONS
LIMITED

Plaintiffs,

v.

LANCE HENDERSON, KRISTY
HENDERSON, FALKBUILT, INC.,
FALKBUILT LTD., MOGENS
SMED, and FALK MOUNTAIN
STATES, LLC

Defendants.

Case No: 1:19CV00144-DBB-DPP

**FIRST AMENDED
COMPLAINT**

The Hon. David B. Barlow

Magistrate Judge Dustin B. Pead

JURY DEMANDED

DIRTT Environmental Solutions, Inc. (“DIRTT Inc.”) and DIRTT Environmental Solutions, Ltd. (“DIRTT, Ltd.”) (collectively “DIRTT”), by their undersigned counsel, file this First Amended Complaint against Defendants Falkbuilt, Inc. and Falkbuilt Ltd. (collectively “Falkbuilt”), Falk Mountain States, LLC, Mogens Smed, Lance Henderson and Kristy Henderson. Former employees of Plaintiffs have taken and used DIRTT confidential information in an attempt to steal customers, opportunities, and business intelligence, with the aim of setting up a competing national business.

Among other matters: (1) Defendant Lance Henderson uploaded over 35 gigabytes of DIRTT data, which included confidential and proprietary information, to a personal cloud-based data storage location; (2) multiple former DIRTT employees, who are now working for or on behalf of Falkbuilt, all set up personal Dropbox accounts within a couple of weeks, or even a few days, prior to leaving DIRTT’s employ; (3) Kristy Henderson, Lance Henderson’s wife and an employee of a former DIRTT partner, incorporated Defendant Falk Mountain States one month before Mr. Henderson left DIRTT’s employ; (4) immediately after her departure from DIRTT, Amanda Buczynski, also a former DIRTT employee, reached out to DIRTT customers on behalf of Falkbuilt in an effort to compete on ongoing projects and undercut DIRTT’s bids by utilizing DIRTT confidential

information; (5) Falkbuilt, Inc. and Falkbuilt Ltd. misleadingly market their products as having identical or superior characteristics to DIRTТ products even though the products are in significant part not similar or identical and are inferior for the purposes of the market; (6) Falkbuilt, Inc. and Falkbuilt Ltd. continue to trade on an alleged connection with DIRTТ products and technology, while privately and publicly degrading DIRTТ's brand and reputation; and (7) Mogens Smed masterminded and encouraged all of these activities, personally acting within the United States market. In support of their First Amended Complaint, Plaintiffs state as follows:

BACKGROUND OF THE PARTIES

1. Plaintiff DIRTТ Inc. is a Colorado company, with its principal places of business in Savannah, Georgia and Phoenix, Arizona. DIRTТ Inc. is the licensee of the trade secrets at issue in this case.

2. Plaintiff DIRTТ Ltd. is a Canadian company, incorporated in the Province of Alberta and with its headquarters and principal place of business in Calgary, Alberta, Canada. DIRTТ Ltd. is DIRTТ Inc.'s parent company. DIRTТ Ltd. is the licensor of the trade secrets at issue in this case.

3. DIRTТ is an innovative, technology-driven company that operates in Canada, the United States and other jurisdictions around the world. DIRTТ's sales

offices in Salt Lake City, Phoenix, New York, Chicago, Calgary, and Toronto are supported by its factories and distribution centers across the United States and Canada.

4. Plaintiffs offer products and services for the digital design of component, prefabricated construction to build out interior spaces in buildings (referred to as “interior construction”). Among many other services, Plaintiffs offer clients the ability to utilize virtual-reality to design office, healthcare, and other interior spaces using modular components which can be rapidly and affordably assembled in Plaintiffs’ factories and on-site.

5. Plaintiffs are innovators and leaders in the prefabricated, interior design and construction market space and have been granted over 300 U.S. and foreign patents for the technology in both their building products themselves and the technology to design and fabricate those products.

6. Plaintiffs use a proprietary software and virtual-reality visualization platform coupled with vertically integrated manufacturing that designs, configures and manufactures prefabricated interior construction solutions used primarily in commercial spaces across a wide range of industries and businesses. Plaintiffs combine innovative product design with their industry-leading, proprietary ICE Software (“ICE Software” or “ICE”) and technology-driven, lean manufacturing

practices and sustainable materials to provide an end-to-end solution for the traditionally inefficient and fragmented interior construction industry. DIRTT creates customized interiors with the aesthetics of conventional construction, but with greater cost and schedule certainty, shorter lead times, greater future flexibility, and better environmental sustainability than conventional construction.

7. Plaintiffs offer interior construction solutions throughout the United States and Canada, as well as in select international markets, through a network of independent regional partners (“Regional Partners”) and an internal sales team. The Regional Partners use the ICE Software to work with end users to envision and design their spaces. Orders are electronically transmitted through ICE to DIRTT Ltd.’s manufacturing facilities for production, packing and shipping. DIRTT’s Regional Partners then coordinate the receipt and installation of DIRTT’s interior construction solutions at the end users’ locations.

8. ICE generates valuable proprietary information, including cost and margin information, the components of the bill of materials for individual companies, detailed plans and specifications for projects, and customer requirements.

9. Apart from ICE, Plaintiffs’ internal restricted information and communications network contains other sources of valuable information, including

prospective and current customer databases that include information on potential projects, as well as the status of all pending projects, and a restricted site for individually-approved users to access called “MyDIRTT”, which contains confidential technical information such as diagrams and other technical know-how.

10. Plaintiff’s Regional Partners execute confidentiality agreements and have access to confidential information, including pricing and prospective customers.

11. In addition to sales and marketing, Regional Partners provide value throughout the planning, design and installation/construction process. At the pre-construction stage, Regional Partners provide design assistance services to architects, designers and end clients. Through the installation/construction process, Regional Partners act as specialty subcontractors to the general contractors and provide installation and other construction services. Post move-in, Regional Partners provide warranty work, ongoing maintenance and repurposing support. The Regional Partners operate under Regional Partner agreements with DIRTT, which outline sales goals and marketing territories and provide the terms and conditions upon which the Regional Partners market and sell DIRTT products. Regional partners agree in writing to keep information generated through this process confidential.

12. Plaintiffs also operate several “DIRTT Experience Centers” (“DXCs”) (previously referred to as “Green Learning Centers”), which are display areas used to showcase DIRTT’s products and services. Plaintiffs generally require their Regional Partners to construct and maintain a DXC in their local markets. There are currently over 80 DXCs showcasing DIRTT’s products and services across North America, the Middle East and India.

13. DIRTT conducts its North American business in a number of cities, including Salt Lake City, Utah, Chicago, Illinois, New York, New York, and Phoenix, Arizona. DIRTT operates manufacturing facilities in Calgary, Alberta, Phoenix, Arizona and Savannah, Georgia. DIRTT currently has a manufacturing facility under construction near Charlotte, North Carolina.

14. DIRTT Ltd. is the owner of the trade secret information at issue in this case and licenses the information directly to DIRTT Inc. DIRTT Ltd. does not sell products directly in the United States, but directly benefits from every DIRTT Inc. sale in the United States.

15. Mr. Henderson is an individual and a resident of Davis County, Utah.

16. Mr. Henderson was a DIRTT employee responsible for sales and marketing from at least May 2009 to August 2, 2019, when he departed from DIRTT of his own initiative.

17. Kristy Henderson is an individual and a resident of Davis County, Utah.

18. Falk Mountain States, LLC is a Utah Limited Liability Company incorporated in July 2019 by Kristy Henderson, with an address and registered agent in Logan, Utah.

19. Falkbuilt, Inc. is a Delaware corporation. Falkbuilt, Inc. was established to emulate DIRTT's business model by departed DIRTT employees, including Mr. Henderson and Mogens Smed.

20. Falkbuilt Ltd. is a Canadian company with offices in Calgary, Alberta, Canada.

21. Mr. Smed is an individual and a resident of Calgary, Alberta, Canada. Until January 2018, Mr. Smed was the Calgary-based CEO, directly or indirectly controlling DIRTT Inc. and DIRTT Ltd. He left DIRTT in September 2018.

22. Additionally, Falkbuilt has created a network of captive and independent representatives, comprised largely of former DIRTT employees and representatives, that it refers to as "Falk Branches".

23. This action concerns the theft of DIRTT's confidential information (both in the United States and Canada and any other location as revealed), as well as the improper use of that information in connection with the United States

market. Additionally, this action addresses false and misleading statements by Falkbuilt representatives creating confusion in the marketplace and causing Plaintiffs to suffer financial injuries measured under both federal and state law.

JURISDICTION AND VENUE

24. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331, as this action arises under the following federal statutes: 18 U.S.C. § 1836, 18 U.S.C. § 1030 and 18 U.S.C. § 2701. This Court has jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367, as they are so related to the claims within the Court's original jurisdiction that they form part of the same case or controversy. The Court also has jurisdiction over the state law claims pursuant to 28 U.S.C. § 1332, as there is complete diversity and the amount in controversy exceeds the statutory minimum.

25. This Court has personal jurisdiction over Mr. Henderson and Mrs. Henderson because they are residents of Davis County, Utah.

26. This court has personal jurisdiction over Mr. Smed because he directed the wrongful actions of the other defendants that took place in the State of Utah, including but not limited to, directing Mr. Henderson to undertake a conspiracy to misappropriate DIRTT's confidential and trade secret information. Mr. Smed also regularly directs business to the State of Utah through

Falkbuilt Ltd., Falkbuilt, Inc. and Falk Mountain States, LLC. Mr. Smed has also availed himself of the protections of this State by directing the filing of Falkbuilt Ltd.'s Counterclaim against DIRT in this forum. Based on Mr. Smed's direction of the Utah-based, wrongful activity complained of in this Complaint, Mr. Smed should have reasonably anticipated being haled into a Utah court over claims based on that wrongful activity.

27. This Court has personal jurisdiction over Falk Mountain States, LLC because it is incorporated in Utah.

28. This Court has personal jurisdiction over Falkbuilt, Inc. because Falkbuilt, Inc. regularly conducts business in the State of Utah, specifically with Falk Mountain States, Mr. Henderson works for Falkbuilt, Inc. or on its behalf in the State of Utah, and Falkbuilt, Inc. should have reasonably anticipated being haled into a Utah court over claims based on the DIRT confidential information it obtained from Mr. Henderson, a Utah resident.

29. This Court has personal jurisdiction over Falkbuilt Ltd. because Falkbuilt Ltd. regularly conducts business in the State of Utah, specifically with Falk Mountain States, Mr. Henderson works for Falkbuilt Ltd. or on its behalf in the State of Utah, and Falkbuilt Ltd. should have reasonably anticipated being

haled into a Utah court over claims based on the DIRTT confidential information it obtained from Mr. Henderson, a Utah resident.

30. Falkbuilt Ltd. also has multiple agents in the United States that hold themselves out as employees and agents of Falkbuilt Ltd., independently establishing jurisdiction over Falkbuilt Ltd.

31. Falkbuilt Inc.'s and Falkbuilt's agents and employees are directed by Mr. Smed.

32. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(2) as a substantial portion of the events giving rise to this action occurred in this district, and pursuant to §1391(b)(1) as the Hendersons and Falk Mountain States reside in this district.

FACTUAL BACKGROUND

33. Since his difficult departure from DIRTT in September 2018, Mr. Smed and those acting in concert with him, including the newly-formed Falkbuilt entities, have engaged in an ongoing attempt to replicate DIRTT's business, steal DIRTT's clients, and co-opt DIRTT's product characteristics and business reputation as Falkbuilt's own, through improper means, including but not limited to using DIRTT confidential information and trade secrets to identify and approach customers and potential customers, utilizing pricing and margin information to

undercut DIRTT's quotes, and sowing confusion in the market by drawing false equivalencies between Falkbuilt's and DIRTT's products and services. These approaches have been made both directly and indirectly through current and former DIRTT Regional Partners.

34. Despite public statements to the contrary by Mr. Smed that Falkbuilt is not a competitor of DIRTT, DIRTT determined, based on a forensic study of electronic information, that Falkbuilt was built upon, and is dependent on, both information and employees obtained from DIRTT. (Exhibit O at ¶¶ 6, 9). In fact, Falkbuilt would likely not be operating today but for the customer contact information, pricing, estimates and other DIRTT confidential information and trade secrets taken by former DIRTT employees, including Mr. Henderson, for use at their new Falkbuilt businesses started by Mr. Smed. Based on information obtained by DIRTT, as well as publicly available information, Falkbuilt is directly competing with DIRTT.

35. In order to build a competing company, Mr. Smed recruited DIRTT employees to work for Falkbuilt and, based on available forensic information, encouraged the employees to assist in planning Falkbuilt: (1) while still working for DIRTT; and (2) in reliance upon DIRTT confidential information. Mr. Smed knew, as the former DIRTT CEO, that each of these employees had contractual,

statutory, and common law obligations to maintain the confidentiality of DIRTT confidential information.

36. Falkbuilt has directly bid against DIRTT on projects using DIRTT Confidential Information.

37. Further, while not independently wrongful, Falkbuilt has built its distribution system for Falkbuilt products in the United States around current and former DIRTT distributors. Those partners target the same customers and markets as DIRTT.

38. Upon information and belief, Mr. Smed not only actively recruited DIRTT employees to join Falkbuilt, including meeting with certain DIRTT employees in advance of their leaving DIRTT's employ, but also encouraged them to solicit other DIRTT employees to work for or on behalf of Falkbuilt. Additionally, on information and belief, Mr. Smed emboldened those same individuals to take with them DIRTT information that they utilized while in DIRTT's employ, and to misappropriate DIRTT's confidential, competitive information to assist Falkbuilt in quickly getting up-to-speed and operational, and to undercut DIRTT's bids and estimates, with the end goal of ultimately taking DIRTT's customers and projects. It is no coincidence that Falkbuilt is bidding on the same projects as DIRTT and contacting DIRTT's customers and prospective

customers, as well as preventing DIRTТ from even learning of potential projects by using confidential information to divert business to Falkbuilt through current and former DIRTТ Regional Partners.

39. As can be seen from Falkbuilt’s website, www.falkbuilt.com (advertising interior component construction for healthcare, commercial and office, and education), Falkbuilt competes in the same market as DIRTТ, www.dirtt.com (advertising projects in education, healthcare, office space, residential, government, and hospitality). Additionally, Falkbuilt’s webpages and designs mimic DIRTТ’s appearance. To date, over 50 DIRTТ employees have joined Falkbuilt, either working for it or on its behalf. The breach of Mr. Smed’s common law employment obligations and express contractual obligations to DIRTТ is the subject of ongoing litigation in Alberta, Canada and will be adjudicated by the Canadian courts.

A. Falkbuilt’s Campaign of Misinformation

1. Ms. Buczynski’s Misattributions

40. Amanda Buczynski was a DIRTТ employee from October 17, 2016 to September 17, 2019. She was responsible for DIRTТ sales in a territory that included Western Pennsylvania and West Virginia. She maintained an office on site at a DIRTТ Regional Partner’s facility in Pittsburgh, Pennsylvania.

41. Immediately after her departure from DIRTT, Ms. Buczynski began working for Falkbuilt, where she is Director of Design and Construction.

42. On behalf of Falkbuilt, Ms. Buczynski walked at least one potential customer through the showroom of one of DIRTT's Regional Partners in Ohio, and misrepresented to this potential customer that the DIRTT installations in the showroom were created by Falkbuilt, not DIRTT. The DIRTT installations in the showroom consisted of ready-for-market examples of DIRTT's products, used to allow DIRTT's customers to place custom orders.

43. Ms. Buczynski has also referred to Falkbuilt as "the new DIRTT" or "DIRTT 2.0", in communications with potential customers, further clouding the issue of which entity originated DIRTT's products and services, and contradicting Falkbuilt's public representations that Falkbuilt is not competing with DIRTT or building upon DIRTT technology and information.

44. Ms. Buczynski knew that these statements were false when she made them, and she made them with the intent to deceive potential DIRTT customers into believing that DIRTT's products are actually those of Falkbuilt for the purpose of steering those customers away from DIRTT to Falkbuilt.

2. Falkbuilt's Misdesignation and Misdescription of the Origin of Its Products and Services

45. Falkbuilt's products and services are demonstrably not equivalent to DIRTT's, yet Falkbuilt continues to intentionally sow confusion in the market to leverage DIRTT's products, services, and reputation as its own.

46. Falkbuilt is also mimicking DIRTT's designs and diagrams in its promotional materials, misdesignating the origin in its techsheets and brochures as Falkbuilt. DIRTT's designs and diagrams are essential to DIRTT's business in that they allow DIRTT's customers to place custom orders. Falkbuilt issues "techsheets" describing the technical features and performance capabilities of the various components that it purports to offer. (See Ex. Q). Falkbuilt also issues illustrated brochures depicting the various installations that it claims to be able to construct and deliver. (See Ex. R). The diagrams and products in these techsheets and brochures are so similar to those offered by DIRTT as to be virtually indistinguishable.

47. It took DIRTT years to develop its proprietary products and their components. Falkbuilt, on the other hand, has purportedly developed its "digital construction" process and its components seemingly overnight. Upon information and belief, Falkbuilt does not actually currently possess the capabilities it is advertising, necessitating the mimicking of DIRTT's designs and diagrams, and the misdesignating of the origin of Falkbuilt's techsheets and brochures as

Falkbuilt. As alleged herein, several former DIRTТ employees took DIRTТ's confidential and proprietary information with them to Falkbuilt, which has inevitably aided Falkbuilt's ramp-up efforts.

48. The similarity of Falkbuilt's promotional material to that of DIRTТ is no coincidence. Falkbuilt's use of advertising and promotional materials that are indistinguishably different from DIRTТ's, including the language and images used, the narrative history of Falkbuilt, and the value proposition, is a key part of its overall effort to knowingly deceive potential customers into believing that Falkbuilt's work is actually that of DIRTТ.

49. However, Falkbuilt's products do not have the same capabilities and characteristics as DIRTТ products. By way of example, to DIRTТ's knowledge, Falkbuilt does not offer tamper-evident tile functionality. Falkbuilt does not offer a foldable wall system with the same functionality as the rest of the product line, instead offering a third-party stacking wall only. Falkbuilt does not possess a system to permit mitered tiles to meet at a corner with no end cap. Falkbuilt's tiles mount only at the verticals, and must end at a vertical post, or the tile must be extended unsupported past the vertical. If Falkbuilt wants a shelf, cabinet or work surface to extend from the tiles, the location must be predetermined and holes must be cut in the tiles. The shelf or cabinet cannot be relocated horizontally without

having new tiles cut and internal mounting componentry moved by a technician. DIRTT, though, possesses a horizontal mounting channel that permits any hanging component to be moved on a horizontal axis at will. In fact, the technology underlying Falkbuilt's solutions is not advanced as compared to the technology underlying DIRTT's solutions.

50. Additionally, unlike DIRTT, which uses actual wood veneer, matching the tile veneer perfectly, Falkbuilt uses vinyl-wrap "Falkskin" on its metal components to emulate woodgrain. Falkbuilt's sit-stand solutions also have visible actuator housings, while DIRTT's actuator housings are concealed under the work surface with the drive mechanisms hidden inside the wall.

51. From a functionality standpoint, Falkbuilt fails to offer the re-configurability of DIRTT's products. For example, DIRTT's sliding door supports allow a door to easily be moved from one point to another or changed out for another door simply by moving the support, which mounts into a horizontal mounting channel, to another location. No screw holes or other marks are left behind. Additionally, should a section of a wall require reconfiguration, such as a glass wall replacing a solid wall, that single section can be removed and replaced without disturbing adjacent wall sections. Falkbuilt's walls, which are built sequentially, would require each section to be disassembled, beginning at the end

of the wall until the section to be replaced was reached. Finally, DIRTT's capabilities allow it to place walls at virtually any angle, with no ramifications when reconfigured to another angle. No drilling or damaging tile at the intersection of the walls is required. In other words, to be the functional equivalent of DIRTT, Falkbuilt would have to offer an easily reconfigurable wall system including infinite horizontal positioning (and re-positioning) of hanging components, without compromising aesthetics. Falkbuilt's system offers none of these things.

52. Moreover, DIRTT and Falkbuilt use different materials in their systems, which renders Falkbuilt unable to provide DIRTT's advantages. DIRTT uses aluminum in its solutions, which allows for much more flexible functionality. The aluminum extrusions used in DIRTT's solutions can be formed in virtually any shape necessary, meaning DIRTT can design any shape needed to accomplish the solution's intended functionality. Falkbuilt, on the other hand, uses steel, which is much more rigid and offers far less flexibility in shaping. Because Falkbuilt relies on steel, it cannot achieve the flexibility of design and reconfigurability that DIRTT offers in its solutions. For this reason, it is not just Falkbuilt's false claims of equivalency to DIRTT that are misleading to customers, but also its own promotional material, which touts that Falkbuilt's solutions are "easily reconfigured" and have "endless design options."

53. Similarly, Falkbuilt does not at present possess in-house design capabilities, which is an aspect of DIRTT's solution that greatly increases the customizability of its solutions for DIRTT customers. Rather, Falkbuilt relies on external designers to create its solutions, making it much more difficult, if not impossible in some instances, to achieve the customizability necessary to achieve the customers' desired functionality.

54. As such, Falkbuilt's attempts to equate the characteristics of its solutions with those of DIRTT constitute a blatant effort to confuse customers and capitalize on the superior characteristics of DIRTT's solutions as compared to Falkbuilt's for the same purposes, and suggest that DIRTT and Falkbuilt are the same, or that Falkbuilt's solutions are an equivalent alternative. The fact is, Falkbuilt and DIRTT are simply not equivalents.

55. Falkbuilt further misrepresents the size and capabilities of its United States operations, as its allegedly independent representatives claim to be Falkbuilt employees.

56. Despite Falkbuilt's contention that it does not compete with DIRTT, these efforts are intended to damage, and have damaged, DIRTT by luring potential customers away from DIRTT to Falkbuilt. For example, a number of existing DIRTT projects have been converted to Falkbuilt projects due to

Falkbuilt’s interference. Similarly, DIRTT has lost competitive bids on projects to Falkbuilt as a result of Falkbuilt’s false claims of equivalency with DIRTT. In one instance, DIRTT lost the bid for phase 2 of a project for which DIRTT had done a full solution installation for phase 1 in 2018-2019. Falkbuilt was a competitor on this bid, and would not have won the bid but for its false claims of equivalency and use of DIRTT’s competitive information. In another example, bid documents from the architects for a particular project DIRTT and Falkbuilt were both competing for had to be amended to clarify that the basis of the design was Falkbuilt, not DIRTT, but noted that DIRTT was an acceptable equivalent manufacturer. This amendment came after a DIRTT representative had a detailed conversation with the architectural firm issuing the bid documents, and explained exactly what Falkbuilt is vis-à-vis DIRTT – i.e. a competitor, wholly separate from DIRTT, and not the “new DIRTT”.

57. Falkbuilt further trades on DIRTT’s technology, heritage, and reputation. One of the clearest examples is that Mr. Smed continues to identify himself as a “DIRTTbag,” a phrase used by DIRTT employees to describe themselves and to express pride in adhering to DIRTT’s philosophy. A collection of representative Tweets from Mr. Smed is attached as Exhibit S. Falkbuilt has created a false impression that it is doing what DIRTT has done in the industry for

the last several years, and intentionally attempts to market itself as associated with, or even part of, DIRTT in order to capitalize on DIRTT's reputation, historical performance, and customer base despite Falkbuilt's inferior products. Falkbuilt uses the same language, same images, and the same value proposition as DIRTT to further this effort and to confuse customers in the marketplace.

58. As further evidence of Falkbuilt's positioning of itself as the same as DIRTT, upon information and belief, Mr. Smed has approached clients of DIRTT to be references for Falkbuilt, based only on their past experience with DIRTT, not Falkbuilt.

59. Mr. Smed has further denigrated DIRTT publicly, and to customers and parties, indicating falsely that Falkbuilt is a successor to DIRTT's technological heritage.

60. As a result, the marketplace is highly convoluted and confused. Customers who have a history with DIRTT are now being approached by a company with many of the same people, a purportedly similar product, and a nearly identical value proposition and origin story. In other words, due to Falkbuilt's tactics of passing itself off as "DIRTT 2.0", many customers view Falkbuilt as having some positive association with DIRTT. Some customers have

even misunderstood Falkbuilt as either a new division of DIRTТ or the same company, but with a new name.

B. The Hendersons' Utah Conspiracy

61. DIRTТ Inc. hired Mr. Henderson as a sales representative. In that capacity, he was entrusted with a variety of significant confidential and proprietary information and trade secrets pertaining to DIRTТ's business ("DIRTТ Confidential Business Information") and owed DIRTТ a fiduciary duty with respect to such DIRTТ Confidential Business Information. At the time he was hired, Mr. Henderson agreed in writing to maintain the confidentiality of DIRTТ's trade secrets and confidential information.

62. In a May 21, 2009 agreement, Mr. Henderson agreed to DIRTТ's terms and conditions regarding his employment, including that he "would not . . . divulge to any other person whosoever and will use [his] best endeavors to prevent unauthorized publication or disclosure of any trade secret, manufacturing process or confidential information concerning the Company and related companies or the finances of the Company and related companies or any of their respective dealings, transactions or affairs which may come to [his] knowledge during or in the course of [his] employment." (Exhibit A).

63. On June 25, 2019, Mr. Henderson acknowledged DIRTT's Computer/Data Security Policy (Exhibit B), which states in relevant part that:

This document is not intended to displace any non-disclosure obligations, but rather to ensure proper data security. Please read the following provisions carefully and thoroughly before signing.

POLICIES / PROCEDURES

1. Personnel are prohibited from accessing any computer or network location for which they have not previously received proper authorization, and from altering any data or database other than that which is specifically authorized as required in the performance of his or her job functions.

2. Sensitive or confidential data/information may not be stored or referenced via systems or communication channels not controlled by DIRTT. For example, the use of external e-mail systems or data storage systems not hosted by or approved by DIRTT, is not allowed.

3. Secure passwords are to be used on all systems as per the DIRTT password policy. These credentials must be unique and must not be used on other external systems or services. Passwords or security codes are not to be disclosed to anyone else; do not allow others to use your IDs and/or passwords. Password(s) must be changed whenever the need exists; such as someone else learning your password, or the password becoming known during problem resolution or day-to-day functions, or when requested by DIRTT I.T.

4. DIRTT I.T. is to be notified immediately in the event that a company device is lost. (mobile phones, laptops etc.).

5. In the event that a system or process is suspected as not being compliant with this policy, immediately notify your supervisor and/or DIRTT I.T. so they can take appropriate action.

6. Personnel assigned the ability to work remotely must take extra precautions to ensure that data is appropriately handled.

64. Mr. Henderson's responsibilities included interfacing with customers, understanding and promoting DIRTT's products, services, and technology, and identifying new potential customers and partners for DIRTT in the southwestern United States. In connection with his job, Mr. Henderson was provided with extensive access to DIRTT Confidential Business Information concerning those markets.

65. Mr. Henderson was also issued a company laptop with access to DIRTT computer resources, including other networked computers, shared file resources, and other repositories of electronically stored information.

66. Mr. Henderson was not authorized to access, store, or retrieve DIRTT Confidential Business Information other than using DIRTT computers and resources, and then only for bona fide business purposes for the benefit of DIRTT.

67. In May 2019, DIRTT's Human Resources department received an administrative garnishment order from the State of Utah for \$11.3 million, which DIRTT learned was related to Mr. Henderson's 2003 felony securities fraud convictions. (Exhibit C). Until receipt of the garnishment order, DIRTT's then current management team was unaware of Mr. Henderson's felony convictions.

68. Mr. Henderson’s crimes were quite serious. According to press accounts of his sentencing, he pled guilty to a number of felony counts involving his stealing between \$6 million and \$8 million from investors in fraudulent business ventures, ultimately serving time in prison based on his convictions. *See* “Swindler Sentenced,” KSL.com, 6/21/03 (available at <https://www.ksl.com/article/90261/swindler-sentenced>, last retrieved 4/9/20).

69. Press reports of Mr. Henderson’s sentencing hearing note that over 64 known victims, many of them senior citizens, lost their life savings and retirement pensions to Mr. Henderson’s fraudulent scheme. Mr. Henderson was ordered to repay those funds.

70. While Mr. Smed was aware of these convictions while acting as DIRTT’s CEO, he nonetheless regularly supported Mr. Henderson in his role at DIRTT. In fact, when the local Regional Partner in Salt Lake City expressed a desire not to work with Mr. Henderson, Mr. Smed arranged for another Regional Partner in Salt Lake City, Interior Solutions, to work specifically with Mr. Henderson. Importantly, Mr. Henderson’s wife, Defendant Kristy Henderson, was, and is, the branch manager of Interior Solutions’ Salt Lake City office.

71. The receipt of the wage garnishment order by DIRTT, of which Mr. Henderson quickly became aware, touched off a series of events for Mr. Henderson and DIRTT.

72. In 2019, after Mr. Smed's departure from DIRTT but before receipt of the wage garnishment order, DIRTT's senior management were considering Mr. Henderson for a promotion.

73. Upon learning about Mr. Henderson's prior criminal convictions, current DIRTT management provided Mr. Henderson a number of opportunities to explain his actions and provide his version of events. During that process, his anticipated promotion was placed on hold.

74. Mr. Henderson apparently determined at that point in time to leave DIRTT and return to work for his prior supporter, Mr. Smed, at Falkbuilt and to take valuable DIRTT Confidential Business Information with him.

75. After DIRTT received the garnishment order and placed Mr. Henderson's promotion on hold, Mr. Henderson commenced or continued a scheme to misappropriate DIRTT's confidential and propriety information and trade secrets by uploading DIRTT Confidential Business Information onto a personal, cloud-based data storage location. There was no legitimate business purpose for this activity.

76. On information and belief, in or around this same time period, Mr. Henderson either made contact or accelerated plans with Mr. Smed and Falkbuilt to assist them in launching a business in Utah to compete with DIRTT, utilizing DIRTT Confidential Business Information to do so.

77. The departure of his primary benefactor at DIRTT, Mr. Smed, coupled with the forthcoming garnishment (which would far exceed Mr. Henderson's DIRTT salary for over 100 years), likely accelerated Mr. Henderson's plans to misappropriate information from DIRTT for Mr. Smed's new venture.

78. Starting on Sunday, June 3, 2019, Mr. Henderson began uploading what would ultimately amount to over 35 gigabytes of data¹ from his DIRTT-issued laptop and account to Google "Google Drive" and/or Apple "iCloud" cloud computing servers.

79. DIRTT IT staff became aware of the unauthorized access to and exfiltration of information from DIRTT's systems on June 10, 2019.

80. When DIRTT confronted Mr. Henderson about uploading this information, he admitted to uploading the data but denied any improper motive, and purported to allow his cloud account to be removed of such data by DIRTT.

¹ On average, one gigabyte contains 4400 documents, depending on the file type.

81. Further investigation has revealed that, in addition to uploading DIRT Confidential Business Information to a cloud server, Mr. Henderson had also likely mirrored DIRT Confidential Business Information to a personal external hard disk drive, which was not authorized by DIRT.

82. To date, the unauthorized hard disk drive remains in Mr. Henderson's possession. DIRT reasonably believes that the unauthorized hard disk drive contains DIRT Confidential Business Information.

83. The files wrongfully taken by Mr. Henderson included materials which he would not have a need or reason to access in his day-to-day employment at DIRT, including design and pricing information and proprietary ICE design files and Standard Factory Net (SFN) price lists for projects which had no connection to his employment at DIRT.

84. The files obtained by Mr. Henderson appear to include hundreds of design, layout, pricing, and other files regarding projects, regions, and customers far outside of Mr. Henderson's responsibilities at DIRT.

85. Examples of the files misappropriated by Mr. Henderson include: (a) specific budget proposals for projects; and (b) ICE files and SFN summaries, which could be used against DIRT in bidding for projects because they contain pricing information, among other valuable data.

86. In the weeks leading up to his departure, Mr. Henderson began separately, affirmatively seeking out information from other DIRTT employees regarding internal company processes, particularly pricing, testing, and structural calculation processes under the guise of improving his knowledge of DIRTT company practices for DIRTT's benefit. Mr. Henderson did so despite the fact that he already knew at the time that he would be leaving DIRTT and assisting Falkbuilt in creating a competing business in Utah, Falk Mountain States, LLC.

87. Shortly after DIRTT's receipt of the garnishment order, Mr. Henderson indicated that DIRTT should terminate its relationship with Interior Solutions, the company where his wife works. DIRTT then terminated the relationship in a negotiated exit based on Mr. Henderson's recommendations.

88. In her role at Interior Solutions, Kristy Henderson had access to DIRTT Confidential Business Information.

89. In entering into a Regional Partner Agreement with DIRTT, Interior Solutions agreed in March 2018 that it would not "copy, use, disclose or transfer" any DIRTT confidential information. (Exhibit D). The confidential information included ICE files, SFN pricing, ICE quotes, and final approved ICE files. Interior Solutions also agreed to adhere to the proprietary license with respect to its use of ICE software.

90. On July 8, 2019, Kristy Henderson, Mr. Henderson's wife, incorporated Falk Mountain States, LLC. Kristy Henderson, through her work at Interior Solutions as a DIRTT Regional Partner, possessed significant knowledge about DIRTT's operations.

91. On information and belief, Falk Mountain States, LLC was intended to be, and is, an affiliate of Falkbuilt, a direct competitor of DIRTT set up by former DIRTT employees. Falk Mountain States' filings with the State of Utah indicate that Falk Mountain States is doing business as "Falkbuilt, Salt Lake City" and "Falkbuilt, St. George".

92. Mr. Henderson resigned from DIRTT effective August 2, 2019 on several weeks' notice.

93. Although Kristy Henderson had already formed Falk Mountain States, LLC at the time of his resignation, Mr. Henderson told DIRTT that he was leaving to launch a construction company with his wife, Kristy Henderson, and to develop some commercial property that had "been in the works" for 15 years. Mr. Henderson never informed anyone at DIRTT that he was actually going to work for Mr. Smed at Falkbuilt, but instead intentionally misled DIRTT regarding his plan to begin working for a direct competitor.

94. On August 8, 2019, Mr. Henderson contacted at least one prospective customer of DIRTT “announcing” his and other former DIRTT employees’ departures to launch a new competitor to DIRTT. Mr. Henderson’s email asked the prospective customer to allow the new entity to bid on an existing project with which he was familiar based on his employment with DIRTT.

95. While still employed by DIRTT, in direct violation of his fiduciary duties owed to DIRTT, Mr. Henderson conspired with Kristy Henderson and Falk Mountain States to obtain and misappropriate DIRTT Confidential Business Information, including trade secrets, to benefit himself, Kristy Henderson, Falkbuilt and Falk Mountain States.

96. Mr. Smed directed and encouraged these efforts by Mr. and Mrs. Henderson to obtain and misappropriate DIRTT Confidential Business Information.

B. Other Efforts to Misappropriate DIRTT Confidential Business Information

97. The Hendersons are not the only individuals engaged by Mr. Smed and Falkbuilt to gain access to DIRTT Confidential Business Information.

98. As part of her job responsibilities with DIRTT, Ms. Buczynski had access to proprietary databases of customer relationships, pricing, costing, and

forecasts accessible only to herself, the CEO, and the COO of DIRTT's regional partner.

99. Ms. Buczynski, as part of her employment with DIRTT, agreed to a confidentiality agreement which provided, among other things, that she would not “without the prior written consent of DIRTT, either during the period of [her] employment or at any time thereafter, disclose or cause to be disclosed any of the Confidential Information in any manner ...” (Exhibit E).

100. Ms. Buczynski also agreed to confidentiality provisions in the DIRTT offer letter she executed on September 30, 2016.

101. Ms. Buczynski resigned from DIRTT effective September 17, 2019, as with Mr. Henderson, falsely stating to her colleagues that she was not leaving to work for Falkbuilt.

102. On Ms. Buczynski's last day, she plugged a USB device with a serial number that included 4A3BCF57-0 into her DIRTT-provided laptop. She also accessed a number of files and folders on her work computer's hard drive related to ongoing DIRTT projects. Ms. Buczynski did not possess authorization to undertake any of these acts. (Exhibit F; Exhibit O at ¶ 9).

103. On August 30, 2019, prior to her departure from DIRTT, Ms. Buczynski copied over 40 files, including one identified as “PPT ‘Large Clients’” to a Dropbox directory/folder. (Exhibit G).

104. In fact, as noted above, Ms. Buczynski started working on behalf of Falkbuilt immediately following her departure from DIRTT.

105. Immediately after leaving DIRTT’s employ, Ms. Buczynski reached out to one or more DIRTT customers on behalf of Falkbuilt in an effort to compete on ongoing projects and to underbid DIRTT by utilizing DIRTT’s Confidential Business Information and information obtained from DIRTT’s partner. (Exhibit H).

106. On information and belief, Ms. Buczynski also worked to advance Falkbuilt’s interests to the detriment of DIRTT by either hiding or sitting on leads that she received in the time leading up to her departure, including inquiries from potential partners interested in working with DIRTT.

107. After submitting her resignation to DIRTT, Ms. Buczynski also emailed to her personal email account DIRTT customer contact information, and DIRTT pricing and estimates. (Exhibit I).

108. Ms. Buczynski's and Mr. Henderson's conduct is part of a pattern of a larger number of former DIRTT employees solicited by Falkbuilt (*see* Exhibit O at ¶ 9):

(a) On December 28, 2018, Christina Engelbert, while a DIRTT employee, received an email from Dropbox instructing her to "Complete your Dropbox setup." The email indicated that Ms. Engelbert had created a Dropbox account. Ms. Engelbert left DIRTT on December 31, 2018 and subsequently went to work for or on behalf of Falkbuilt. (Exhibit J).

(b) On December 29, 2018, Clayton Smed, while a DIRTT employee, received an email from Dropbox instructing him to "Complete your Dropbox setup." The email indicated that Mr. Smed had created a Dropbox account. Clayton Smed changed the email associated with his Dropbox account from his DIRTT email to his personal email on January 14, 2019. Clayton Smed left DIRTT on January 31, 2019 and subsequently went to work for or on behalf of Falkbuilt. (Exhibit K).

(c) On January 12, 2019 Laura Shadow, while a DIRTT employee, received an email from Dropbox instructing her to "Complete your Dropbox setup." The email indicated Ms. Shadow had created a Dropbox account.

Ms. Shadow left DIRTT's employ on January 31, 2019 and subsequently went to work for or on behalf of Falkbuilt. (Exhibit L).

109. On September 19, 2018, David Weeks sent Mogens Smed a sensitive, confidential DIRTT document titled "Typical Headwall Cost Breakdown". This information constitutes DIRTT Confidential Business Information. Mr. Weeks left DIRTT on Feb. 28, 2019 and went to work for Mr. Smed at Falkbuilt. (Exhibit M). Mr. Weeks forwarded similar pricing information to his personal email account in November 2018.

110. Ingrid Schoning (who left DIRTT on September 15, 2019) forwarded a DIRTT confidential document to her Gmail account. This information constitutes DIRTT Confidential Business Information. Ms. Schoning now works for or on behalf of Falkbuilt. Ms. Schoning also changed a Dropbox account to associate it with her personal email address on July 23, 2019. (Exhibit N).

111. Jordan Smed (who left DIRTT on January 31, 2019) accessed CAD design files at an abnormally high rate just prior to his departure from DIRTT. Mr. J. Smed accessed CAD files a total of 281 times over a period of nearly *six years* from 2012 to October 2018. In the three months prior to his departure from DIRTT, he accessed the CAD files 714 times, with 449 of those times being in the month of his departure. Mr. J. Smed also sent DIRTT pricing information, as well

as shipping and forecast reports, to his personal email in the two weeks prior to his departure, including on his very last day of employment with DIRTT.

112. Defendants are using and have misappropriated DIRTT Confidential Business Information, and DIRTT has reason to believe that Defendants' actions are ongoing and widespread and directed by Falkbuilt.

113. Plaintiffs have reason to believe, based upon direct knowledge of information actually taken, the facial similarity of DIRTT and Falkbuilt products, and the direct approach of Falkbuilt to DIRTT customers and partners with the purportedly similar products, that the theft was far more widespread than currently known.

114. DIRTT seeks all relief available at law and in equity including, but not limited to, preliminary and permanent injunctive relief to restrain Defendants from using or disclosing DIRTT Confidential Business Information. DIRTT requests injunctive relief to protect itself from irreparable injuries caused by Defendants' conduct and to prevent further harm. DIRTT also seeks an award of compensatory damages, exemplary damages, and attorney's fees.

C. DIRTT Confidential Business Information Constitutes Trade Secrets

115. DIRTT's manufacturing approach is built on a foundation of technology, the center of which is the proprietary ICE Software. DIRTT uses ICE

Software to design, visualize, configure, price, communicate, engineer, specify, order and manage projects. The ICE Software was developed in or around 2005 as a custom interior design and construction software solution to integrate into DIRTT's offerings. The ICE Software makes manufactured, fully custom interiors both feasible and profitable while addressing challenges associated with traditional construction, including cost overruns, inconsistent quality, delays, and significant material waste. The ICE Software is used throughout the sales process, ensuring consistency across DIRTT's services and products received by all of DIRTT's clients.

116. DIRTT begins manufacturing custom DIRTT products once a file (an "ICE File") is generated and a purchase order is received. The ICE Software allows an entire project to be tracked and managed across the entire production cycle through design, sales, production, delivery and installation. The ICE File (containing a project's engineering and manufacturing data) generated during the design and specification process can be used for optimizing future reconfigurations, renovations, technology integration initiatives and changes to a client's space.

Case No. 21-4078

In the
United States Court of Appeals
for the
Tenth Circuit

DIRTT ENVIRONMENTAL SOLUTIONS, INC.;
DIRTT ENVIRONMENTAL SOLUTIONS, LTD,

Plaintiffs-Appellants,

v.

FALKBUILT LTD.; FALKBUILT, INC.; MOGENS SMED,

Defendants-Appellees,

and

LANCE HENDERSON; KRISTY HENDERSON;
FALK MOUNTAIN STATES, LLC,

Defendant.

*Appeal from a Decision of the United States District Court for the District of Utah – Salt Lake City,
Case No. 1:19-CV-00144-DBB-DBP • Honorable David Barlow, U.S. District Judge*

APPELLANTS' APPENDIX
VOLUME 4 OF 6 – Pages 897 - 1188

JEFFREY J. MAYER
CATHERINE A. MILLER
AKERMAN LLP
71 South Wacker Drive, 47th Floor
Chicago, Illinois 60606
(312) 634-5700 Telephone
(312) 424-1900 Facsimile
jeffrey.mayer@akerman.com
catherine.miller@akerman.com

CHAD E. NYDEGGER
WORKMAN NYDEGGER
60 East South Temple
Suite 1000
Salt Lake City, Utah 84111
(801) 533-9800 Telephone
(801) 328-1707 Facsimile
cnydegger@wnlaw.com



TABLE OF CONTENTS

VOLUME 1 OF 6 (1 to 298)

Civil Docket Sheet, District of Utah, 1:19-cv-00144-DBB-DBP 1

2 Verified Complaint filed 12/11/1926

 Exhibit A – Correspondence dated May 21, 2009 from DIRTT
 to Lance Henderson.....60

 Exhibit B – DIRTT Computer/Data Security Policy63

 Exhibit C – Administrative Garnishment Order65

 Exhibit D – DIRTT Regional Partner Agreement (2018).....81

 Exhibit E (Filed Under Seal)
 (See full unredacted document at Volume 6 at 1455)112

 Exhibit F (Filed Under Seal)
 (See full unredacted document at Volume 6 at 1461)113

 Exhibit G (Filed Under Seal)
 (See full unredacted document at Volume 6 at 1472)114

 Exhibit H – Correspondence dated November 15, 2019
 from Metz Lewis to Amanda Buczynski115

 Exhibit I – (Filed Under Seal)
 (See full unredacted document at Volume 6 at 1480)118

 Exhibit J – Dropbox set up119

 Exhibit K – Dropbox set up.....122

 Exhibit L – Dropbox set up125

 Exhibit M – (Filed Under Seal)
 (See full unredacted document at Volume 6 at 1503)129

 Exhibit N – (Filed Under Seal)
 (See full unredacted document at Volume 6 at 1507)130

 Exhibit O – Declaration of Julian Grijns.....131

5 Plaintiff’s Motion for a Preservation Order and, Following Expedited Discovery, a Limited Preliminary Injunction to Preserve the Status Quo filed 12/12/19136

Exhibit A – Order Granting Motion for Preliminary Injunction161

Exhibit B – Order Granting Motion for Preservation Order164

40 Notice of Dismissal of Falkbuilt LLC filed 01/22/20166

42 Falkbuilt Ltd.’s Answer to Verified Complaint and Counterclaim filed 02/05/20168

Exhibit A – ICANN Doman Name Registration Data Lookup.....217

Exhibit B – Complaint at Website220

Exhibit C – Complaint.pdf Metadata.....254

Exhibit D – DIRTT Press Release from Website255

62 Falkbuilt Ltd.’s First Amended Counterclaim (Jury Demanded) filed 03/18/20259

64 Notice of Preliminary Injunction to Preserve the Status Quo filed 04/02/20 regarding Doc. 61 Order290

VOLUME 2 OF 6 (299 to 596)

72 Falkbuilt Ltd.’s Short Form Motion for Protective Order from Discovery until Plaintiff Identifies its Alleged Trade Secrets filed 06/15/20299

Exhibit A – Plaintiff’s First Requests for Production of Documents and Requests for Production of Documents and Request for Inspection to All Defendants304

Exhibit B – Notice of Subpoena318

Exhibit A – Notice of Preliminary Injunction to Preserve the Status Quo334

Exhibit C – Correspondence from Fabian VanCott to Akerman LLP dated April 23, 2020344

Exhibit D – Correspondence from Akerman to Fabian VanCott dated April 28, 2020350

Exhibit E – Email from Akerman to Jason Hardin and Bruce Badger dated May 4, 2020356

Exhibit F – Correspondence from Fabian VanCott to Akerman LLP dated May 5, 2020358

Exhibit G – Correspondence from Akerman to Fabian VanCott dated June 5, 2020377

Exhibit H – Correspondence from Fabian VanCott to Akerman LLP dated June 11, 2020390

73 Plaintiff’s Short Form Motion to Compel Falkbuilt’s Responses to Document Requests filed 06/16/20397

Exhibit D – Falkbuilt Ltd.’s First Disclosure Required by Stipulated Injunction to Preserve the Status Quo403

Exhibit E - Correspondence from Akerman LLP to Fabian VanCott dated June 5, 2020413

76 Plaintiff’s Response to Falkbuilt Ltd.’s Short Form Motion for Protective Order from Discovery filed 06/16/20.....426

77 Falkbuilt’s Short Form Motion for Protective Order and to Quash Subpoenas filed on 06/16/20431

Exhibit A – Notice of Subpoena.....436

Exhibit B – Notice of Subpoena462

Exhibit C – Declaration of Barrie Loberg488

Exhibit D – Email from Akerman to Jason Hardin and Bruce Badger dated June 16, 2020493

Exhibit E – Order Granting Falkbuilt Ltd.’s Short Form Motion for Protective Order and to Quash Subpoenas498

78 Henderson Defendants’ Short Form Motion to Require Plaintiff to Identify Its Alleged Trade Secrets filed 06/17/20500

Exhibit A – Defendants Lance Henderson, Kristy Henderson and Falk Mountain States, LLC’s Response to Plaintiff’s First Requests for Documents and Production506

79 Order Granting Falkbuilt Ltd.’s Short Form Motion for Protective Order from Discovery Until Plaintiff Identifies its Alleged Trade Secrets filed 06/17/20546

80 Order Granting Plaintiff’s Motion to Seal Exhibits B and C to its Motion to Compel filed 06/18/20548

81 Plaintiff’s Response to Falkbuilt’s Short Form Motion for Protective Order and to Quash Subpoenas filed on 06/16/20.....549

Exhibit A – Notice of Preliminary Injunction to Preserve the Status Quo554

Exhibit B – Amanda Buczysnki’s LinkedIn Profile.....564

Exhibit C – Correspondence from Akerman LLP to Fabian VanCott dated April 28, 2020581

Exhibit D – Correspondence from Akerman LLP to Fabian VanCott dated June 5, 2020587

82 Plaintiff’s Short Form Motion to Compel Production of Falkbuilt, Ltd.’s Information from Canadian Employees filed 06/18/20592

VOLUME 3 OF 6 (597 to 896)

Exhibits to Dkt. 82 continued

Exhibit A – Falkbuilt Ltd.’s Supplemental Responses to Plaintiff’s First Requests for Production of Documents.....597

Exhibit B – Filed Under Seal
(*See full unredacted document at Volume 6 at 1510*)640

Exhibit C – Order on Plaintiff’s Short Form Motion to Compel Production of Falkbuilt Ltd. Information from Canadian Employees641

85 Plaintiff’s Response to Henderson Defendants’ Short Form Motion to Require Plaintiff to Identify its Alleged Trade Secrets filed 06/22/20643

Exhibit A – Defendants Lance Henderson, Kristy Henderson and Falk Mountain States, LLC’s First Disclosure of Information Pursuant to Preliminary Injunction Order649

Exhibit B – Correspondence from Manning Curtis Bradshaw & Bednar to Akerman LLP dated June 17, 2020654

Exhibit C – DIRTT Environmental Solutions, Inc.’s Responses to Falkbuilt Ltd.’s First Set of Interrogatories658

86 Response to Plaintiff’s Short Form Motion to Compel Falkbuilt Ltd.’s Responses to Document Requests filed 06/23/20685

Exhibit A – Email strings between Jason Hardin to Akerman.....690

Exhibit B – Falkbuilt Ltd.’s Supplemental Responses to Plaintiff’s First Requests for Production of Documents.....704

Exhibit C – Email from Sonja Burdash to Akerman.....746

Exhibit D – Plaintiff’s First Requests for Production of Documents and Request for Inspection to All Defendants.....752

87 Corrected Exhibit A – Communications – Replacing Dkt. 86-1 filed 06/23/20 as Exhibit A to Response to Plaintiff’s Short Form Motion to Compel Falkbuilt Ltd.’s Responses to Document Requests (Filed 06/23/20 as Dkt. 86).....765

88 Plaintiff’s Short Form Motion to Compel Henderson Defendants’ Document Production filed 06/24/20784

Exhibit A – Correspondence from Manning Curtis Bradshaw & Bednar to Akerman LLP dated June 17, 2020789

Exhibit B – Plaintiff’s First Requests for Production of Documents and Request for Inspection to All Defendants.....793

Exhibit C – Defendants Lance Henderson, Kristy Henderson and Falk Mountain States, LLC’s First Disclosure of Information Pursuant to Preliminary Injunction Order807

Exhibit D – Filed Under Seal
(*See full unredacted document at Volume 6 at 1623*)812

Exhibit E – Correspondence from Akerman LLP to Manning Curtis dated June 5, 2020813

Exhibit F – Correspondence from Manning Curtis Bradshaw & Bednar to Akerman LLP dated June 15, 2020823

89 Plaintiff’s Motion to File Under Seal Exhibit D to its Short Form Motion to Compel Henderson Defendants’ Document Production filed 06/24/20 832

Exhibit A – Order Granting Plaintiff’s Motion to File Under Seal Exhibit D to its Motion to Compel Henderson Defendants 834

90 Sealed Document regarding Redacted Motion to Expedite Plaintiff’s Short Form Motion to Compel Henderson Defendants’ Document Production and Memorandum in Support Filed by DIRTT filed on June 24, 2020 835

91 Falkbuilt, Ltd.’s (1) Response to Plaintiff’s Short Form Motion to Compel Production of Falkbuilt, Ltd. Information from Canadian Employees, and (2) Request for Extended Briefing filed 06/25/20 837

93 Notice of Newly Obtained Supplemental Information Relevant to Falkbuilt Ltd.’s Motion for Protective Order and to Quash Subpoenas filed on 07/01/20 842

Exhibit A – Correspondence from Crawford & Bangs, LLP to Akerman regarding Objection to Subpoenas 846

Exhibit B – Email string regarding Subpoenas 849

94 Henderson Defendants’ Response to Plaintiff’s Short Form Motion to Compel Henderson Defendants’ Document Production filed 07/01/20 853

Exhibit A – Proposed Order Denying Plaintiff’s Short Form Motion to Compel Henderson Defendants’ Document Production 858

117 First Amended Complaint Jury Demanded filed 10/20/20 859

VOLUME 4 OF 6 (897 to 1188)

(continuation from Volume III)

117 First Amended Complaint Jury Demanded filed 10/20/20 897

Exhibit A – Correspondence from DIRTT to Lance Henderson dated May 21, 2009 940

Exhibit B – DIRTT Computer/Data Security Policy 943

Exhibit C – Administrative Garnishment Order/Office of State Debt Collection.....	945
Exhibit D – DIRT Regional Partner Agreement.....	961
Exhibit E – Filed Under Seal Pursuant to Court Order (See full unredacted document at Volume 6 at 1455)	992
Exhibit F – Filed Under Seal Pursuant to Court Order (See full unredacted document at Volume 6 at 1461)	993
Exhibit G – Filed Under Seal Pursuant to Court Order (See full unredacted document at Volume 6 at 1472)	994
Exhibit H – Correspondence from Metz Lewis Brodman Must O’Keefe to Amanda Buczynski.....	995
Exhibit I – Filed Under Seal Pursuant to Court Order (See full unredacted document at Volume 6 at 1480)	998
Exhibit J – Email regarding DropBox account.....	999
Exhibit K – Email regarding DropBox account	1002
Exhibit L – Email regarding DropBox account.....	1005
Exhibit M – Filed Under Seal Pursuant to Court Order (See full unredacted document at Volume 6 at 1503)	1009
Exhibit N – Filed Under Seal Pursuant to Court Order (See full unredacted document at Volume 6 at 1507)	1010
Exhibit O – Declaration of Julian Grijns	1011
Exhibit P – Filed Under Seal Pursuant to Court Order (See full unredacted document at Volume 6 at 1760)	1016
Exhibit Q – Falkbuilt Folding Glass Wall.....	1017
Exhibit R – Falkbuilt Digital Component Construction.....	1019
Exhibit S – Tweet Threads	1038
124 Memorandum Decision and Order filed 10/23/20.....	1048
129 Rule 72 Objection and Rule 60(b)(1) Motion to Reverse Magistrate Judge Pead’s Memorandum Decision and Order [Docket No. 124] filed 11/06/20.....	1051

Exhibit A – Form 10 Amended Amended Statement of Claim1066

131 Answer of Defendant Lance Henderson to Amended Complaint
filed 11/19/20.....1086

132 Answer of Defendant Kristy Henderson to Amended Complaint
filed 11/19/20.....1120

133 Answer of Defendant Falk Mountain States, LLC to Amended
Complaint filed 11/19/20.....1155

VOLUME 5 OF 6 (1189 to 1454)

134 Motion to Dismiss First Amended Complaint as to Defendants
Falkbuilt Ltd., Falkbuilt, Inc. and Mogens Smed filed 11/19/201189

Exhibit 1 – Form 10 Statement of Claim.....1221

Exhibit 2 – Executive Employment Agreement Amendment between
DIRTT and Mogens Smed.....1240

135 Falkbuilt Ltd.’s Response to Plaintiffs’ Rule 72 Objection and
Rule 60(b)(1) Motion to Reverse Magistrate Judge Pead’s
Memorandum Decision and Order [Docket No. 124] filed 11/20/201258

138 Reply in Support of Rule 72 Objection and Rule 60(b)(1) Motion
to Reverse Magistrate Judge Pead’s Memorandum Decision and
Order [Docket No. 124] filed 11/30/201273

139 Opposition to Motion to Dismiss First Amended Complaint as to
Falkbuilt Ltd., Falkbuilt, Inc. and Mogens Smead [Dkt. 134]
filed 12/17/20.....1287

143 Reply Memorandum in Support of Motion to Dismiss First
Amended Complaint as to Falkbuilt, Ltd., Falkbuilt, Inc. and
Mogens Smed (Dkt. 134) filed 01/15/211319

145 Memorandum Decision and Order filed 01/25/211333

146 Memorandum Decision and Order Denying Motion to Compel
filed 01/27/211342

147 Memorandum Decision and Order Granting Motion to Compel
Production of Falkbuilt, Ltd., Information from Canadian Employees
filed 01/27/211345

162 Minute Entry for Proceedings held before Judge Barlow: Motion Hearing held on 05/19/21 regarding Motion to Dismiss and Memorandum in Support of First Amended Complaint as to Defendants Falkbuilt Ltd., Falkbuilt, Inc. and Mogens Smed filed by Falkbuilt Ltd., Mogens Smed, Falkbuilt, Inc.1349

163 Notice of Consent: (1) to Canadian Jurisdiction by Falkbuilt, Inc., and (2) To Entry of Stipulated Preliminary Injunction in the Court of Queen’s Bench, Alberta as to Falkbuilt Ltd., Falkbuilt, Inc. and Mogens Smed filed 05/21/21.....1351

164 Memorandum Decision and Order Granting [134] Motion to Dismiss First Amended Complaint as to Defendants Falkbuilt Ltd., Falkbuilt Inc. and Mogens Smed and Denying Plaintiffs’ Oral Motion to Amend filed 05/21/211354

168 Motion for Rule 54(b) Certification of Docket No. 164 filed 06/04/211358

178 Memorandum Decision and Order Granting [168] Motion for Rule 54(b) Certification of Docket No. 164 filed 07/01/211367

166 Motion Hearing Before Judge David Barlow on May 19, 20211369

VOLUME 6 OF 6 (1455 to 1760)
(FILED UNDER SEAL)

Exhibits to Verified Complaint, Dkt. 2:

2-5 Exhibit E – Employment Contract between DIRTT and a former employee.....1455

2-6 Exhibit F – Spreadsheet substantiating a former DIRTT employee taking confidential DIRTT electronic files1461

2-7 Exhibit G – Spreadsheet substantiating a former DIRTT employee’s upload of a “large clients” PowerPoint file to Dropbox1472

2-9 Exhibit I – String of emails from a former DIRTT employee to her personal email account attaching DIRTT’s pricing and estimates.....1480

2-13 Exhibit M – Email sent outside DIRTT containing a sensitive, confidential DIRTT document.....1503

2-14 Exhibit N – Email forwarded by a former DIRTT employee, who now works for defendant Falkbuilt, to her personal email account that contains DIRTT’s confidential business information1507

82-2 Exhibit B to DIRTT’s Motion to Compel Production of Falkbuilt Information from Canadian Employees – Email from a former DIRTT employee to his personal email account attaching DIRTT’s confidential pricing and project information1510

88-4 Exhibit D to DIRTT’s Motion to Compel Production of Henderson Defendants’ Document Production – Spreadsheet substantiating a former DIRTT employee’s taking confidential DIRTT electronic files1623

Exhibits to Amended Complaint, Dkt. 117:

117-5 Exhibit E – Employment Contract between DIRTT and a former employee1704

117-6 Exhibit F – Spreadsheet substantiating a former DIRTT employee taking confidential DIRTT electronic files1710

117-7 Exhibit G – Spreadsheet substantiating a former DIRTT employee’s upload of a “large clients” PowerPoint file to Dropbox1721

117-9 Exhibit I – String of emails from a former DIRTT employee to her personal email account attaching DIRTT’s pricing and estimates1729

117-13 Exhibit M – Email sent outside DIRTT containing a sensitive, confidential DIRTT document1752

117-14 Exhibit N – Email forwarded by a former DIRTT employee, who now works for defendant Falkbuilt, to her personal email account that contains DIRTT’s confidential business information1756

117-16 Exhibit P – listing of bids DIRTT lost to Falkbuilt and projects that have been flipped from DIRTT to Falkbuilt, and contains DIRTT’s sensitive, confidential business information, including client names and project locations1759

117. The ICE Software is licensed to unrelated companies and Regional Partners of DIRTT, but only for certain limited information and only if the parties agree to be bound by a confidentiality agreement.

118. DIRTT's proprietary ICE Software is among a body of DIRTT's valuable intellectual property. The ICE Software is subject to a number of patents in Canada, the United States, Europe and Singapore. DIRTT also has a number of trademark and copyright protections related to the ICE Software.

119. ICE files generated by ICE Software contain proprietary costing information that would be of substantial benefit to a competitor seeking to undercut DIRTT on price. Costing is a closely-guarded secret at DIRTT for this reason, and because of the substantial efforts utilized to generate it.

120. In addition to the ICE Software, during their employment with DIRTT, Mr. Henderson, Ms. Buczynski, and other former DIRTT employees had access to DIRTT Confidential Business Information, including but not limited to:

- (a) DIRTT's job costing;
- (b) DIRTT's customer and supplier lists, and a list of prospects and projects;
- (c) DIRTT's sales figures and projections;
- (d) DIRTT's pre-use customer presentations and marketing materials;

- (e) DIRTT's marketing and sales strategies;
- (f) DIRTT's customer, supplier and Regional Partner order histories, needs, and preferences;
- (g) DIRTT's customer proposals, service agreements, contracts and purchase orders;
- (h) DIRTT's plans to expand and target new clients and markets;
- (i) design specifications and drawings of DIRTT products;
- (j) specialized methods and processes used to create custom prefabricated modular interior wall partitions, other ocular interior components and other DIRTT products;
- (k) research and development of new DIRTT products;
- (l) trade secrets and intellectual property strategy, including strategy regarding the ICE Software and ancillary programs;
- (m) strategic plans and business plans; and
- (n) library of prior projects and customer needs, impossible to replicate without access to DIRTT's confidential system.

This information comprises DIRTT Confidential Business Information.

121. DIRTT Confidential Business Information is comprised of thousands of different files and documents. And while DIRTT is aware that some of the files constituting DIRTT's Confidential Business Information were taken (or retained) without authorization, due to the volume of information that individuals such as Mr. Henderson, Mr. Jordan Smed, and Ms. Buczynski had access to, it is nearly

impossible for DIRTT to identify every individual stolen file at this time, until or unless Defendants comply with their discovery obligations.

122. Further, given Mr. Smed's close personal relationship with many of the departing DIRTT employees, DIRTT has reasonably concluded that such information was widely shared within Falkbuilt Inc. and Falkbuilt Ltd. and directed by Mr. Smed. Additionally, considering that Falkbuilt's regional branches are investors in Falkbuilt, are personally close to Mr. Smed, and that Falkbuilt issues email addresses to the branches, maintains the servers for them and stores emails for the branches, DIRTT believes the information is shared with Falkbuilt partners.

123. DIRTT devotes significant resources to developing DIRTT Confidential Business Information.

124. DIRTT Confidential Business Information constitutes trade secrets of DIRTT. It is vital to DIRTT's business success and enables it to compete effectively in an extremely competitive marketplace. DIRTT takes reasonable measures to protect and maintain the confidentiality of DIRTT Confidential Business Information, including the measures described above.

125. DIRTT derives substantial economic value from maintaining the secrecy of its DIRTT Confidential Business Information, including, among other things, its pricing, its customer, prospect, and supplier information, its sales figures

and projections, its marketing and sales strategies, its technical-know-how, its design specifications, and its strategic and business plans. Any of this information would be immensely valuable to a competitor, and a global theft of the information would allow a competitor an unfair advantage in bidding against DIRTT on projects. DIRTT has incurred significant costs and expenses in developing its DIRTT Confidential Business Information.

126. DIRTT Confidential Business Information, including, among other things, pricing, its customer, prospect and supplier information, its sales figures and projections, its marketing and sales strategies, its design specifications, and strategic and business plans, is neither generally known, nor is it readily ascertainable, to the general public, to DIRTT's competitors, or to any other person or entity that could obtain value from such information.

127. DIRTT takes reasonable measures to protect and maintain the secrecy of its DIRTT Confidential Business Information, including, among other things, its pricing, its customer, prospect, and supplier information, its sales figures and projections, its marketing and sales strategies, its design specifications, and its strategic and business plans.

128. DIRTT limits access to DIRTT Confidential Business Information, and requires network passwords to access DIRTT Confidential Business

Information on DIRTT's computers, confidential agreements, warranty on ICE Software, and partner confidentiality agreements. DIRTT also has policies and procedures in place governing the access to and use of DIRTT Confidential Business Information, including efforts described above to identify attempts to improperly transfer DIRTT Confidential Business Information.

D. Falkbuilt directly and unlawfully competes with DIRTT, Inc.

129. Despite Falkbuilt's claims to the contrary, since its formation, Falkbuilt has attempted to compete in the same market as DIRTT, Inc. Not only is Falkbuilt attempting to compete in exactly the same market as Plaintiffs, but it is also attempting to steal DIRTT, Inc.'s customers and convert existing DIRTT, Inc. projects into Falkbuilt projects through unlawful means, including through its controlled regional representatives and partners. The regional branches are largely investors in Falkbuilt, and many hold themselves out as employees or principals of Falkbuilt, Ltd. The email servers for these purported independent businesses are controlled and maintained by Falkbuilt, Ltd.

130. By way of example, in June 2020, Mr. Smed, on behalf of Falkbuilt, met with representatives from a DIRTT client. During this meeting, Mr. Smed discussed the DIRTT project, and made accusations regarding DIRTT with the

intent of sowing suspicion and doubt about DIRTT's ability to complete the project.

131. Similarly, one of DIRTT's Regional Partners in New York has already begun transitioning from selling DIRTT products to also selling Falkbuilt products. In addition to selling Falkbuilt products in the same market as DIRTT products, this partner has converted existing DIRTT projects into Falkbuilt projects. Such a transition of DIRTT projects to Falkbuilt projects will directly result in a loss of business and revenue for DIRTT.

132. One of DIRTT's partners in Cleveland has similarly used its dual relationship with DIRTT and Falkbuilt to Falkbuilt's advantage. Specifically, DIRTT lost the bid for the second phase of a project for which DIRTT had done a full solution installation for the first phase in 2018 to 2019. DIRTT had informed its Regional Partner of the opportunity to bid on the second phase, which the partner then wrongfully disclosed to Falkbuilt. Despite DIRTT's involvement in the project and what it believed was a competitive bid, DIRTT lost the bid. In other words, Falkbuilt has demonstrated a pattern of using DIRTT's partner network in an effort to gain exposure to DIRTT's competitive information. While DIRTT does not suggest that Falkbuilt should refrain from recruiting certain partners, it is certainly improper to use DIRTT's partners to gain access to

confidential information, such as bid pricing, in order to gain an unfair advantage in Falkbuilt's direct competition with DIRTT, or to promote a false equivalency with DIRTT products.

133. Falkbuilt and Mr. Smed have created confusion in the marketplace by:

(a) Presenting Falkbuilt services to customers, including DIRTT customers and prospects, and misrepresenting the characteristics of such products and services by stating and representing that Falkbuilt products can replace DIRTT products with the full range of customization and functionality. In fact, for one project, the customer was so misled by Falkbuilt's statements concerning the similarity between DIRTT and Falkbuilt that the project documents had to be formally amended to clarify that the design was based on Falkbuilt's solution, and that DIRTT was an acceptable alternative as a manufacturer. This change was only made after a DIRTT representative had an in-depth conversation with the architect for the project, explaining the substantial difference between DIRTT and Falkbuilt.

(b) Repeatedly and falsely claiming an affiliation with DIRTT, as Mr. Smed refers to DIRTTBAGS and DIRTT through social media, wrongly suggesting an affiliation, and that Falkbuilt's technology is a lawful outgrowth of DIRTT technological heritage.

(c) Degrading DIRTT to DIRTT customers and partners by falsely announcing departures of DIRTT partners, falsely representing DIRTT's ability to perform its obligations with its customers, and falsely referring to the destruction of the company by current management.

134. Falkbuilt's own materials illustrate the extent to which Falkbuilt and its allegedly independent regional branches are intertwined. In one presentation, Falkbuilt claims that over 85% of Falkbuilt's branches are investors in Falkbuilt, and over 66% of the total capital for Falkbuilt was raised directly from the branches. With the branches having so significant a financial stake in Falkbuilt, it is clear that they, too, have an incentive to use DIRTT information to leverage a competitive advantage for Falkbuilt.

135. DIRTT, Inc. and DIRTT Ltd. have both been injured by Falkbuilt's actions. Plaintiffs both have an interest in the integrity of DIRTT Confidential Information. Both companies also have lost revenue and face the risk of further lost revenue.

**COUNT I - VIOLATION OF UTAH UNIFORM TRADE SECRETS ACT
(Utah. Code § 13-24-1 *et seq.*)(Against Lance Henderson, Kristy Henderson,
Falkbuilt Ltd., Falkbuilt, Inc. and Falk Mountain States, LLC)**

136. The allegations contained in the preceding paragraphs set forth above are incorporated as if fully set forth herein.

137. The Utah Uniform Trade Secrets Act (“UTSA”) provides a private right of action for misappropriation of trade secrets.

138. A “trade secret” is defined as “information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” Utah. Code § 13-24-2.

139. The term “misappropriation” includes “(a) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or (b) disclosure or use of a trade secret of another without express or implied consent by a person who: (i) used improper means to acquire knowledge of the trade secret; or (ii) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was: (A) derived from

or through a person who had utilized improper means to acquire it; (B) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or (iii) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.” Utah. Code § 13-24-2.

140. The term “improper means” includes “theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.” Utah. Code § 13-24-2.

141. While a DIRTT employee, Mr. Henderson had access to DIRTT’s trade secrets, including confidential customer and account information, such as marketing strategies and techniques, marketing and development plans for client contact information, price lists, specific contract pricing and payment histories. Such information gives DIRTT a commercial competitive advantage and derives economic value from not being generally known to and not readily ascertainable by the public or any person who can obtain economic value from its disclosure or use.

142. Upon information and belief, Defendants have conspired to misappropriate a large number of other DIRTT trade secrets. Plaintiffs are aware

of, for example, DIRTT pricing information, design documents, client specific project documents, and other trade secrets that were misappropriated. However, due to the potentially thousands of individual trade secrets at issue (i.e. individual design files, pricing documents, and client project information), DIRTT cannot reasonably identify each trade secret at issue, as the information necessary for such identification is in the possession of Defendants and in the possession of those former DIRTT employees who took part in Defendants' conspiracy.

143. As a DIRTT employee, Mr. Henderson was aware of the confidential nature of DIRTT's trade secrets and agreed to ensure the continued confidentiality of such information as set forth above.

144. As a DIRTT employee, Mr. Henderson was also aware that DIRTT placed confidence in him to maintain the confidentiality of DIRTT's trade secrets, at least through the confidentiality agreement he signed.

145. At all relevant times, DIRTT made, and continues to make, reasonable efforts to maintain the secrecy of DIRTT's trade secrets, by, among other things, requiring Mr. Henderson to sign a confidentiality agreement in connection with his employment.

146. In violation of his duty to refrain from using or disclosing DIRTT's trade secrets, Mr. Henderson, on his own and as part of a conspiracy with Falkbuilt

Ltd., Falkbuilt, Inc., Kristy Henderson and Falk Mountain States, LLC, misappropriated DIRTТ's trade secrets, including but not limited to, confidential and proprietary customer account information, marketing data and analysis, customer histories and payment histories, including marketing information and hundreds of DIRTТ files and folders.

147. These Defendants' violations of the UTSA caused DIRTТ substantial damage. Among other things, DIRTТ was required to hire attorneys and computer forensic experts to investigate and attempt to mitigate Defendants' misappropriation of DIRTТ's trade secrets.

148. DIRTТ also suffered damage as a result of the loss or diminishment of value of DIRTТ Confidential Business Information and other confidential and proprietary information, and diminishment of business value and competitive standing.

149. Falkbuilt competes directly with DIRTТ, and Defendants continue to use the misappropriated DIRTТ trade secrets to gain an unfair competitive advantage in the marketplace. Upon information and belief, it is at least in part due to Falkbuilt's illegal use of DIRTТ's trade secrets that several DIRTТ projects were stolen by Falkbuilt, and the reason why DIRTТ lost bids to Falkbuilt on the

same projects. A list of such projects currently known to DIRTT is attached as Exhibit P, and filed under seal.

150. At all times, Mr. Smed, as founder and CEO of Falkbuilt, was aware of and actively encouraged Mr. Henderson's and Kristy Henderson's improper acquisition of DIRTT trade secret information.

151. In addition to Mr. Henderson, Falkbuilt Ltd., Falkbuilt, Inc., Falk Mountain States, LLC, Kristy Henderson, and Mogens Smed are directly liable for violations of the UTSA because they actively participated, through their conspiracy with each other and Mr. Henderson, in misappropriating DIRTT's trade secrets.

152. Falkbuilt, Inc., Falkbuilt Ltd., and Falk Mountain States, LLC are also directly liable for violations of the UTSA because they acquired DIRTT trade secret information through their agents, Mr. Henderson and Kristy Henderson, knowing that such information was obtained by improper means, including violations of Mr. Henderson's explicit and implied duties of confidentiality.

153. Falkbuilt, Inc., Falkbuilt Ltd., Falk Mountain States, LLC, Mr. Henderson, and Kristy Henderson are each liable for violations of the UTSA because they used DIRTT trade secrets (which include DIRTT Confidential Business Information) without express or implied permission from DIRTT and because Falkbuilt, Inc., Falkbuilt Ltd., Falk Mountain States, LLC and Kristy

Henderson knew or had reason to know that Mr. Henderson had acquired DIRT T's trade secrets under circumstances giving rise to a duty to maintain their secrecy or limit their use, and had divulged DIRT T's trade secrets when he owed a duty to DIRT T to maintain their secrecy or limit their use.

154. DIRT T has been and continues to be injured irreparably by these Defendants' misappropriations of its trade secrets.

**COUNT II – FEDERAL DEFEND TRADE SECRETS ACT (18 U.S.C. § 1836)
(Against Lance Henderson, Kristy Henderson, Falkbuilt Ltd., Falkbuilt, Inc.,
and Falk Mountain States, LLC)**

155. The allegations contained in the preceding paragraphs set forth above are incorporated as if fully set forth herein.

156. The Federal Defend Trade Secrets Act provides a private right of action for an "owner of a trade secret that is misappropriated . . . if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce." 18 U.S.C. § 1836(b)(1).

157. A "trade secret" means:

all forms and types of financial, business, scientific, technical, economic or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically or in writing if (A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the

information derives independent economic value, actual or potential, from not being known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

18 U.S.C. § 1836(3).

158. The term “misappropriation” includes the “disclosure or use of a trade secret of another without express or implied consent by a person who . . . at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was . . . derived from or through a person who owed a duty to the person seeking relief to maintain the secrecy of the trade secret.” 18 U.S.C. § 1839(5)(B)(ii)(III).

159. The term “improper” includes “breach of a duty to maintain secrecy . . .” 18 U.S.C. § 1939(6).

160. DIRTT Confidential Business Information is a “trade secret” under the Federal Defend Trade Secrets Act because it comprises confidential and proprietary customer information, including marketing plans, strategies and data, artwork, financial information, customer information, account histories and other information which DIRTT takes reasonable measures to maintain secret.

161. Such information derives independent economic value because it provides DIRTT with a competitive commercial advantage from not being known

to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

162. Upon information and belief based upon available objective information, Defendants have conspired to misappropriate a large number of other DIRTT trade secrets. Plaintiffs are aware of, for example, DIRTT pricing information, design documents, client specific project documents, and other trade secrets that were misappropriated. However, due to the potentially thousands of individual trade secrets at issue (i.e. individual design files, pricing documents, and client project information), DIRTT cannot reasonably identify each trade secret at issue in this Litigation until or unless Defendants respond in discovery, as the information necessary for such identification is in the possession of Defendants and in the possession of those former DIRTT employees who took part in Defendants' conspiracy.

163. The DIRTT trade secrets misappropriated by Falkbuilt Ltd., Falkbuilt, Inc., Lance Henderson, Kristy Henderson and Falk Mountain States, LLC are used in interstate commerce to bid for, design, and construct projects throughout the United States.

164. As a DIRTT employee, Mr. Henderson had contractual and fiduciary duties to maintain the secrecy of DIRTT's trade secrets and not misappropriate the information for his own use or for the use of DIRTT's competitors.

165. At all relevant times, Mr. Henderson was aware of the duty to maintain the secrecy of DIRTT's trade secrets and not misappropriate such information for his own use.

166. In violation of this duty, Mr. Henderson misappropriated DIRTT's trade secrets, marketing data and analyses, customer histories and payment histories, by taking such information without DIRTT's express or implied consent.

167. These Defendants' violations of the Federal Defend Trade Secrets Act caused DIRTT substantial damage. Among other things, DIRTT was required to hire attorneys and computer forensic experts to investigate and attempt to mitigate Defendants' misappropriation of DIRTT's trade secrets.

168. DIRTT also suffered damage as a result of the loss or diminishment of value of DIRTT's trade secrets, and diminishment of business value and competitive standing.

169. Falkbuilt competes directly with DIRTT, and Defendants continue to use the misappropriated DIRTT trade secrets to gain an unfair competitive advantage in the marketplace. Upon information and belief, it is at least in part due

to Falkbuilt's illegal use of DIRTT's trade secrets that several DIRTT projects were stolen by Falkbuilt, and the reason why DIRTT lost bids to Falkbuilt on the same projects. A list of such projects currently known to DIRTT is attached as Exhibit P, and filed under seal.

170. In addition to Mr. Henderson, Falkbuilt, Inc., Falkbuilt Ltd., Falk Mountain States, LLC and Kristy Henderson are directly liable for violations of the Defend Trade Secrets Act because they actively participated, through their conspiracy with other Defendants in misappropriating DIRTT's trade secrets.

171. Falkbuilt, Inc., Falkbuilt Ltd. and Falk Mountain States, LLC are also directly liable for violations of the Defend Trade Secrets Act because they acquired DIRTT trade secret information through their agents, the Hendersons, knowing that such information was obtained by improper means, including violations of Mr. Henderson's explicit and implied duties of confidentiality.

172. Falkbuilt, Inc., Falkbuilt Ltd., Falk Mountain States, LLC, Mr. Henderson, and Kristy Henderson are liable for violations of the Defend Trade Secrets Act because they used DIRTT trade secrets without express or implied permission from DIRTT and Falkbuilt, Inc., Falkbuilt Ltd., Falk Mountain States, LLC and Kristy Henderson knew or had reason to know that Mr. Henderson had acquired the DIRTT trade secrets under circumstances giving rise to a duty to

maintain their secrecy or limit their use; and had divulged DIRTT trade secrets when he owed a duty to DIRTT to maintain their secrecy or limit their use.

**COUNT III – BREACHES OF CONTRACTS
(Against Mr. Henderson)**

173. The allegations contained in the preceding paragraphs set forth above are incorporated as if fully set forth herein.

174. Mr. Henderson owed contractual duties to DIRTT based on his May 21, 2009 agreement to DIRTT’s terms and conditions, and his June 25, 2019 execution of DIRTT’s Computer/Data Security policy.

175. On information and belief, Mr. Henderson breached his obligations under the May 21, 2009 agreement by failing to prevent unauthorized publication and disclosure of (a) any trade secret, manufacturing process or confidential information concerning DIRTT, and (b) the finances of DIRTT and respective dealings, transactions or affairs of which Mr. Henderson was familiar during his employment.

176. For example, Mr. Henderson has used his knowledge of DIRTT dealings with customers and prospective customers for the benefit of Falkbuilt, Falkbuilt Mountain States, and himself.

177. On information and belief, Mr. Henderson has also damaged DIRTT by publishing and disclosing to Falkbuilt and Falkbuilt Mountain States, DIRTT’s

competitor, DIRTT Confidential Business Information, including confidential electronic information, copied from DIRTT's computer systems before his departure.

178. On information and belief, Mr. Henderson breached his obligations under the June 25, 2019 DIRTT Computer/Data Security Policy by (a) storing information on systems and channels not controlled by DIRTT (e.g., cloud computing services and a personal hard drive), and (b) accessing DIRTT computer or network locations and resources for which he was not previously authorized (e.g. projects outside of his market area, which on information and belief were accessed to benefit Falkbuilt).

COUNT IV – VIOLATION OF PENNSYLVANIA UNIFORM TRADE SECRETS ACT (12 P.S. § 5302) (Against Falkbuilt, Inc. and Falkbuilt Ltd.)

179. The allegations contained in the preceding paragraphs set forth above are incorporated as if fully set forth herein.

180. The Pennsylvania Uniform Trade Secrets Act (“PUTSA”) provides a private right of action for misappropriation of trade secrets.

181. A “trade secret” is defined as “information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons

who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” 12 P.S. § 5302.

182. The term “misappropriation” includes “(a) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or (b) disclosure or use of a trade secret of another without express or implied consent by a person who: (i) used improper means to acquire knowledge of the trade secret; or (ii) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was: (A) derived from or through a person who had utilized improper means to acquire it; (B) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or (iii) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.” 12 P.S. § 5302.

183. The term “improper means” includes “theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.” 12 P.S. § 5302.

184. While a DIRTТ employee, Ms. Buczynski, working from Pennsylvania, had access to DIRTТ's trade secrets, including DIRTТ Confidential Business Information, including confidential customer and account information, such as marketing strategies and techniques, marketing and development plans for client contact information, price lists, specific contract pricing and payment histories. Such information derives economic value because it gives DIRTТ a commercial competitive advantage from not being generally known to and not readily ascertainable by the public or any person who can obtain economic value from its disclosure or use.

185. As a DIRTТ employee, Ms. Buczynski was aware of the confidential nature of DIRTТ's trade secrets and agreed to ensure the continued confidentiality of such information.

186. As a DIRTТ employee, Ms. Buczynski was also aware that DIRTТ placed confidence in her to maintain the confidentiality of DIRTТ's trade secrets.

187. At all relevant times, DIRTТ made, and continues to make, reasonable efforts to maintain the secrecy of DIRTТ Confidential Business Information, by, among other things, requiring Ms. Buczynski to sign a confidentiality agreement.

188. Upon information and belief, Defendants have conspired to misappropriate a large number of other DIRTТ trade secrets. Plaintiffs are aware

of, for example, DIRTT pricing information, design documents, client specific project documents, and other trade secrets that were misappropriated. However, due to the potentially thousands of individual trade secrets at issue (i.e. individual design files, pricing documents, and client project information), DIRTT cannot reasonably identify each trade secret at issue, as the information necessary for such identification is in possession of Defendants and in the possession of those former DIRTT employees who took part in Defendants' conspiracy.

189. In violation of her duty to refrain from using or disclosing DIRTT's trade secrets, Ms. Buczynski, on her own and as part of a conspiracy with Falkbuilt, Inc. and Falkbuilt Ltd., misappropriated DIRTT's trade secrets. Mr. Smed, as CEO and founder of Falkbuilt, was aware of and actively encouraged and induced these activities of Ms. Buczynski, which constitute a breach of her duty to maintain the secrecy of DIRTT's trade secrets.

190. Falkbuilt, Inc.'s and Falkbuilt Ltd.'s violations of the PUTSA caused DIRTT substantial damage. Among other things, DIRTT was required to hire attorneys and computer forensic experts to investigate and attempt to mitigate Falkbuilt's misappropriation of DIRTT Confidential Business Information.

191. DIRTT also suffered damage as a result of the loss or diminishment of value of DIRTT Confidential Business Information and other confidential and

proprietary information, and diminishment of business value and competitive standing.

192. Falkbuilt competes directly with DIRTT, and Defendants continue to use the misappropriated DIRTT trade secrets to gain a competitive advantage in the marketplace. Upon information and belief, several DIRTT projects were stolen by Falkbuilt, and DIRTT lost bids to Falkbuilt on the same projects, at least in part due to Falkbuilt's illegal use of DIRTT's trade secrets. A list of such projects currently known to DIRTT is attached as Exhibit P, and filed under seal.

193. DIRTT further believes that Falkbuilt is improperly using DIRTT's confidential information gained from its regional branches to gain a competitive edge on DIRTT in direct competition on projects. Falkbuilt has used, and continues to use, confidential information obtained from DIRTT to undercut DIRTT's pricing on project bids for which DIRTT and Falkbuilt are in competition. In many cases, DIRTT has lost bids to Falkbuilt by just hundreds of dollars. In one example, DIRTT lost the bid for the second phase of a project for which DIRTT had already bid, won, and completed the first phase in 2018 to 2019. DIRTT had informed its Regional Partner of the opportunity to bid on the second phase, which the partner then wrongfully disclosed to Falkbuilt.

194. Falkbuilt, Inc., and Falkbuilt Ltd. are directly liable for violations of the PUTSA because they actively participated with Ms. Buczynski in misappropriating DIRTT's trade secrets.

195. Falkbuilt, Inc. and Falkbuilt Ltd. are also directly liable for violations of the PUTSA because they acquired DIRTT trade secret information through their agent, Ms. Buczynski, knowing that such information was obtained by improper means, including violations of Ms. Buczynski's explicit and implied duties of confidentiality.

196. Falkbuilt, Inc. and Falkbuilt Ltd. are liable for violations of the PUTSA because they used DIRTT trade secrets without express or implied permission from DIRTT, and Falkbuilt, Inc. and Falkbuilt Ltd. knew or had reason to know that Ms. Buczynski had acquired the DIRTT trade secrets under circumstances giving rise to a duty to maintain their secrecy or limit their use; and had divulged DIRTT's trade secrets when she owed a duty to DIRTT to maintain their secrecy or limit their use.

197. DIRTT has been and continues to be injured irreparably by Falkbuilt, Inc.'s and Falkbuilt Ltd.'s misappropriations of DIRTT's trade secrets.

**COUNT V – VIOLATION OF LANHAM ACT (15 U.S.C. § 1501, et seq.)
(Against Falkbuilt, Inc., Falkbuilt Ltd. and Mogens Smed)**

198. The allegations contained in the preceding paragraphs set forth above are incorporated as if fully set forth herein.

199. The Lanham Act provides a private cause of action for misidentification of the origin of goods and services.

200. Specifically, the Lanham Act provides:

§1125 FALSE DESIGNATIONS OF ORIGIN, FALSE DESCRIPTIONS, AND DILUTION FORBIDDEN

(a) Civil action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities.

201. In this case, Falkbuilt has presented itself in the marketplace as providing equivalent services to DIRTT. As explained above in Paragraphs 45-60, Falkbuilt's solutions are demonstrably not equivalent to those of DIRTT. Falkbuilt's solutions lack the flexibility or customizability of DIRTT's solutions, and rely on considerably older technology.

202. Falkbuilt, Inc., Falkbuilt Ltd. and Mr. Smed violated the prohibitions of the Lanham Act in four separate ways:

(a) Repeatedly misrepresenting the nature and character of Falkbuilt's goods and services by drawing false comparisons between DIRTT products and Falkbuilt products, which is likely to cause confusion among consumers, as explained in Paragraphs 45-60 above. Specifically, Falkbuilt, Inc., Falkbuilt Ltd. and Mr. Smed have misrepresented the capability of Falkbuilt solutions. Similarly, Falkbuilt, Inc.'s, Falkbuilt Ltd.'s and Mr. Smed's false comparisons to DIRTT solutions misrepresent Falkbuilt's access to DIRTT's proprietary methods, which are protected by patents. Falkbuilt further misrepresents the cost of Falkbuilt products over the life of

the products. Upon information and belief, such misrepresentations are not limited to individual instances, but are widespread and ongoing. At least one specific example, as explained in Paragraph 56 above, is presently known to DIRTT in which Falkbuilt's misrepresentations as to the equivalency between DIRTT and Falkbuilt were such that when the reality was discovered, project documents had to be formally amended.

(b) Repeatedly and falsely representing an association or affiliation with DIRTT through the use of social media, which is likely to cause confusion among consumers by, for example, creating an illusion that Mr. Smed and Falkbuilt have access to DIRTT's resources and clientele, and co-opting DIRTT's reputation. This is part of an ongoing effort to persuade consumers that Falkbuilt's products and services are equivalent to DIRTT's products and services. Specifically, Mr. Smed has issued numerous Tweets that either (1) falsely create the illusion of his continued association with DIRTT or (2) detail false information about DIRTT and/or its customers. These Tweets were directed to the marketplace as a whole, and are attached hereto as Exhibit S.

(c) Ms. Buczynski, on behalf of Falkbuilt, passed off the ready-for-market products in DIRTT's showroom as those of Falkbuilt and,

when discussing Falkbuilt with consumers, referred to it as “the new DIRTT” or “DIRTT 2.0.” Upon information and belief, Falkbuilt partners and employees continue to make similar misrepresentations, which are directed at consumers and at the marketplace, generally.

(d) Falkbuilt, Inc., Falkbuilt Ltd. and Mr. Smed knowingly misdesignated the origin of Falkbuilt’s techsheets and brochures, and similar information included on Falkbuilt’s website, mimicking DIRTT’s diagrams and products in them even though, as explained in Paragraphs 45-60 above, there is no real equivalence between DIRTT’s and Falkbuilt’s interior construction solutions. Such information and promotional materials were distributed, and continue to be distributed, widely in the marketplace to consumers.

203. There is a high likelihood of consumer confusion as to the origin of the goods and services caused by these Defendants’ false designations of origin. DIRTT is harmed by the false designation of DIRTT products as those of Falkbuilt because such false attribution diverts existing and potential customers, in the health care sector and others, from DIRTT to Falkbuilt, resulting in damages to DIRTT.

204. Upon information and belief, it is due to Defendants’ false descriptions that several DIRTT projects were obtained by Falkbuilt, either by

flipping projects that were DIRTТ projects, or winning bids on projects that would otherwise have gone to DIRTТ but for Falkbuilt’s misrepresentations.

205. Pursuant to the Lanham Act, DIRTТ is entitled to damages in the amount of: (1) Falkbuilt’s profits related to the violations; (2) damages sustained by DIRTТ; (3) DIRTТ’s costs of the action; and (4) DIRTТ’s attorneys’ fees.

COUNT VI – VIOLATION OF COLORADO CONSUMER PROTECTION ACT (Colo. Rev. Stat. § 6-1-101, et seq.) (Against Falkbuilt, Inc., Falkbuilt Ltd. and Mogens Smed)

206. The allegations contained in the preceding paragraphs set forth above are incorporated as if fully set forth herein.

207. The Colorado Consumer Protection Act (“CCPA”) provides a private cause of action to citizens of Colorado, including businesses such as DIRTТ which are incorporated there.

208. Defendants Falkbuilt, Inc., Falkbuilt, Ltd. and Mr. Smed are liable for violating the CCPA because these Defendants engaged in unfair or deceptive trade practices by:

- (a) Repeatedly misrepresenting the nature and character of Falkbuilt’s goods and services by drawing false comparisons between DIRTТ products and Falkbuilt products, which is likely to cause confusion among consumers, as explained in Paragraphs 45-60 above. Specifically,

Falkbuilt, Inc., Falkbuilt Ltd. and Mr. Smed have misrepresented the capability of Falkbuilt's interior construction solutions. Similarly, Falkbuilt, Inc.'s, Falkbuilt Ltd.'s and Mr. Smed's false comparisons to DIRTT solutions misrepresent Falkbuilt's access to DIRTT's proprietary methods, which are protected by patents. Falkbuilt further misrepresents the cost of Falkbuilt products over the life of the products. Upon information and belief, such misrepresentations are not limited to individual instances, but are widespread and ongoing. At least one specific example, as explained in Paragraph 56 above, is presently known to DIRTT in which Falkbuilt's misrepresentations as to the equivalency between DIRTT and Falkbuilt was such that when the reality was discovered, project documents had to be formally amended. And DIRTT believes that it lost the bid for that project in January 2020 due to Falkbuilt's misrepresentations.

(b) Repeatedly and falsely representing an association or affiliation with DIRTT through the use of social media, which is likely to cause confusion among consumers by, for example, creating an illusion that Mr. Smed and Falkbuilt have access to DIRTT's resources and clientele, and co-opting DIRTT's reputation. This is part of an ongoing effort to persuade consumers that Falkbuilt's products and services are equivalent to DIRTT's

products and services. Specifically, Mr. Smed has issued numerous Tweets that either: (1) falsely create the illusion of his continued association with DIRTT; or (2) detail false information about DIRTT and/or its customers. These Tweets were directed to the marketplace as a whole, and are attached hereto as Exhibit S.

(c) Ms. Buczynski, on behalf of Falkbuilt, passed off the ready-for-market products in DIRTT's showroom as those of Falkbuilt and, when discussing Falkbuilt with consumers, referred to it as "the new DIRTT" or "DIRTT 2.0". Upon information and belief, Falkbuilt branches and employees continue to make similar misrepresentations, which are directed at consumers and at the marketplace, generally. And in fact, Falkbuilt's own promotional material touts the fact that it has no showrooms, which may explain why Falkbuilt branches and employees rely on DIRTT's showrooms to be able to provide Falkbuilt customers with in-person demonstrations of its solutions.

(d) Falkbuilt, Inc., Falkbuilt Ltd. and Mr. Smed knowingly misdesignated the origin of Falkbuilt's techsheets and brochures, and similar information included on Falkbuilt's website, mimicking DIRTT's diagrams and products in them even though, as explained in Paragraphs 45-60 above,

there is no real equivalence between DIRTТ's and Falkbuilt's interior construction solutions. Such information and promotional materials were distributed, and continue to be distributed, widely in the marketplace to consumers.

209. All of these acts and false statements of facts occurred in the course of Falkbuilt's business, and these Defendants' efforts to create confusion are directed generally to the marketplace for DIRTТ's goods and services.

210. These Defendants' acts and false statements of facts constitute an ongoing fraud on the consumer public.

211. These acts and false statements of facts significantly impact the public as actual or potential consumers of DIRTТ's goods and services because they create a high likelihood of confusion among actual or potential consumers of those goods and services as to the origin of those goods and services.

212. The end users of DIRTТ's goods and services, including hospitals and medical clinics, are not necessarily knowledgeable about the technological nuances of the process by which these units are constructed. Thus, these Defendants' efforts to misstate the origin of these goods and services have the capacity, and are highly likely, to deceive consumers. These consumers are likely to have to expend time and effort to determine the actual origin of the goods and services. Unless

restrained and enjoined by this Court, these Defendants' actions will continue to cause confusion in the marketplace as to the origin of DIRTT's goods and services.

213. The conduct of these Defendants has caused, and unless restrained and enjoined by this Court, will continue to cause, irreparable damage to DIRTT, a Colorado corporation, by confusing consumers as to the origin of its goods and services and by creating doubt about DIRTT's stability with respect to its partner network. These Defendants' deceptive conduct has directly and negatively impacted DIRTT's reputation, business value, and competitive standing. Upon information and belief, it is due to Defendants' false statements of fact that several DIRTT projects were stolen by Falkbuilt, and the reason why DIRTT lost bids to Falkbuilt on the same projects. A list of such projects currently known to DIRTT is attached as Exhibit P, and filed under seal.

214. Pursuant to Colo. Rev. Stat. § 6-1-113, DIRTT is entitled to recover an amount equal to three times its actual damages, and reasonable attorneys' fees.

**COUNT VII – VIOLATION OF OHIO DECEPTIVE PRACTICES ACT
(Ohio Rev. Code Ann. § 4165.01, et seq.)
(Against Falkbuilt, Inc., Falkbuilt Ltd. and Mogens Smed)**

215. The allegations contained in the preceding paragraphs set forth above are incorporated as if fully set forth herein.

216. The Ohio Deceptive Practices Act (“ODPA”) provides a private cause of action when, among other things, “in the course of [a] person’s business, vocation or occupation, the person causes likelihood of confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services.” Ohio Rev. Code Ann. § 4165.02(A)(2).

217. Falkbuilt, Inc., Falkbuilt Ltd. and Mr. Smed are liable for violation of the ODPA because they knowingly engaged in deceptive trade practices by falsely designating the source of goods and services originated by DIRTT by:

(a) Repeatedly misrepresenting the nature and character of the goods and services by drawing false comparisons between DIRTT products and Falkbuilt products, which is likely to cause confusion among consumers, as explained in Paragraphs 45-60 above. Specifically, Falkbuilt, Inc., Falkbuilt Ltd. and Mr. Smed have misrepresented the capability of Falkbuilt’s interior construction solutions. Similarly, Falkbuilt, Inc.’s, Falkbuilt Ltd.’s and Mr. Smed’s false comparisons to DIRTT solutions

misrepresent Falkbuilt's access to DIRTT's proprietary methods, which are protected by patents. Falkbuilt further misrepresents the cost of Falkbuilt products over the life of the products. Upon information and belief, such misrepresentations are not limited to individual instances, but are widespread and ongoing. At least one specific example, as explained in Paragraph 56 above, is presently known to DIRTT in which Falkbuilt's misrepresentations as to the equivalency between DIRTT and Falkbuilt was such that when the reality was discovered, project documents had to be formally amended. And DIRTT believes that it lost the bid for that project in January 2020 due to Falkbuilt's misrepresentations.

(b) Repeatedly and falsely representing an association or affiliation with DIRTT through the use of social media, which is likely to cause confusion among consumers by, for example, creating an illusion that Mr. Smed and Falkbuilt have access to DIRTT's resources and clientele, and co-opting DIRTT's reputation. This is part of an ongoing effort to persuade consumers that Falkbuilt's products and services are equivalent to DIRTT's products and services. Specifically, Mr. Smed has issued numerous Tweets that either: (1) falsely create the illusion of his continued association with DIRTT or; (2) detail false information about DIRTT and/or its customers.

These Tweets were directed to the marketplace as a whole, and are attached hereto as Exhibit S.

(c) Ms. Buczynski, on behalf of Falkbuilt, passed off the ready-for-market products in DIRTT's showroom as those of Falkbuilt and, when discussing Falkbuilt with consumers, referred to it as "the new DIRTT" or "DIRTT 2.0". Upon information and belief, Falkbuilt branches and employees continue to make similar misrepresentations, which are directed at consumers and at the marketplace, generally. And, in fact, Falkbuilt's own promotional material touts the fact that it has no showrooms, which may explain why Falkbuilt partners and employees rely on DIRTT's showrooms to be able to provide Falkbuilt customers with in-person demonstrations of its solutions.

(d) Falkbuilt, Inc., Falkbuilt Ltd. and Mr. Smed knowingly misdesignated the origin of Falkbuilt's techsheets and brochures, and similar information included on Falkbuilt's website, mimicking DIRTT's diagrams and products in them even though, as explained in Paragraphs 45-60 above, there is no real equivalence between DIRTT's and Falkbuilt's interior construction solutions. Such information and promotional materials were

distributed, and continue to be distributed, widely in the marketplace to consumers.

218. There is a high likelihood of confusion or misunderstanding on the part of the buying public as to the source of DIRTT's goods and services caused by these Defendants' false designations of origin. These Defendants knew that their actions were deceptive. DIRTT is harmed by the false designation of DIRTT products as those of Falkbuilt because such false attribution diverts existing and potential customers, in the health care sector and others, from DIRTT to Falkbuilt, resulting in monetary damages to DIRTT.

219. These Defendants' intentional efforts to misstate the origin of these goods and services have the capacity, and are highly likely, to deceive consumers. Unless restrained and enjoined by this Court, these Defendants' actions will continue to cause confusion in the marketplace as to the origin of DIRTT's goods and services.

220. These Defendants' deceptive conduct has directly and negatively impacted DIRTT's reputation, business value, and competitive standing. The extent of this damage is not yet known, but will be proven at trial.

221. Pursuant to ODPa, DIRTT is entitled to an injunction enjoining Mr. Smed, Falkbuilt, Inc. and Falkbuilt Ltd. from violating the ODPa and creating a

likelihood of confusion among the buying public as to the source of DIRTT's goods and services. DIRTT is further entitled under the ODPa to recover its actual damages and, due to Defendants' willful violations of the statute, DIRTT is also entitled to recover its reasonable attorneys' fees.

PRAYER FOR RELIEF

WHEREFORE, DIRTT respectfully requests the following relief against Defendants:

- a. Enter judgment for it and against Lance Henderson, Kristy Henderson, Falkbuilt Ltd., Falkbuilt, Inc., and Falk Mountain States, LLC on Counts I and II, against Falkbuilt, Inc. and Falkbuilt Ltd. on Count IV, against Mr. Henderson on Count III, and against Falkbuilt, Inc., Falkbuilt Ltd. and Mr. Smed on Counts V, VI and VII;
- b. Continue the preliminary injunction currently in place restraining and enjoining each Defendant, including Mr. Smed and Falkbuilt, Inc., and all persons and entities in active concert with any of them, from disclosing, using or misappropriating any of DIRTT's trade secrets;
- c. Enter a mandatory injunction requiring each Defendant, and all persons and entities in active concert with any of them, to return to DIRTT any and all written materials, including copies thereof, and/or flash drives, thumb drives, external hard drives, USB storage drives, computer disks, diskettes, databases and/or other retrievable data which reflect, refer, or relate to DIRTT Confidential Business Information, and any copies that are in Defendants' possession, custody, or control;
- d. Order each Defendant, and all persons and entities in active concert with any of them, to provide a full accounting as to the whereabouts of all of DIRTT's trade secrets, DIRTT Confidential Business Information and other DIRTT property in their possession, custody, or

control (including information on the personal cloud drives of Defendants' employees);

- e. Enter judgment that Lance Henderson, Kristy Henderson, Falkbuilt Ltd., Falkbuilt, Inc., and Falk Mountain States, LLC are jointly and severally liable to DIRTT for its actual damages for losses resulting from these Defendants' misappropriation of DIRTT's trade secrets, including but not limited to lost profits proximately caused by Defendants' misappropriation, or in the alternative, a reasonable royalty for Defendants' misappropriation of DIRTT's trade secrets in violation of the Utah Uniform Trade Secrets Act and/or Federal Defend Trade Secrets Act;
- f. Enter judgment that Lance Henderson, Kristy Henderson, Falkbuilt Ltd., Falkbuilt, Inc., and Falk Mountain States, LLC are jointly and severally liable to DIRTT for disgorgement of all compensation paid to Mr. Henderson by DIRTT during and after his breaches, and disgorgement of any and all profits Defendants earned as a result of the misappropriation of DIRTT's trade secrets in violation of the Utah Uniform Trade Secrets Act and/or Federal Defend Trade Secrets Act;
- g. Enter judgment that Lance Henderson, Kristy Henderson, Falkbuilt Ltd., Falkbuilt, Inc., and Falk Mountain States, LLC are jointly and severally liable to DIRTT for exemplary damages for these Defendants' willful, wanton or reckless disregard of DIRTT's rights under the Utah Uniform Trade Secrets Act and/or Federal Defend Trade Secrets Act;
- h. Enter judgment that Lance Henderson, Kristy Henderson, Falkbuilt Ltd., Falkbuilt, Inc., and Falk Mountain States, LLC are jointly and severally liable to DIRTT for DIRTT's attorneys' fees for these Defendants' willful, wanton or reckless disregard of DIRTT's rights under the Utah Uniform Trade Secrets Act and/or Federal Defend Trade Secrets;
- i. Enter judgment that Falkbuilt, Inc. and Falkbuilt Ltd. are liable to DIRTT for its actual damages for losses resulting from their misappropriation of DIRTT's trade secrets, including lost profits proximately caused by Falkbuilt, Inc.'s and Falkbuilt Ltd.'s

misappropriation of DIRTT's trade secrets, or, in the alternative, a reasonable royalty for their misappropriation of DIRTT's trade secrets in violation of the Pennsylvania Uniform Trade Secrets Act;

- j. Enter judgment that Falkbuilt, Inc. and Falkbuilt Ltd. are liable to DIRTT for disgorgement of all compensation paid to Ms. Buczynski by DIRTT during and after her breaches, and disgorgement of any and all profits Mr. Smed, Falkbuilt, Inc. and Falkbuilt Ltd. earned as a result of the misappropriation of DIRTT's trade secrets in violation of the Pennsylvania Uniform Trade Secrets Act;
- k. Enter judgment that Falkbuilt, Inc. and Falkbuilt Ltd. are liable to DIRTT for exemplary damages for their willful, wanton or reckless disregard of DIRTT's rights under the Pennsylvania Uniform Trade Secrets Act;
- l. Enter judgment that Falkbuilt, Inc. and Falkbuilt Ltd. are jointly and severally liable to DIRTT for DIRTT's attorneys' fees for their willful, wanton or reckless disregard of DIRTT's rights under the Pennsylvania Uniform Trade Secrets Act;
- m. Enter judgment that Mr. Henderson is liable to DIRTT for its actual damages and losses resulting from Mr. Henderson's breaches of contracts;
- n. Enter judgment that Falkbuilt, Inc., Falkbuilt Ltd. and Mr. Smed are jointly and severally liable to DIRTT for their violation of the Lanham Act;
- o. Enter judgment that Falkbuilt, Inc., Falkbuilt Ltd. and Mr. Smed are jointly and severally liable to DIRTT for Falkbuilt's profits related to their violation of the Lanham Act; damages sustained by DIRTT; DIRTT's costs of the action; and DIRTT's attorney's fees for their violation of the Lanham Act;
- p. Enter judgment that Mr. Smed, Falkbuilt, Inc. and Falkbuilt Ltd. are jointly and severally liable to DIRTT for three times the amount of its actual damages for their willful, wanton or reckless disregard of DIRTT's rights under the Colorado Consumer Protection Act;

- q. Enter judgment that Mr. Smed, Falkbuilt, Inc. and Falkbuilt Ltd. are jointly and severally liable to DIRTT for DIRTT's attorneys' fees for Defendants' violation of the Colorado Consumer Protection Act;
- r. Enter judgment that Mr. Smed, Falkbuilt, Inc. and Falkbuilt Ltd. are jointly and severally liable to DIRTT for DIRTT's actual damages for their violation of the Ohio Deceptive Practices Act;
- s. Enter judgment that Mr. Smed, Falkbuilt, Inc. and Falkbuilt Ltd. are jointly and severally liable to DIRTT for DIRTT's attorneys' fees for their willful violation of the Ohio Deceptive Practices Act;
- t. Enter an injunction enjoining Mr. Smed, Falkbuilt, Inc. and Falkbuilt Ltd. from violating the Ohio Deceptive Practices Act and creating a likelihood of confusion among the buying public as to the source of DIRTT's goods and services; and
- u. Award such other and further relief that this Court determines to be just and proper under the circumstances.

Dated: October 20, 2020

DIRTT ENVIRONMENTAL
SOLUTIONS, INC. and DIRTT
ENVIRONMENTAL SOLUTIONS
LTD.

Plaintiff,

By: /s/ Chad E. Nydegger
One of Their Attorneys

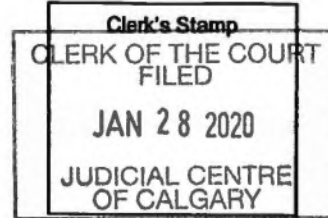
Chad E. Nydegger
Workman Nydegger
60 East South Temple, Suite 1000
Salt Lake City, Utah 84111
cnydegger@wnlaw.com

Jeffrey J. Mayer
Catherine A. Miller
Akerman LLP
71 S. Wacker Drive, 47th Floor
Chicago, Illinois 60606
Jeffrey.Mayer@akerman.com
Catherine.Miller@akerman.com

Attorneys for Plaintiff

AMENDED this 28 day of January 2020 Pursuant to Rule 3.62 Dated the 28 day of Jan 2020

Form 10
Alberta Rules of Court
Rule 3.25



COURT FILE NUMBER 1901-06550

COURT Court of Queen's Bench of Alberta

JUDICIAL CENTRE Calgary

PLAINTIFF DIRT Environmental Solutions Ltd.

DEFENDANTS Falkbuilt Ltd., Mogens Smed, and Barrie Loberg, Saad Fahssi, David Weeks, Nathan McLean, and Hamidullah Wafa, 2179086 Alberta Ltd. (operating in its own right or as Echo), Ingrid Schoning and Tara Murray

DOCUMENT **AMENDED AMENDED STATEMENT OF CLAIM**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT
 Barbara B. Johnston, Q.C. & April Kosten
 Dentons Canada LLP
 15th Floor, Bankers Court
 850 - 2nd Street SW
 Calgary, Alberta T2P 0R8
 Ph: (403) 268-3030 / Fax: (403) 268-3100
 File No: 577195-1

NOTICE TO DEFENDANTS:

Falkbuilt Ltd., Mogens Smed, and Barrie Loberg, Saad Fahssi, David Weeks, Nathan McLean, and Hamidullah Wafa, 2179086 Alberta Ltd. (operating in its own right or as Echo), Ingrid Schoning and Tara Murray. You are being sued. You are a defendant.

Go to the end of this document to see what you can do and when you must do it.

Note: State below only facts and not evidence (Rule 13.6)

Statement of facts relied on:

1. DIRT Environmental Solutions Ltd. ("DIRT") is a leading technology driven company carrying on business in Alberta and elsewhere around the world.
2. The Defendants, Mogens Smed ("Smed") and Barrie Loberg ("Loberg"), are former executives of DIRT and are residents of Calgary, Alberta or the surrounding area (the "Executive Employees"). At all material times, the Executive Employees were officers and directing minds of DIRT.
3. The Defendants, Saad Fahssi ("Fahssi"), David Weeks ("Weeks"), Nathan McLean ("McLean") and Hamidullah Wafa ("Wafa"), Ingrid Schoning ("Schoning") and Tara Murray ("Murray") are former employees of DIRT. Excepting Weeks and Schoning, all of the former employees are residents of Calgary, Alberta or the surrounding area. Weeks worked remotely from Prince Edward

- 2 -

Island and Schoning worked in Ontario. Together, these additional employees will be referred to as the "Additional Departed Employees".

4. The Defendant, Falkbuilt Ltd. ("Falkbuilt"), is a company incorporated under the laws of Alberta on October 26, 2018. Smed is the sole director of Falkbuilt.
5. The Defendant, 2179086 Alberta Ltd. (operating in its own right or as Echo) ("217 Ltd."), is a company incorporated under the laws of Alberta on or about March 13, 2019. Smed is the sole director of 217 Ltd.

Nature of DIRTT's Business

6. DIRTT was founded in or around 2003 by Smed, Loberg and Geoff Gosling. DIRTT commenced operations in February 2004 and began commercial sales in May 2005.
7. DIRTT is an innovative manufacturing company featuring a proprietary software and virtual reality visualization platform coupled with vertically integrated manufacturing that designs, configures and manufactures prefabricated interior solutions used primarily in commercial spaces across a wide range of industries and businesses. DIRTT combines innovative product design with its industry-leading, proprietary ICE Software (the "ICE Software" or "ICE"), and technology-driven, lean manufacturing practices and sustainable materials to provide an end-to-end solution for the traditionally inefficient and fragmented interior construction industry. DIRTT creates customized interiors with the aesthetics of conventional construction but with greater cost and schedule certainty, shorter lead times, greater future flexibility, and better environmental sustainability than conventional construction.
8. DIRTT offers interior construction solutions throughout the United States and Canada, as well as in select international markets, through a network of independent distribution partners ("Distribution Partners") and an internal sales team. The Distribution Partners use the ICE Software to work with end users to envision and design their spaces. Orders are electronically sent through ICE to DIRTT's manufacturing facilities for production, packing and shipping. DIRTT's Distribution Partners then coordinate the receipt and installations of DIRTT's interior solutions at the end users' locations.
9. In addition to sales and marketing, the Distribution Partners provide value throughout the construction process. At the pre-construction stage, Distribution Partners provide design assistance services to architects and designers. Through the construction process, Distribution Partners act as specialty subcontractors to the general contractors and provide installation and other construction services. Post-move in, Distribution Partners provide warranty work, ongoing maintenance and repurposing support. The Distribution Partners operate under Distribution Partner agreements with DIRTT, which outline sales goals and marketing territories and provide the terms and conditions upon which the Distribution Partners market and sell DIRTT products.
10. DIRTT also operates several ~~Green Learning Centers ("GLCs")~~ DIRTT Experience Centers ("DXC"), previously known as Green Learning Centers, which are display areas to showcase DIRTT's products and services. DIRTT generally requires its Distribution Partners to construct and maintain a GLC DXC in their local markets. There are currently over 80 GLCs DXCs showcasing DIRTT's products and services across North America, the Middle East and India.

- 3 -

11. DIRT's head office is located in Calgary, Alberta. DIRT has manufacturing facilities in Calgary, Alberta, Phoenix, Arizona and Savannah, Georgia.
12. On November 28, 2013, DIRT went public and listed its common shares for trading on the Toronto Stock Exchange ("TSX").
13. Based on the foregoing, DIRT has acquired goodwill and reputation around the world, including, but not limited to in Canada and North America.

DIRT's Confidential and Proprietary Information

14. DIRT's manufacturing approach is built on a foundation of technology, the center of which is the proprietary ICE Software. DIRT uses the ICE Software to design, visualize, configure, price, communicate, engineer, specify, order and manage projects. The ICE Software was developed in or around 2005 as a custom interior design and construction software solution to integrate into DIRT's interior offerings. The ICE Software makes manufactured, fully custom interiors both feasible and profitable while addressing challenges associated with traditional construction, including cost overruns, inconsistent quality, delays and significant material waste. The ICE Software is used throughout the sales process, ensuring consistency across DIRT's services and products received by all of DIRT's clients.
15. DIRT begins manufacturing custom DIRT products once a file ("ICE File") is generated and a purchase order is received. The ICE Software allows an entire project to be tracked and managed across the chain of custody through sales, production, delivery and installation. The ICE File (containing a project's engineering and manufacturing data) generated during the design and specification process can be used for optimizing future reconfigurations, renovations, technology integration initiatives and changes to a client's space.
16. The ICE Software is also licenced to unrelated companies and Distribution Partners of DIRT.
17. DIRT's proprietary ICE Software is among a body of DIRT's valuable intellectual property. The ICE Software is subject to a number of patents in Canada, the United States, Europe and Singapore. DIRT also has a number of trademark and copyright protections.
18. In addition to the ICE Software, during their employment with DIRT, the Executive Employees had access to DIRT's other confidential and proprietary information relating to DIRT's business, including but not limited to:
 - (a) DIRT's internal pricing and job costing;
 - (b) DIRT's customer, supplier and Distribution Partner contacts;
 - (c) DIRT's sales figures and projections;
 - (d) DIRT's customer presentations and marketing materials;
 - (e) DIRT's marketing and sales strategies;
 - (f) DIRT's customer, supplier and Distribution Partner order histories, needs, preferences and idiosyncrasies;

- 4 -

- (g) DIRTT's customer proposals, service agreements, contracts and purchase orders;
- (h) DIRTT's plans to expand and target new clients and markets;
- (i) new business opportunities;
- (j) personnel information;
- (k) design specifications and drawings of DIRTT products;
- (l) specialized methods and processes used to create custom prefabricated modular interior wall partitions, other ocular interior components and other DIRTT products;
- (m) research and development of new DIRTT products;
- (n) copyrights, trademarks, trade secrets, patents, patents pending, and intellectual property strategy, including the ICE Software and ancillary programs;
- (o) strategic plans and business plans; and
- (p) such further and other confidential and proprietary information as may be proven at trial (collectively, the "Confidential Information").

Executive Employees

Smed

19. Smed was one of the founders of DIRTT and commenced employment with DIRTT in 2003 as Chief Executive Officer ("CEO"). Smed held the role of CEO until December 2017, when he moved into the role of Executive Chairman. Smed was also a member of the Board of Directors of DIRTT from September 2003 until September 10, 2018.
20. At all material times, Smed held a key senior and influential position within DIRTT. Smed was the face of DIRTT. As CEO of DIRTT, Smed's responsibilities included, but were not limited to, the following:
- (a) developing, implementing and maintaining DIRTT's strategic plan;
 - (b) developing new products and new innovation;
 - (c) improving DIRTT's market position to achieve financial growth as outlined in its strategic plan;
 - (d) maintaining DIRTT's relationships with current DIRTT customers, Distribution Partners, suppliers, and developing new customers, Distribution Partners and supplier contacts and relationships on behalf of DIRTT;
 - (e) acting as an ambassador of DIRTT toward current and potential DIRTT customers, Distribution Partners and suppliers;

- 5 -

- (f) developing and implementing DIRTT's overall sales and marketing strategies;
 - (g) identifying new business opportunities, including customers and markets;
 - (h) maintaining extensive knowledge of current market conditions and DIRTT's product;
 - (i) hiring, training and retaining employees and consultants; and
 - (j) such further and other responsibilities as may be proven at trial.
21. DIRTT's customers, Distribution Partners, suppliers, consultants and employees relied heavily upon Smed and trusted his advice regarding DIRTT's products and services. Smed had (and continues to have) a great deal of interaction and influence over DIRTT's customers, Distribution Partners, suppliers, consultants and employees.
22. DIRTT personnel involved in the sales, project management, research, development and manufacturing of DIRTT products and processes worked closely with Smed, reported directly to Smed, received directions from Smed, and Smed had (and continues to have) a great deal of interaction and influence with those DIRTT personnel.
23. Smed had unlimited access to DIRTT's Confidential Information relating to DIRTT's business.
24. Smed had extensive and recurring contact with key customers of DIRTT around the world, in the course of which Smed gained and used an intimate knowledge of those customers' special needs, preferences, idiosyncrasies and plans. DIRTT's key customers relied heavily upon Smed and trusted his advice regarding DIRTT's products and services. Smed had (and continues to have) a great deal of interaction and influence over DIRTT's customers, and in particular, its key customers.
25. Smed had extensive and recurring contact with key suppliers of DIRTT around the world, in the course of which Smed gained and used an intimate knowledge of those suppliers' special needs, preferences, idiosyncrasies and plans. DIRTT's key suppliers relied heavily upon Smed and trusted his advice regarding DIRTT products and services. Smed had (and continues to have) a great deal of interaction and influence over DIRTT's key suppliers.
26. Smed had extensive and recurring contact with DIRTT's Distribution Partners around the world, in the course of which Smed gained and used intimate knowledge of those Distribution Partners' special needs, preferences, idiosyncrasies and plans. DIRTT's Distribution Partners relied heavily on Smed and trusted his advice regarding DIRTT's products and services. Smed had (and continues to have) a great deal of interaction and influence over the Distribution Partners.
27. In 2013, as part of DIRTT's public offering, Smed entered into a written Employment Agreement with DIRTT dated October 21, 2013, amended on January 17, 2018 ("**Smed Agreement**"). Some express and/or implied key terms and conditions, *inter alia*, of the Smed Agreement include the following:
- (a) Smed agreed not to compete directly or indirectly with DIRTT during his employment and for a period of 24 months following the date of his termination;

- 6 -

- (b) Smed agreed not to directly or indirectly solicit or attempt to solicit any employee or Distribution Partner of DIRTT during his employment and for a period of 24 months following the date of his termination;
 - (c) Smed agreed not to use or disclose any confidential or proprietary information of DIRTT during his employment with DIRTT or anytime after his date of termination;
 - (d) Smed recognized DIRTT's proprietary rights in the tangible and intangible property of DIRTT and acknowledged that he did not obtain or acquire and would not obtain or acquire any right, title or interest, in any of the property of DIRTT or its predecessors, successors, affiliates or related companies, including the ICE Software or any other writing, communications, manuals, documents, instruments, contracts, agreements, files, literature, data, technical information, formulas, products, devices, apparatuses, trademarks, trade names, trade styles, service marks, logos, copyrights or patents, in each case, made or developed using the resources of DIRTT by Smed either alone or in conjunction with others (collectively, the "Other Materials");
 - (e) Smed irrevocably waived, for the benefit of DIRTT, all of Smed's moral rights whatsoever in the ICE Software and Other Materials, including any right to the integrity of the ICE Software and Other Materials, any right to be associated with the ICE Software and Other Materials and any right to restrict or prevent the modification or use of the ICE Software and Other Materials in any way whatsoever;
 - (f) Smed irrevocably transferred to DIRTT all rights to restrict any violations of moral rights in the ICE Software and Other Materials, including any distortion, mutilation or other modification;
 - (g) Smed irrevocably and exclusively assigned all such ownership rights in any intellectual property rights in the ICE Software and Other Materials to DIRTT throughout the world, including any renewals, extensions or reversions relating thereto and any right to bring any action or to collect compensation for past infringements;
 - (h) Smed agreed that DIRTT had the exclusive right to obtain copyright registrations, letters patent, industrial design registrations, trade-mark registrations or any other protection in respect of the Other Materials and the intellectual property rights relating to the ICE Software and Other Materials anywhere in the world; and
 - (i) Smed agreed that any obligations under the Smed Agreement were in addition to his fiduciary obligations owing to DIRTT.
- 28.** DIRTT terminated Smed's employment on September 10, 2018. As at the termination date (and following, as applicable), Smed was bound by the Smed Agreement, policies and common law duties, including fiduciary duties.

Loberg

- 29.** Loberg was a founder of DIRTT and commenced employment at DIRTT in February 2004 in the position of Vice President, Software Development. He remained in that position until his termination. Loberg was one of the developers and authors of the ICE Software.

- 7 -

30. At all material times, Loberg held a key senior and influential position within DIRT. In addition, as Vice President, Software Development, Loberg's responsibilities included the following:

- (a) overseeing the information technology system;
- (b) maintaining the ICE Software;
- (c) looking for and developing new products and new innovations, including as it relates to the ICE Software;
- (d) improving DIRT's market position to achieve financial growth as outlined in its strategic plan;
- (e) maintaining DIRT's relationships with current DIRT customers, Distribution Partners, suppliers, and developing new customers, Distribution Partners, supplier contacts and relationships on behalf of DIRT;
- (f) acting as an ambassador of DIRT toward current and potential DIRT customers, Distribution Partners and suppliers;
- (g) developing and implementing DIRT's overall sales and marketing strategies;
- (h) identifying new business opportunities, including customers and markets;
- (i) maintaining extensive knowledge of current market conditions and DIRT's product;
- (j) hiring, training and retaining employees and consultants; and
- (k) such further and other responsibilities as may be proven at trial.

31. DIRT personnel involved in the research, development and manufacturing of DIRT's proprietary ICE Software and information technology systems worked closely with Loberg, reported directly to Loberg, received directions from Loberg, and Loberg had (and continues to have) a great deal of contact and influence with those DIRT personnel.

32. Loberg had unlimited access to DIRT's Confidential Information relating to DIRT's business.

33. In 2013, as part of DIRT's public offering Loberg entered into an Employment Agreement with DIRT dated October 21, 2013 ("**Loberg Agreement**"). Some express and/or implied key terms and conditions, *inter alia*, of the Loberg Agreement include the following:

- (a) Loberg agreed not to compete directly or indirectly with DIRT during his employment and for a period of 24 months following the date of his termination;
- (b) Loberg agreed not to directly or indirectly solicit or attempt to solicit any employee or Distribution Partner of DIRT during his employment and for a period of 24 months following the date of his termination;
- (c) Loberg agreed not to use or disclose any confidential or proprietary information of DIRT during his employment with DIRT or anytime after his date of termination;

- 8 -

- (d) Loberg recognized DIRTT's proprietary rights in the tangible and intangible property of DIRTT and acknowledged that he did not obtain or acquire and would not obtain or acquire any right, title or interest, in any of the property of DIRTT or its predecessors, successors, affiliates or related companies, including the ICE Software and Other Materials;
 - (e) Loberg irrevocably waived, for the benefit of DIRTT, all of Loberg's moral rights whatsoever in the ICE Software and Other Materials, including any right to the integrity of the ICE Software and Other Materials, any right to be associated with the ICE Software and Other Materials and any right to restrict or prevent the modification or use of the ICE Software and Other Materials in any way whatsoever;
 - (f) Loberg irrevocably transferred to DIRTT all rights to restrict any violations of moral rights in the ICE Software and Other Materials, including any distortion, mutilation or other modification;
 - (g) Loberg irrevocably and exclusively assigned all such ownership rights in any intellectual property rights in the ICE Software and Other Materials to DIRTT throughout the world, including any renewals, extensions or reversions relating thereto and any right to bring any action or to collect compensation for past infringements;
 - (h) Loberg agreed that DIRTT had the exclusive right to obtain copyright registrations, letters patent, industrial design registrations, trade-mark registrations or any other protection in respect of the ICE Software and Other Materials and the intellectual property rights relating to the ICE Software and Other Materials anywhere in the world; and
 - (i) Loberg agreed that any obligations under the Loberg Agreement were in addition to his fiduciary obligations owing to DIRTT.
34. DIRTT terminated Loberg's employment on January 15, 2019. As at the termination date (and following, as applicable) Loberg was bound by the Loberg Agreement, policies and common law duties, including fiduciary duties.

Additional Departed Employees

35. Fahssi commenced employment with DIRTT on or about February 28, 2005. Fahssi was most recently part of the General Production team at DIRTT. Fahssi was subject to contractual confidentiality obligations owing to DIRTT, including a confidentiality agreement. Fahssi resigned from DIRTT on or about February 8, 2019.
36. Weeks commenced employment with DIRTT on or about September 4, 2012. Weeks was a project manager with the Remote Solutions team at DIRTT. Weeks was subject to contractual confidentiality obligations owing to DIRTT. Weeks resigned from DIRTT on or about March 1, 2019.
37. McLean commenced employment with DIRTT on or about June 2, 2014. McLean was part of the Sheet Metal team at DIRTT. McLean was subject to contractual confidentiality obligations owing to DIRTT, including a confidentiality agreement. McLean resigned from DIRTT on or about December 1, 2018.
38. Wafa commenced employment with DIRTT on or about November 11, 2007. Wafa was part of the Millwork team at DIRTT. Wafa was subject to contractual confidentiality obligations owing to

- 9 -

- DIRTT, including a confidentiality agreement. Wafa resigned from DIRTT on or about March 12, 2019.
39. Murray commenced employment with DIRTT on or about October 3, 2013. Murray was part of the project development group. Murray was subject to contractual confidentiality obligations owing to DIRTT, including a proprietary rights agreement. Murray resigned on or about January 10, 2019, and her last day of employment with DIRTT was on or about January 30, 2019.
40. Schoning commenced employment at DIRTT as a sales representative in or around September 2005. Schoning was subject to contractual confidentiality obligations owing to DIRTT, including a confidentiality agreement.
41. Schoning held a key senior and influential position within DIRTT. Schoning was actively involved in soliciting and locating business opportunities for DIRTT and for managing customer relationships. Most recently, Schoning was the lead person involved in preparing an RFP for a project with a large DIRTT customer. In assisting with this RFP, Schoning had access to significant Confidential Information, including but not limited to financial, pricing, shipping, forecast (market opportunities) and labour information. Schoning played a key and influential role in the relationship DIRTT had with a number of customers.
42. In or around August 2019, Schoning resigned from DIRTT. Her last day of employment with DIRTT was on or about September 13, 2019.
43. The Additional Departed Employees have commenced employment with Falkbuilt since their respective departures from DIRTT.
44. Prior to and following their departures the Additional Departed Employees have acted in their own right and as agents of the Executive Employees.

Executive Employees' and Additional Departed Employees' Additional Obligations

45. The Executive Employees held key, senior and influential positions and played influential roles in DIRTT's business. The Additional Departed Employees were also integral to DIRTT's business.
46. Throughout the time they were employed by DIRTT, the Executive Employees played a key and influential role in the relationships DIRTT had with its employees, consultants, customers, Distribution Partners and suppliers.
47. Given the key role the Executive Employees played as leaders or integral employees of DIRTT's business, DIRTT is extremely vulnerable to the misuse or disclosure of DIRTT's Confidential Information by the Executive Employees and Additional Departed Employees; the solicitation of DIRTT's customers, suppliers, Distribution Partners, consultants and employees by the Executive Employees and Additional Departed Employees; and unlawful competition by the Executive Employees and Additional Departed Employees.
48. The Executive Employees had extensive and recurring contact with key customers, Distribution Partners and suppliers of DIRTT around the world. The Executive Employees had a great deal of influence over DIRTT's key customers, Distribution Partners and suppliers. DIRTT's key customers, Distribution Partners and suppliers relied heavily on the Executive Employees and trusted their advice regarding DIRTT products and services.

- 10 -

- 49.** In addition to their contractual obligations, the Executive Employees owed, and continue to owe, duties including fiduciary duties, duty of confidence and a duty of fidelity and good faith to DIRTT.
- 50.** In addition to their contractual obligations, the Additional Departed Employees owed and continue to owe a duty of confidence and duty of fidelity and good faith to DIRTT. In addition, by virtue of acting as agents of the Executive Employees, the Additional Departed Employees are further subject to additional duties, including fiduciary duties.
- 51.** The Executive Employees' and Additional Departed Employees' duties towards DIRTT include, but are not limited to, the following:
- (a) to avoid conflicts of interest and the appropriation of corporate opportunities;
 - (b) to maintain the confidentiality of DIRTT's information and not take, reveal or make use of Confidential Information for their own benefit;
 - (c) not to take business opportunities they became aware of as employees, officers or directors of DIRTT for their own benefit and to the detriment of DIRTT;
 - (d) that they would not, directly or indirectly, solicit the business of DIRTT customers or cause those customers to alter, leave or terminate their relationship with DIRTT;
 - (e) that they would not, directly or indirectly, solicit DIRTT employees or consultants to cause those employees or consultants to alter, leave or terminate their relationship with DIRTT;
 - (f) that they would not, directly or indirectly, solicit DIRTT Distribution Partners or suppliers to cause those Distribution Partners or suppliers to alter, leave or terminate their relationship with DIRTT;
 - (g) that they would not unfairly compete with DIRTT;
 - (h) that they would not copy, re-create, use, transfer, assign or utilize in any manner whatsoever the Confidential Information, the ICE Software or Other Materials, or portions thereof, without the express permission of DIRTT; and
 - (i) they would not apply for any Canadian trademarks in direct competition with DIRTT;
 - (j) they would not pass themselves or their goods or services off as those of DIRTT; and
 - (k) such further and other particulars to be proven at trial.
- 52.** All DIRTT employees, including the Executive Employees and Additional Departed Employees, are further required to comply with the DIRTT Code of Conduct. The DIRTT Code of Conduct includes provisions prohibiting any conflict of interest, ensuring fair business dealings, not using corporate opportunities for personal gain, and the protection of proprietary information.
- 53.** Finally, in addition to the Executive Employees' contractual and common law duties as described above, pursuant to section 122(1) of the Alberta *Business Corporations Act*, as officers and/or directors of DIRTT, the Executive Employees were obligated to act honestly and in good faith with

- 11 -

a view to the best interests of DIRT and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

ICE Software and Other Materials

- 54.** The ICE Software was developed in or around 2005.
- 55.** DIRT holds valid and subsisting legal copyrights in the ICE Software and the ICE Software is an original work and computer program and/or subsists of original works and computer programs in accordance with the provisions of the Canadian *Copyright Act*, R.S.C. 1985, c. C-42 ("**Copyright Act**"). Furthermore, DIRT holds valid and subsisting legal copyrights in other works, which fall within the scope of Other Materials.
- 56.** Having regard to the facts set out herein, the Smed Agreement and Loberg Agreement, and the relevant provisions of the *Copyright Act*, including section 13(3), DIRT is the owner, and is presumed to be the owner, of the ICE Software and Other Materials and all copyrights in the ICE Software and Other Materials.
- 57.** The development of the ICE Software was difficult, time consuming and took a number of years. In order to develop comparable technology or software in a short timeframe, access to the ICE Software and Other Materials would be required.
- 58.** Prior to and following the Executive Employees' and Additional Departed Employees' respective terminations from DIRT, the Defendants began, without the consent or authorization of DIRT, copying, using, re-creating, transferring, assigning and/or utilizing the ICE Software and Other Materials or portions thereof. The full extent of the Defendants' activities is presently unknown to DIRT.
- 59.** The Defendants' activities have been with full knowledge of DIRT's copyright interests and, by reason of their blatant disregard for these rights, the Defendants have demonstrated a propensity to further infringe the copyright interests of DIRT, not only in respect to past and current versions of the ICE Software and Other Materials, but in other works in which DIRT has or may acquire a copyright interest and works not yet in existence but in respect to which they may become the owner of the copyright or a holder of an interest therein granted by license. The Defendants will likely infringe the copyright in all such works unless enjoined by the Court from doing so.

Breaches of Obligations

- 60.** Prior to and following the Executive Employees' and Additional Departed Employees' respective terminations from DIRT, they breached their respective contractual, common law and statutory obligations owing, as applicable, to DIRT. The Additional Departed Employees have acted in their own right committing these breaches and as agents of the Executive Employees.
- 61.** Prior to and following the Executive Employees' respective terminations from DIRT, they directly or indirectly founded a new business, Falkbuilt, which is a direct competitor of DIRT. Smed is the sole director of Falkbuilt.
- 62.** On or about March 13, 2019, 217 Ltd. was incorporated. Smed is the sole director of 217 Ltd. 217 Ltd. is operating as Echo, a cloud-based end-to-end software solution of the construction industry. Based on this description, this is equivalent to the ICE Software.

- 12 -

- 63.** On or around August 1, 2019, Falkbuilt filed a trademark application in Canada for the mark FALKBUILT in association with goods described as "(1) Architectural, planning, building, construction products."
- 64.** On or around August 1, 2019, 217 Ltd. filed a trademark application in Canada for the mark ECHO in association with goods described as "(1) Computer software for data visualization and configuration in the field of marketing" and services described as "(1) Consulting services in the field of marketing data and visualization and configuration."
- 65.** Prior to and following the Executive Employees' and Additional Departed Employees' respective terminations from DIRTT, the Defendants, or each of them, have been and are engaged in the following wrongful activities:
- (a) misappropriating and misusing Confidential Information, particulars of which include:
 - (i) directly or indirectly copying and downloading Confidential Information from DIRTT's servers without authorization;
 - (ii) using, re-creating, transferring, assigning and/or utilizing the Confidential Information, the ICE Software and/or Other Materials, or portions thereof, without the express permission of DIRTT;
 - (iii) breaching their obligations of confidentiality by using and disclosing DIRTT's Confidential Information in furtherance of their own interests and the interests of Falkbuilt and/or 217 Ltd.;
 - (iv) using and/or disclosing Confidential Information in carrying out their duties for Falkbuilt and/or 217 Ltd.;
 - (v) taking advantage of business opportunities, which they became aware of as directors, officers or employees of DIRTT and while providing services to DIRTT; and
 - (vi) such further and other particulars to be proven at trial;
 - (b) acting in a breach of confidence;
 - (c) copying the ICE Software and certain Other Materials without the express permission of DIRTT, such particulars to be proven at trial;
 - (d) copying the computer code for the ICE Software, or portions thereof, without the express permission of DIRTT;
 - (e) infringing DIRTT's copyrights contrary to sections 3 and 27(1) of the *Copyright Act*;
 - (f) directly or indirectly inducing and soliciting, taking steps to induce and solicit, and/or attempting to induce and solicit DIRTT customers to not do business with, alter or terminate their relationship with DIRTT;

- 13 -

- (g) directly or indirectly inducing and soliciting, taking steps to induce and solicit, and/or attempting to induce and solicit Distribution Partners and DIRTТ suppliers to not do business with, alter or terminate their relationship with DIRTТ;
 - (h) directly or indirectly inducing and soliciting, taking steps to induce and solicit, and/or attempting to induce and solicit DIRTТ employees or consultants to not do business with, alter or terminate their relationship with DIRTТ;
 - (i) incorporating and controlling Falkbuilt and/or 217 Ltd. for the purpose of directly or indirectly competing with DIRTТ;
 - (j) unlawfully competing with DIRTТ through Falkbuilt and/or 217 Ltd. or otherwise;
 - (k) conspiring to wrongfully profit for themselves and injure DIRTТ's goodwill, reputation, business relationships and economic interests and relations; ~~and~~
 - (l) applying in Canada for the trademarks FALKBUILT and ECHO to directly compete with DIRTТ;
 - (m) directing public attention to their goods, services or business in such a way as to cause or be likely to cause confusion in Canada with DIRTТ's goods, services or business, at the time they commenced so to direct attention to them, between their goods, services or business and the goods, services or business of DIRTТ;
 - (n) passing off the goods or services of DIRTТ, including the ICE Software, as the Defendants own software, as ordered or requested; and
 - (o) such further and other particulars to be proven at trial.
66. The wrongful acts described above were carried out for the direct benefit of the Defendants. The Defendants conspired with each other to engage in those wrongful acts described herein and carried out the agreement causing damage to DIRTТ.
67. Prior to and following the Executive Employees' and Additional Departed Employees' respective terminations from DIRTТ, the Defendants have, without legal justification, acquired and used DIRTТ's Confidential Information to unfairly compete and solicit DIRTТ employees, consultants, customers, Distribution Partners and suppliers, without consent. Such use of Confidential Information by the Defendants has unlawfully interfered with the business of DIRTТ, and was intended by the Defendants to harm DIRTТ.
68. Prior to and following the Executive Employees' and Additional Departed Employees' respective terminations from DIRTТ, the Defendants have, without legal justification, used Confidential Information belonging to DIRTТ as a springboard for its business, to the detriment of DIRTТ.
69. Prior to and following the Executive Employees' and Additional Departed Employees' respective terminations from DIRTТ, the Defendants wrongfully induced over 45 DIRTТ employees to commit the breaches alleged above, knowing of the contractual, fiduciary and other duties and obligations the Executive Employees and Additional Departed Employees owed to DIRTТ. The activities undertaken by the Defendants were calculated and done with the intent to injure the economic interests of DIRTТ, were illegal or unlawful and did cause deliberate damage and loss to DIRTТ.

- 14 -

The Defendants' conduct amounts to unlawful interference with the economic interests and relations of DIRTT.

70. Furthermore, the Defendants knew or ought to have known that contracts of employment existed between other former DIRTT employees and DIRTT. Without legal justification, the Defendants induced other former employees from performing their employment contracts with DIRTT which resulted in the other former employees breaching or failing to perform their respective employment contracts with DIRTT. The Defendants intentionally acted to interfere with the employment contracts between DIRTT and its other former employees, or alternatively, were recklessly indifferent that their actions would result in the former employees breaching or failing to perform their employment contracts. As a result of the Defendants' actions, DIRTT has suffered loss and damage. The Defendants' conduct amounts to interference with the contractual relations of DIRTT.
71. The activities undertaken by the Defendants with respect to DIRTT's other former employees further amounts to the Defendants wrongfully inducing the former employees to breach their employment contracts with DIRTT.
72. Further, or in the alternative, prior to and following the Executive Employees' and Additional Departed Employees' respective terminations from DIRTT, the Defendants have conspired and intentionally entered into an agreement, lawful or unlawful, to use DIRTT's Confidential Information so as to unfairly compete and solicit DIRTT employees, consultants, customers, Distribution Partners and suppliers, without consent. The Defendants acted with the predominant purpose of causing injury to DIRTT or, alternatively, acted in a manner where their conduct was directed towards DIRTT and they should have known that injury to DIRTT was likely to occur.
73. DIRTT has lost, and continues to lose, contracts, employees, consultants, customers, suppliers, Distribution Partners and profits, and has otherwise suffered damages, a loss of business, goodwill and reputation as a result of the conduct of the Defendants.
74. If the conduct set out above continues, DIRTT will suffer irreparable harm not compensable in damages.
75. The Defendants were aware that these activities would, in fact, cause DIRTT damages but nonetheless undertook activities in a willful and deliberate fashion entitling DIRTT to punitive, aggravated and exemplary damages as against the Defendants.
76. The actions and the conduct of the Defendants have resulted in their unjust enrichment to the detriment of DIRTT, for which there is no juristic reason and for which DIRTT has suffered damages. It would be unjust to allow the Defendants to retain profits or other benefits they have earned from their wrongful conduct.
77. DIRTT pleads and relies upon the *Copyright Act* and its regulations and amendments thereto.
78. DIRTT pleads and relies upon the *Alberta Business Corporations Act*, R.S.A. 2000, c. B-9, and its regulations and amendments thereto.
79. DIRTT pleads and relies upon rules 11.25 and 11.26 of the Alberta Rules of Court, Alta Reg 124/2010.

- 15 -

Breach of Retention Agreements

- 80.** On or about January 17, 2018, each of the Executive Employees entered into a Retention Bonus Agreement (the "**Retention Agreements**") with DIRTT in exchange for the payment of a one-time retention bonus (the "**Retention Bonuses**").
- 81.** The Retention Bonuses paid to each Executive Employee were conditional on, among other things, that the respective Executive Employee was not terminated by DIRTT for just cause prior to certain dates and that the Executive Employees at all times complied with their confidentiality obligations and did not disparage DIRTT (the "**Retention Eligibility Requirements**").
- 82.** The Retention Agreements included clawback provisions whereby 100% of the Retention Bonuses would have to be repaid to DIRTT if at any time prior to September 30, 2018, the respective Executive Employee, among other things, failed to comply with the Retention Eligibility Requirements.
- 83.** Both of the Executive Employees failed to comply with the Retention Eligibility Requirements prior to September 30, 2018, thereby requiring each Executive Employee to pay back to DIRTT 100% of the respective Retention Bonus payments received by each Executive Employee. In particular, the conduct of the Executive Employees prior to and after their respective terminations, as alleged at paragraphs **60** to **76** above, provide DIRTT with after-acquired just cause to terminate the Executive Employees. Further, the Executive Employees have breached their confidentiality obligations and disparaged DIRTT.
- 84.** In the alternative, if it is determined that the Executive Employees did not breach the Retention Eligibility Requirements prior to September 30, 2018, the Retention Agreements further require that the Executive Employees pay back 50% of their respective Retention Bonuses if they breach the Retention Eligibility Requirements prior to March 31, 2019. As a result, at the very least, the Executive Employees have breached the Retention Eligibility Requirements prior to March 31, 2019 for the reasons set out in paragraph **83** above, thereby requiring the Executive Employees to pay back to DIRTT 50% of their respective Retention Bonuses.
- 85.** DIRTT proposes that the trial of this action be held at Calgary, Alberta. In the opinion of DIRTT, this action will take less than 25 days of trial time.

Relief requested:

- 86.** DIRTT's claim as against the Defendants, jointly and severally, is as follows:
- (a) an interim and permanent injunction:
- (i) restraining the Defendants from competing against DIRTT, directly or indirectly;
- (ii) restraining the Defendants from using or disclosing the Confidential Information of DIRTT or otherwise exploiting the Confidential Information;
- (iii) requiring the Defendants to deliver up all Confidential Information in their possession or control to DIRTT;

- 16 -

- (iv) restraining the Defendants from using or disclosing the Other Materials or otherwise exploiting the Other Materials;
- (v) restraining the Defendants from copying, re-creating, using, transferring, assigning, utilizing or exploiting in any way the ICE Software and/or the ICE Software's coding, or portions thereof, in any manner whatsoever;
- (vi) pursuant to section 39.1 of the *Copyright Act*, restraining the Defendants from making, distributing, selling, exposing or offering for sale, renting, exhibiting in public or parting with possession of, unauthorized copies, in whole or substantial part, of other works or subject matter published, or which will be published in which DIRTT owns copyright or an interest in, copyright granted by license;
- (vii) requiring the Defendants to deliver up all versions of the ICE Software, related coding, any Other Materials, and any other software, coding or technology developed by using the ICE Software or Other Materials as a springboard, in their possession or control to DIRTT;
- (viii) in the alternative, requiring that the Defendants immediately destroy all versions and copies of the ICE Software, related coding, any Other Materials, and any other software, coding or technology developed by using the ICE Software or Other Materials as a springboard, in their possession and control;
- (ix) restraining the Defendants from contacting and soliciting DIRTT clients, directly or indirectly;
- (x) restraining the Defendants from contacting and soliciting DIRTT employees and consultants, directly or indirectly;
- (xi) restraining the Defendants from contacting and soliciting DIRTT suppliers, directly or indirectly;~~and~~
- (xii) restraining the Defendants from contacting and soliciting DIRTT Distribution Partners, directly or indirectly;
- (xiii) restraining the Defendants from directing public attention to their goods, services or business in such a way as to cause or be likely to cause confusion in Canada with DIRTT's goods, services or business, at the time they commenced so to direct attention to them, between their goods, services or business and the goods, services or business of DIRTT;
- (xiv) restraining the Defendants from passing off the goods or services of DIRTT as and for those of the Defendants', ordered or requested; and
- (xv) restraining the Defendants from applying in Canada for the trademarks FALKBUILT and ECHO or being issued trademark registrations for the marks FALKBUILT and ECHO.

- 17 -

- (b) a declaration that the Executive Employees and Additional Departed Employees' breached their duties, including their contractual and fiduciary duties, duty of fidelity, duty of loyalty and good faith and obligations of confidence to DIRTT;
- (c) a declaration that the Defendants have unlawfully interfered with the economic interests and relations of DIRTT;
- (d) a declaration that the Defendants have interfered with the contractual relations of DIRTT;
- (e) a declaration that the Defendants have unlawfully conspired to engage in wrongful acts which cause harm to DIRTT;
- (f) a declaration that DIRTT at all material times held and continues to hold valid and subsisting copyright(s) in the ICE Software pursuant to the *Copyright Act*, and that DIRTT is the lawful owner of said copyrights;
- (g) a declaration that DIRTT at all material times held and continues to hold valid and subsisting copyright(s) in certain Other Materials pursuant to the *Copyright Act*, and that DIRTT is the lawful owner of said copyrights, the particulars of which will be proven at trial;
- (h) a declaration that the Defendants have infringed DIRTT's copyright(s) in the ICE Software, contrary to sections 3 and 27(1) of the *Copyright Act*;
- (i) a declaration that the Defendants have infringed DIRTT's copyright(s) in certain Other Materials contrary to sections 3 and 27(1) of the *Copyright Act*, the particulars of which will be proven at trial;
- (j) a declaration that the Defendants have unlawfully copied the ICE Software, its coding, or portions thereof, contrary to section 3 of the *Copyright Act*;
- (k) a declaration that the Defendants have unlawfully copied certain Other Materials contrary to section 3 of the *Copyright Act*, the particulars of which will be proven at trial;
- (l) an order directing the Defendants, and each of them, to return to DIRTT all DIRTT Confidential Information, the ICE Software and Other Materials in the Defendants' possession or control;
- (m) an order directing that Loberg repay to DIRTT his \$500,000 retention bonus payment;
- (n) an order directing that Smed repay to DIRTT his \$1,000,000 retention bonus payment;
- (o) an accounting of revenue and profits of the Defendants at the date of trial;
- (p) judgment requiring the Defendants, jointly and severally, to pay to DIRTT the revenue, profits and other financial gains made by the Defendants, and the damages and losses suffered by DIRTT as a result of the wrongful acts of the Defendants to the date of trial;
- (q) damages in an amount to be proven at trial;
- (r) the costs of recovering and securing DIRTT's Confidential Information;

- 18 -

- (s) special or general damages in the amount of \$12,000,000 or such other amount to be proven at trial;
- (t) damages for copyright infringement in an amount to be proven at trial;
- (u) in the alternative, and at the sole election of DIRT, an award of statutory damages for all copyright infringements involved in these proceedings, with respect to each infringing work;
- (v) punitive damages in the amount of \$5,000,000;
- (w) aggravated and exemplary damages in an amount to be proven at trial;
- (x) interest pursuant to the terms of the *Judgment Interest Act*, R.S.A. 2000, c. J-1, as amended;
- (y) cost of this action on an indemnity basis, including GST; and
- (z) such further and other relief as this Honourable Court may deem just and appropriate in the circumstances.

- 19 -

NOTICE TO THE DEFENDANTS:

Falkbuilt Ltd., Mogens Smed, and Barrie Loberg, Saad Fahssi, David Weeks, Nathan McLean and Hamidullah Wafa, 2179086 Alberta Ltd. (operating in its own right or as Echo), Ingrid Schoning and Tara Murray

You only have a short time to do something to defend yourself against this claim:

20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

2 months if you are served outside Canada

You can respond by filing a statement of defence or a demand for notice in the office of the clerk of the Court of Queen's Bench at Calgary, Alberta, AND serving your statement of defence or a demand for notice on the plaintiff's address for service.

WARNING

If you do not file and serve a statement of defence or a demand for notice within your time period, you risk losing the law suit automatically. If you do not file, or do not serve, or are late in doing either of these things, a court may give a judgment to the plaintiff(s) against you.

42455545_3|NATDOCS

Case No. 21-4078

In the
United States Court of Appeals
for the
Tenth Circuit

DIRTT ENVIRONMENTAL SOLUTIONS, INC.;
DIRTT ENVIRONMENTAL SOLUTIONS, LTD,

Plaintiffs-Appellants,

v.

FALKBUILT LTD.; FALKBUILT, INC.; MOGENS SMED,

Defendants-Appellees,

and

LANCE HENDERSON; KRISTY HENDERSON;
FALK MOUNTAIN STATES, LLC,

Defendants.

*Appeal from a Decision of the United States District Court for the District of Utah – Salt Lake City,
Case No. 1:19-CV-00144-DBB-DBP • Honorable David Barlow, U.S. District Judge*

APPELLANTS' APPENDIX
VOLUME 5 OF 6 – Pages 1189 - 1454

JEFFREY J. MAYER
CATHERINE A. MILLER
AKERMAN LLP
71 South Wacker Drive, 47th Floor
Chicago, Illinois 60606
(312) 634-5700 Telephone
(312) 424-1900 Facsimile
jeffrey.mayer@akerman.com
catherine.miller@akerman.com

CHAD E. NYDEGGER
WORKMAN NYDEGGER
60 East South Temple
Suite 1000
Salt Lake City, Utah 84111
(801) 533-9800 Telephone
(801) 328-1707 Facsimile
cnydegger@wnlaw.com



TABLE OF CONTENTS

VOLUME 1 OF 6 (1 to 298)

Civil Docket Sheet, District of Utah, 1:19-cv-00144-DBB-DBP 1

2 Verified Complaint filed 12/11/1926

 Exhibit A – Correspondence dated May 21, 2009 from DIRTT
 to Lance Henderson.....60

 Exhibit B – DIRTT Computer/Data Security Policy63

 Exhibit C – Administrative Garnishment Order65

 Exhibit D – DIRTT Regional Partner Agreement (2018).....81

 Exhibit E (Filed Under Seal)
 (See full unredacted document at Volume 6 at 1455)112

 Exhibit F (Filed Under Seal)
 (See full unredacted document at Volume 6 at 1461)113

 Exhibit G (Filed Under Seal)
 (See full unredacted document at Volume 6 at 1472)114

 Exhibit H – Correspondence dated November 15, 2019
 from Metz Lewis to Amanda Buczynski115

 Exhibit I – (Filed Under Seal)
 (See full unredacted document at Volume 6 at 1480)118

 Exhibit J – Dropbox set up119

 Exhibit K – Dropbox set up.....122

 Exhibit L – Dropbox set up125

 Exhibit M – (Filed Under Seal)
 (See full unredacted document at Volume 6 at 1503)129

 Exhibit N – (Filed Under Seal)
 (See full unredacted document at Volume 6 at 1507)130

 Exhibit O – Declaration of Julian Grijns.....131

5 Plaintiff’s Motion for a Preservation Order and, Following Expedited Discovery, a Limited Preliminary Injunction to Preserve the Status Quo filed 12/12/19136

Exhibit A – Order Granting Motion for Preliminary Injunction161

Exhibit B – Order Granting Motion for Preservation Order164

40 Notice of Dismissal of Falkbuilt LLC filed 01/22/20166

42 Falkbuilt Ltd.’s Answer to Verified Complaint and Counterclaim filed 02/05/20168

Exhibit A – ICANN Doman Name Registration Data Lookup.....217

Exhibit B – Complaint at Website220

Exhibit C – Complaint.pdf Metadata.....254

Exhibit D – DIRTT Press Release from Website255

62 Falkbuilt Ltd.’s First Amended Counterclaim (Jury Demanded) filed 03/18/20259

64 Notice of Preliminary Injunction to Preserve the Status Quo filed 04/02/20 regarding Doc. 61 Order290

VOLUME 2 OF 6 (299 to 596)

72 Falkbuilt Ltd.’s Short Form Motion for Protective Order from Discovery until Plaintiff Identifies its Alleged Trade Secrets filed 06/15/20299

Exhibit A – Plaintiff’s First Requests for Production of Documents and Requests for Production of Documents and Request for Inspection to All Defendants304

Exhibit B – Notice of Subpoena318

Exhibit A – Notice of Preliminary Injunction to Preserve the Status Quo334

Exhibit C – Correspondence from Fabian VanCott to Akerman LLP dated April 23, 2020344

Exhibit D – Correspondence from Akerman to Fabian VanCott dated April 28, 2020350

Exhibit E – Email from Akerman to Jason Hardin and Bruce Badger dated May 4, 2020356

Exhibit F – Correspondence from Fabian VanCott to Akerman LLP dated May 5, 2020358

Exhibit G – Correspondence from Akerman to Fabian VanCott dated June 5, 2020377

Exhibit H – Correspondence from Fabian VanCott to Akerman LLP dated June 11, 2020390

73 Plaintiff’s Short Form Motion to Compel Falkbuilt’s Responses to Document Requests filed 06/16/20397

Exhibit D – Falkbuilt Ltd.’s First Disclosure Required by Stipulated Injunction to Preserve the Status Quo403

Exhibit E - Correspondence from Akerman LLP to Fabian VanCott dated June 5, 2020413

76 Plaintiff’s Response to Falkbuilt Ltd.’s Short Form Motion for Protective Order from Discovery filed 06/16/20.....426

77 Falkbuilt’s Short Form Motion for Protective Order and to Quash Subpoenas filed on 06/16/20431

Exhibit A – Notice of Subpoena.....436

Exhibit B – Notice of Subpoena462

Exhibit C – Declaration of Barrie Loberg488

Exhibit D – Email from Akerman to Jason Hardin and Bruce Badger dated June 16, 2020493

Exhibit E – Order Granting Falkbuilt Ltd.’s Short Form Motion for Protective Order and to Quash Subpoenas498

78 Henderson Defendants’ Short Form Motion to Require Plaintiff to Identify Its Alleged Trade Secrets filed 06/17/20500

Exhibit A – Defendants Lance Henderson, Kristy Henderson and Falk Mountain States, LLC’s Response to Plaintiff’s First Requests for Documents and Production506

79 Order Granting Falkbuilt Ltd.’s Short Form Motion for Protective Order from Discovery Until Plaintiff Identifies its Alleged Trade Secrets filed 06/17/20546

80 Order Granting Plaintiff’s Motion to Seal Exhibits B and C to its Motion to Compel filed 06/18/20548

81 Plaintiff’s Response to Falkbuilt’s Short Form Motion for Protective Order and to Quash Subpoenas filed on 06/16/20.....549

Exhibit A – Notice of Preliminary Injunction to Preserve the Status Quo554

Exhibit B – Amanda Buczysnki’s LinkedIn Profile.....564

Exhibit C – Correspondence from Akerman LLP to Fabian VanCott dated April 28, 2020581

Exhibit D – Correspondence from Akerman LLP to Fabian VanCott dated June 5, 2020587

82 Plaintiff’s Short Form Motion to Compel Production of Falkbuilt, Ltd.’s Information from Canadian Employees filed 06/18/20592

VOLUME 3 OF 6 (597 to 896)

Exhibits to Dkt. 82 continued

Exhibit A – Falkbuilt Ltd.’s Supplemental Responses to Plaintiff’s First Requests for Production of Documents.....597

Exhibit B – Filed Under Seal
(*See full unredacted document at Volume 6 at 1510*)640

Exhibit C – Order on Plaintiff’s Short Form Motion to Compel Production of Falkbuilt Ltd. Information from Canadian Employees641

85 Plaintiff’s Response to Henderson Defendants’ Short Form Motion to Require Plaintiff to Identify its Alleged Trade Secrets filed 06/22/20643

Exhibit A – Defendants Lance Henderson, Kristy Henderson and Falk Mountain States, LLC’s First Disclosure of Information Pursuant to Preliminary Injunction Order649

Exhibit B – Correspondence from Manning Curtis Bradshaw & Bednar to Akerman LLP dated June 17, 2020654

Exhibit C – DIRTT Environmental Solutions, Inc.’s Responses to Falkbuilt Ltd.’s First Set of Interrogatories658

86 Response to Plaintiff’s Short Form Motion to Compel Falkbuilt Ltd.’s Responses to Document Requests filed 06/23/20685

Exhibit A – Email strings between Jason Hardin to Akerman.....690

Exhibit B – Falkbuilt Ltd.’s Supplemental Responses to Plaintiff’s First Requests for Production of Documents.....704

Exhibit C – Email from Sonja Burdash to Akerman.....746

Exhibit D – Plaintiff’s First Requests for Production of Documents and Request for Inspection to All Defendants.....752

87 Corrected Exhibit A – Communications – Replacing Dkt. 86-1 filed 06/23/20 as Exhibit A to Response to Plaintiff’s Short Form Motion to Compel Falkbuilt Ltd.’s Responses to Document Requests (Filed 06/23/20 as Dkt. 86).....765

88 Plaintiff’s Short Form Motion to Compel Henderson Defendants’ Document Production filed 06/24/20784

Exhibit A – Correspondence from Manning Curtis Bradshaw & Bednar to Akerman LLP dated June 17, 2020789

Exhibit B – Plaintiff’s First Requests for Production of Documents and Request for Inspection to All Defendants.....793

Exhibit C – Defendants Lance Henderson, Kristy Henderson and Falk Mountain States, LLC’s First Disclosure of Information Pursuant to Preliminary Injunction Order807

Exhibit D – Filed Under Seal
(*See full unredacted document at Volume 6 at 1623*)812

Exhibit E – Correspondence from Akerman LLP to Manning Curtis dated June 5, 2020813

Exhibit F – Correspondence from Manning Curtis Bradshaw & Bednar to Akerman LLP dated June 15, 2020823

89 Plaintiff’s Motion to File Under Seal Exhibit D to its Short Form Motion to Compel Henderson Defendants’ Document Production filed 06/24/20 832

Exhibit A – Order Granting Plaintiff’s Motion to File Under Seal Exhibit D to its Motion to Compel Henderson Defendants 834

90 Sealed Document regarding Redacted Motion to Expedite Plaintiff’s Short Form Motion to Compel Henderson Defendants’ Document Production and Memorandum in Support Filed by DIRTT filed on June 24, 2020 835

91 Falkbuilt, Ltd.’s (1) Response to Plaintiff’s Short Form Motion to Compel Production of Falkbuilt, Ltd. Information from Canadian Employees, and (2) Request for Extended Briefing filed 06/25/20 837

93 Notice of Newly Obtained Supplemental Information Relevant to Falkbuilt Ltd.’s Motion for Protective Order and to Quash Subpoenas filed on 07/01/20 842

Exhibit A – Correspondence from Crawford & Bangs, LLP to Akerman regarding Objection to Subpoenas 846

Exhibit B – Email string regarding Subpoenas 849

94 Henderson Defendants’ Response to Plaintiff’s Short Form Motion to Compel Henderson Defendants’ Document Production filed 07/01/20 853

Exhibit A – Proposed Order Denying Plaintiff’s Short Form Motion to Compel Henderson Defendants’ Document Production 858

117 First Amended Complaint Jury Demanded filed 10/20/20 859

VOLUME 4 OF 6 (897 to 1188)

(continuation from Volume III)

117 First Amended Complaint Jury Demanded filed 10/20/20 897

Exhibit A – Correspondence from DIRTT to Lance Henderson dated May 21, 2009 940

Exhibit B – DIRTT Computer/Data Security Policy 943

Exhibit C – Administrative Garnishment Order/Office of State Debt Collection.....945

Exhibit D – DIRTT Regional Partner Agreement.....961

Exhibit E – Filed Under Seal Pursuant to Court Order
(*See full unredacted document at Volume 6 at 1455*)992

Exhibit F – Filed Under Seal Pursuant to Court Order
(*See full unredacted document at Volume 6 at 1461*)993

Exhibit G – Filed Under Seal Pursuant to Court Order
(*See full unredacted document at Volume 6 at 1472*)994

Exhibit H – Correspondence from Metz Lewis Brodman Must O’Keefe to Amanda Buczynski.....995

Exhibit I – Filed Under Seal Pursuant to Court Order
(*See full unredacted document at Volume 6 at 1480*)998

Exhibit J – Email regarding DropBox account.....999

Exhibit K – Email regarding DropBox account1002

Exhibit L – Email regarding DropBox account.....1005

Exhibit M – Filed Under Seal Pursuant to Court Order
(*See full unredacted document at Volume 6 at 1503*)1009

Exhibit N – Filed Under Seal Pursuant to Court Order
(*See full unredacted document at Volume 6 at 1507*)1010

Exhibit O – Declaration of Julian Grijns1011

Exhibit P – Filed Under Seal Pursuant to Court Order
(*See full unredacted document at Volume 6 at 1760*)1016

Exhibit Q – Falkbuilt Folding Glass Wall.....1017

Exhibit R – Falkbuilt Digital Component Construction.....1019

Exhibit S – Tweet Threads1038

124 Memorandum Decision and Order filed 10/23/20.....1048

129 Rule 72 Objection and Rule 60(b)(1) Motion to Reverse Magistrate Judge Pead’s Memorandum Decision and Order [Docket No. 124] filed 11/06/20.....1051

Exhibit A – Form 10 Amended Amended Statement of Claim1066

131 Answer of Defendant Lance Henderson to Amended Complaint
filed 11/19/20.....1086

132 Answer of Defendant Kristy Henderson to Amended Complaint
filed 11/19/20.....1120

133 Answer of Defendant Falk Mountain States, LLC to Amended
Complaint filed 11/19/20.....1155

VOLUME 5 OF 6 (1189 to 1454)

134 Motion to Dismiss First Amended Complaint as to Defendants
Falkbuilt Ltd., Falkbuilt, Inc. and Mogens Smed filed 11/19/201189

Exhibit 1 – Form 10 Statement of Claim.....1221

Exhibit 2 – Executive Employment Agreement Amendment between
DIRTT and Mogens Smed.....1240

135 Falkbuilt Ltd.’s Response to Plaintiffs’ Rule 72 Objection and
Rule 60(b)(1) Motion to Reverse Magistrate Judge Pead’s
Memorandum Decision and Order [Docket No. 124] filed 11/20/201258

138 Reply in Support of Rule 72 Objection and Rule 60(b)(1) Motion
to Reverse Magistrate Judge Pead’s Memorandum Decision and
Order [Docket No. 124] filed 11/30/201273

139 Opposition to Motion to Dismiss First Amended Complaint as to
Falkbuilt Ltd., Falkbuilt, Inc. and Mogens Smead [Dkt. 134]
filed 12/17/20.....1287

143 Reply Memorandum in Support of Motion to Dismiss First
Amended Complaint as to Falkbuilt, Ltd., Falkbuilt, Inc. and
Mogens Smed (Dkt. 134) filed 01/15/211319

145 Memorandum Decision and Order filed 01/25/211333

146 Memorandum Decision and Order Denying Motion to Compel
filed 01/27/211342

147 Memorandum Decision and Order Granting Motion to Compel
Production of Falkbuilt, Ltd., Information from Canadian Employees
filed 01/27/211345

162 Minute Entry for Proceedings held before Judge Barlow: Motion Hearing held on 05/19/21 regarding Motion to Dismiss and Memorandum in Support of First Amended Complaint as to Defendants Falkbuilt Ltd., Falkbuilt, Inc. and Mogens Smed filed by Falkbuilt Ltd., Mogens Smed, Falkbuilt, Inc.1349

163 Notice of Consent: (1) to Canadian Jurisdiction by Falkbuilt, Inc., and (2) To Entry of Stipulated Preliminary Injunction in the Court of Queen’s Bench, Alberta as to Falkbuilt Ltd., Falkbuilt, Inc. and Mogens Smed filed 05/21/21.....1351

164 Memorandum Decision and Order Granting [134] Motion to Dismiss First Amended Complaint as to Defendants Falkbuilt Ltd., Falkbuilt Inc. and Mogens Smed and Denying Plaintiffs’ Oral Motion to Amend filed 05/21/211354

168 Motion for Rule 54(b) Certification of Docket No. 164 filed 06/04/211358

178 Memorandum Decision and Order Granting [168] Motion for Rule 54(b) Certification of Docket No. 164 filed 07/01/211367

166 Motion Hearing Before Judge David Barlow on May 19, 20211369

**VOLUME 6 OF 6 (1455 to 1760)
(FILED UNDER SEAL)**

Exhibits to Verified Complaint, Dkt. 2:

2-5 Exhibit E – Employment Contract between DIRTT and a former employee.....1455

2-6 Exhibit F – Spreadsheet substantiating a former DIRTT employee taking confidential DIRTT electronic files1461

2-7 Exhibit G – Spreadsheet substantiating a former DIRTT employee’s upload of a “large clients” PowerPoint file to Dropbox1472

2-9 Exhibit I – String of emails from a former DIRTT employee to her personal email account attaching DIRTT’s pricing and estimates.....1480

2-13 Exhibit M – Email sent outside DIRTT containing a sensitive, confidential DIRTT document.....1503

2-14 Exhibit N – Email forwarded by a former DIRT T employee, who now works for defendant Falkbuilt, to her personal email account that contains DIRT T’s confidential business information1507

82-2 Exhibit B to DIRT T’s Motion to Compel Production of Falkbuilt Information from Canadian Employees – Email from a former DIRT T employee to his personal email account attaching DIRT T’s confidential pricing and project information1510

88-4 Exhibit D to DIRT T’s Motion to Compel Production of Henderson Defendants’ Document Production – Spreadsheet substantiating a former DIRT T employee’s taking confidential DIRT T electronic files1623

Exhibits to Amended Complaint, Dkt. 117:

117-5 Exhibit E – Employment Contract between DIRT T and a former employee1704

117-6 Exhibit F – Spreadsheet substantiating a former DIRT T employee taking confidential DIRT T electronic files1710

117-7 Exhibit G – Spreadsheet substantiating a former DIRT T employee’s upload of a “large clients” PowerPoint file to Dropbox1721

117-9 Exhibit I – String of emails from a former DIRT T employee to her personal email account attaching DIRT T’s pricing and estimates1729

117-13 Exhibit M – Email sent outside DIRT T containing a sensitive, confidential DIRT T document1752

117-14 Exhibit N – Email forwarded by a former DIRT T employee, who now works for defendant Falkbuilt, to her personal email account that contains DIRT T’s confidential business information1756

117-16 Exhibit P – listing of bids DIRT T lost to Falkbuilt and projects that have been flipped from DIRT T to Falkbuilt, and contains DIRT T’s sensitive, confidential business information, including client names and project locations1759

P. Bruce Badger (A4791)
bbadger@fabianvancott.com
Jason W. Hardin (A8793)
jhardin@fabianvancott.com
FABIAN VANCOTT
215 South State Street, Suite 1200
Salt Lake City, UT 84111-2323
Telephone: (801) 531-8900

Attorneys for Defendants Falkbuilt Ltd., Falkbuilt, Inc. and Mogens Smed

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, NORTHERN DIVISION**

DIRTT ENVIRONMENTAL
SOLUTIONS, INC., DIRTT
ENVIRONMENTAL SOLUTIONS
LIMITED,

Plaintiffs,

vs.

LANCE HENDERSON, KRISTY
HENDERSON, FALKBUILT, INC.,
FALKBUILT LTD., MOGENS
SMED, AND FALK MOUNTAIN
STATES, LLC,

Defendants.

Case No. 1:19CV00144-DBB-DBP

**MOTION TO DISMISS
FIRST AMENDED COMPLAINT
AS TO DEFENDANTS
FALKBUILT LTD., FALKBUILT,
INC. AND MOGENS SMED**

Honorable David B. Barlow

Magistrate Judge Dustin B. Pead

Pursuant to Rules 7 and 12(b)(1), (3) & (6) of the Federal Rules of Civil Procedure and DUCivR 7-1, Defendants Falkbuilt Ltd., Falkbuilt, Inc., (collectively, "Falkbuilt") and Mogens Smed ("Mr. Smed") hereby respectfully move to dismiss the First Amended Complaint (the "FAC").

INTRODUCTION

At its core, this case against Falkbuilt and Mr. Smed duplicates a first-filed, pending lawsuit before the Court of Queen’s Bench of Alberta, Canada between two Canadian companies (i.e., plaintiff DIRT Environmental Solutions Limited (“DIRT Ltd.”) and defendant Falkbuilt Ltd.), their Canadian citizen founder, Mr. Smed, and other individuals. (Dkt. 129-1.) Accordingly, the Court should dismiss the First Amended Complaint as it relates to Falkbuilt and Mr. Smed on both *forum non conveniens* and international comity grounds.

Initially, Plaintiff DIRT Environmental Solutions, Inc. (“DIRT Inc.”), the wholly owned Colorado subsidiary of DIRT Ltd., artfully pled in its original Verified Complaint that “[t]his particular action concerns the theft and improper use of DIRT’s confidential information in the United States.” (Ver. Compl., (Dkt. 2), ¶ 19, (emphasis added)). For months, DIRT Inc. repeatedly emphasized that stated scope. (*See, e.g.*, Pl’s Mot. for Preservation, (Dkt. 5), at 2, n.1; Pl’s Mot. Expedited Discovery, (Dkt. 6), at 4.) Because of this limitation and the non-joinder of DIRT Ltd., Falkbuilt initially elected not to challenge venue and to cooperatively agree to a Preliminary Injunction.¹

¹ Falkbuilt has no desire and has had no intention to steal or use any of DIRT’s allegedly confidential information, and Falkbuilt maintains that any acquisition or retention of DIRT confidential information was inadvertent and has caused no damage to DIRT. (Dkt. 46 at 5-8.)

After entry of the stipulated Preliminary Injunction, (Dkt. 61), Falkbuilt trusted that this case would proceed expeditiously to conclusion. But DIRTT had other plans and embarked on scorched earth discovery with seventy-three (73) broadly worded document requests and twenty-nine (29) subpoenas to nearly all of Falkbuilt's United States dealers seeking literally every document and communication ever created by Falkbuilt or its dealers regardless of connection to this case, including expansive discovery from Falkbuilt's Canadian employees. (*See, e.g.*, Dkts. 77, 86). Because DIRTT Inc. had limited its claims to "the alleged theft and improper use of DIRTT Inc.'s confidential information in the United States" and because of the pending Canadian lawsuit, Magistrate Pead held that discovery from Falkbuilt Ltd.'s Canadian-based employees was off limits. (Dkts. 82, 91, 124).

Shortly before Magistrate Pead's ruling, and evidently expecting that discovery from Falkbuilt's Canadian employees would not be allowed, DIRTT filed its FAC, which substantially expands the scope of this case—expressly extending across the border into Canada and adding three new parties (including DIRTT Ltd. and Mr. Smed), three new causes of action, and many new allegations (221 paragraphs in all). (Dkt. 117.) The FAC abandons all pretense that this case is limited to the United States and replaces the express territorial limitation from

original paragraph 19, (Dkt. 105-2, at 9-11) with an allegation that “[t]his action concerns the theft of DIRTT’s confidential information (both in the United States **and Canada** and any other location as revealed),” (Dkt. 117, ¶ 23 (emphasis added)).

But in doing so, DIRTT has pled itself out of this Court by overlapping its pending case in Alberta. The only apparent purpose for such parallel, redundant lawsuits is to greatly inconvenience and burden Falkbuilt during a pandemic, hoping to run the newly formed company out of business. For the reasons expressed below, the Court should dismiss the FAC as to Falkbuilt and Mr. Smed.

PRECISE RELIEF SOUGHT AND GROUNDS FOR MOTION

Pursuant to DUCivR 7-1(a)(1)(A), Falkbuilt and Smed seek dismissal of all claims pled against them in the FAC on *forum non conveniens* and international comity grounds.

RELEVANT FACTUAL² AND PROCEDURAL BACKGROUND

1. DIRTT Ltd. is a Canadian company, incorporated in Alberta, with its headquarters and principal place of business in Calgary, Alberta, Canada. (FAC, (Dkt. 117), ¶ 2.)

² Any factual allegations taken from the FAC are—for purposes of this Motion only—assumed to be true. DIRTT and Mr. Smed expressly reserve their right to dispute any or all of those allegations in all proceedings outside of this Motion.

2. DIRTT, Inc. is a Colorado company with its headquarters in Calgary, Alberta, Canada and, up until recently, with its principal place of business in Calgary. (*Compare Ver. Compl.*, (Dkt. 2), ¶ 1 *with FAC*, (Dkt. 117), ¶¶ 1, 2.)

3. DIRTT Ltd. is DIRTT Inc.’s parent company. (FAC, (Dkt. 117), ¶¶ 1, 2.) (Herein, the two entities may be jointly referred to as “DIRTT”.)

4. DIRTT provides goods and services in the prefabricated, modular interior design and construction market space in Canada, the United States and other international markets. (*Id.* ¶¶ 4-7.)

5. DIRTT Ltd. owns the Canadian trade secret information at issue in this case and licenses that information directly to its U.S. subsidiary. (*Id.* ¶ 14.)

6. Mr. Smed is a resident of Alberta, Canada. Until January 2018, Mr. Smed was the Calgary-based CEO of DIRTT Inc. *and* DIRTT Ltd. He left DIRTT in September 2018. (*Id.* ¶ 21.)

7. After Mr. Smed’s departure from DIRTT, he assisted in establishing Falkbuilt. (*Id.* ¶¶ 19, 33.)

8. On May 9, 2019, over seven (7) months *before* DIRTT Inc. filed the original Verified Complaint in this case, DIRTT Ltd. brought suit against Falkbuilt Ltd. and Mr. Smed in a Statement of Claim filed in the Court of Queen’s Bench of

Alberta, Court File Number 1901-06550. (Statement of Claim, Exhibit 1, attached hereto.) The Statement of Claim:

- a. describes a wide variety of broadly worded DIRTT “Confidential and Proprietary Information,” (*Id.* at 3-4, ¶¶ 11-15);
- b. alleges that Mr. Smed was a founder of DIRTT who held a variety of key senior and influential positions and that, as a result, had unlimited access to “DIRTT’s Confidential Information relating to DIRTT’s business,” (*Id.* at 4-5, ¶¶ 16-20);
- c. alleges that Mr. Smed entered into an Employment Agreement with DIRTT, dated October 21, 2013, amended on January 17, 2018, (*Id.* at 6, ¶ 24);
- d. alleges that Mr. Smed (and co-defendant Mr. Loberg) founded Falkbuilt Ltd., which is a direct competitor of DIRTT’s, (*Id.* at 11, ¶ 46);
- e. alleges that Mr. Smed breached “contractual, common law and statutory obligations” owed to DIRTT, (*Id.* at 11, ¶ 45 (emphasis));
- f. alleges that Falkbuilt Ltd. and Mr. Smed “have been and are engaged in [several] ... wrongful activities,” including, but not limited to:
 - “misappropriating and misusing [DIRTT’s] Confidential Information;”

- “copying the ICE Software and certain Other Materials without the express permission of DIRTT;”
- “copying the computer code for the ICE Software;”
- “infringing DIRTT’s copyrights;”
- “directly or indirectly inducing and soliciting, taking steps to induce and solicit, and/or attempting to induce and solicit DIRTT customers to not do business with, alter or terminate their relationship with DIRTT;”
- “directly or indirectly inducing and soliciting, taking steps to induce and solicit, and/or attempting to induce and solicit Distribution Partners and DIRTT suppliers to not do business with, alter or terminate their relationship with DIRTT;”
- “unlawfully competing with DIRTT through Falkbuilt or otherwise;” and
- “conspiring to wrongfully profit for themselves and injure DIRTT’s reputation, business relationships and economic interests and relations;”

(*Id.* at 11-12, ¶ 47);

g. alleges that “DIRTT has lost, and continues to lose, contracts, employees, consultants, customers, suppliers, Distribution Partners and profits, and has otherwise suffered damages, a loss of business, goodwill and reputation as a result of the conduct of the Defendants,” (*Id.* at 14, ¶ 55);

h. alleges that the actions of Falkbuilt Ltd. and Mr. Smed were “willful and deliberate,” entitling DIRTT to “punitive, aggravated and exemplary damages,” (*Id.* at 14, ¶ 57); and

i. contains a three (3) page prayer for relief seeking interim and permanent injunctions (including, but not limited to, “restraining the Defendants from using or disclosing the Confidential Information of DIRTT or otherwise exploiting the Confidential Information” and “requiring the Defendants to deliver up all Confidential Information in their possession or control to DIRTT”), multiple declarations, repayment of bonuses, payment of the revenues and profits of Falkbuilt Ltd., damages, exemplary damages, punitive damages, interest and costs, (*Id.* at 15-17, ¶ 67).

9. DIRTT’s Canadian litigation is ongoing and has even expanded since the May 9, 2019 filing of the Statement of Claim. (Dkt. 129 at 11; Dkt. 129-1.)

10. Notably, DIRTT Ltd. filed an Amended Amended Statement of Claim on January 28, 2020, Court File Number 1901-06550. (Dkt. 129-1.) The Amended Amended Statement of Claim:

a. joins new defendants David Weeks (who is mentioned in DIRTT’s FAC herein, (Dkt. 117, ¶ 109)), and Ingrid Schoning (who also is mentioned in DIRTT’s FAC, (Dkt. 117, ¶ 110)), (Dkt. 129-1 at 1);

b. alleges that “DIRTT has acquired goodwill and reputation around the world, including, but not limited to in Canada and North America,” (Dkt. 129-1 at 3, ¶ 13);

c. alleges new “wrongful activities” by Falkbuilt Ltd. and Mr. Smed, including, but not limited to, the “directing [of] public attention to their Goods, services or business in such a way as to cause or be likely to cause confusion in Canada with DIRTT’s goods, services or business, at the time they commenced so to direct attention to them, between their goods, services or business and the goods, services or business of DIRTT” and the “passing off the goods or services of DIRTT, including the ICE Software, as the Defendants own software, as ordered or requested,” (Dkt. 129-1 at 13, ¶¶ 65(m), (n)); and

d. contains newly sought injunctive relief relating to the newly alleged wrongful activities mentioned in the preceding paragraph, (Dkt. 129-1 at 16, ¶¶ 86(a)(xiii)-(xv)).

11. Mr. Smed’s Employment Agreement with DIRTT, dated October 21, 2013, amended on January 17, 2018, referenced in both the Statement of Claim and Amended Amended Statement of Claim in the Canadian lawsuit, (Ex. 1 at 6, ¶ 24; (Dkt. 129-1 at 5, ¶ 27)), contains a “Governing Law” provision requiring that “[t]his Amendment Agreement shall be governed by and construed in accordance with the laws of the Province of Alberta and the laws of Canada applicable therein” and that “[t]he Corporation [i.e., DIRTT Ltd.] and the Executive [i.e., Mr.

Smed] irrevocably submit to the non-exclusive jurisdiction of the courts of Alberta in respect of all matters relating to this Amendment Agreement.” (Exhibit 2 (in redacted form), attached hereto, at 3.)

12. DIRTT’s FAC contains no geographic limitations. It deletes the prior express territorial limitation that this case “concerns the theft and improper use of DIRTT’s confidential information **in the United States**,” (Dkt. 105-2, at 9-11 (emphasis added)),³ and replaces it with the allegation that “[t]his action concerns the theft of DIRTT’s confidential information (**both in the United States and Canada and any other location as revealed**), **as well as** the improper use of that information in connection with the United States market.” (Dkt. 117, ¶ 23 (emphasis added).)

13. Additionally, DIRTT’s FAC alleges that “this action addresses false and misleading statements by Falkbuilt representatives [*without identifying the location or country of origin of the statements*] creating confusion in the marketplace [*without identifying the marketplace’s location or country*] and causing Plaintiffs to suffer financial injuries measured under both federal and state law. (*Id.*) Similarly, the FAC repeatedly alleges that Mr. Smed and Falkbuilt have

³ For months during this litigation, DIRTT Inc. repeatedly emphasized that stated scope. (*See, e.g.,* Pl’s Mot. for Preservation, (Dkt. 5), at 2, n.1; Pl’s Mot. Expedited Discovery, (Dkt. 6), at 4.)

engaged in a variety of activities to cause or “sow” confusion in the “marketplace” and with “customers” without identifying the location or country of such market(s) or customers. (*See, e.g.*, Dkt. 117, ¶¶ 33, 45, 54, 57, 60, 133, 202, 212, 219.)

14. DIRTT’s FAC describes “DIRTT’s proprietary ICE Software” and a lengthy list of “DIRTT Confidential Business Information” in a manner that is strikingly similar—indeed, almost identical—to DIRTT’s “proprietary ICE Software” and the laundry list of DIRTT’s “allegedly “confidential and proprietary information relating to DIRTT’s business” set forth in the pending Canadian litigation. (*Compare* Dkt. 117, ¶¶ 115-120, *with* Dkt. 129-1, ¶¶ 14-18.)

15. DIRTT’s FAC alleges causes of action against Falkbuilt for federal and state (Utah and Pennsylvania) trade secret misappropriation, (Dkt 117, ¶¶ 136-172, 179-197), and against Falkbuilt and Mr. Smed for violations of Section 43(a) of the Lanham Act, the Colorado Consumer Protection Act, and the Ohio Deceptive Practices Act, (Dkt 117, ¶¶ 198-221). These causes of action and the related remedies in the FAC are comparable to the allegations and relief DIRTT demands in its ongoing Canadian litigation against Falkbuilt, Mr. Smed, and others. (*Compare generally* Dkt. 117, *with* Dkt. 129-1.)

ARGUMENT

I. THE COURT SHOULD DISMISS THE CLAIMS AGAINST FALKBUILT AND MR. SMED FOR *FORUM NON CONVENIENS*.

The Court should find that the most convenient forum for all of DIRT T's claims against Falkbuilt and Mr. Smed is Alberta, Canada and, thus, dismiss the claims.

Under the doctrine of *forum non conveniens*, a court may order the dismissal of an action over which it declines jurisdiction because the court lacks a mechanism to transfer to the proper forum, typically when the forum is in a foreign country. *Kelvion, Inc. v. PetroChina Canada Ltd.*, 918 F.3d 1088, 1091 (10th Cir. 2019); Charles Alan Wright et al., 14D Fed. Prac. & Proc. Juris. § 3828 (4th ed., Nov. 2018 update). The doctrine is “essentially ‘a supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined.’” *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 429 (2007) (quoting *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994)). “The central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient.” *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 605 (10th Cir. 1998) (citations and quotations omitted).

District courts in the Tenth Circuit apply a two-step threshold test to determine whether a case may be dismissed under the *forum non conveniens* doctrine. *Fireman’s Fund Ins. Co. v. Thyssen Min. Const. of Canada, Ltd.*, 703 F.3d 488, 495 (10th Cir. 2012); *Yavuz v. 61 MM, Ltd.*, 576 F.3d 1166, 1174 (10th Cir. 2009) (affirming dismissal on *forum non conveniens* grounds). First, there must be “an adequate alternative forum in which the defendant is amenable to process.” *Fireman’s Fund*, 703 F.3d at 495 (quotation omitted). Second, the court must confirm that foreign law is applicable. *Id.* “If the answer to either of these questions is no, the *forum non conveniens* doctrine is inapplicable.” *Id.* (quotation omitted). But if these threshold criteria are satisfied, the court proceeds to balance “a range of private and public interest factors.” *Yavuz*, 576 F.3d at 1180.

As detailed below, the two threshold criteria are easily met and both the private and public factors strongly weigh in favor of dismissal.

A. Alberta, Canada Is an Adequate Forum in Which Falkbuilt and Mr. Smed Are Amenable to Process.

As to the first threshold criteria, Falkbuilt and Mr. Smed are certainly amenable to process in Alberta, Canada. DIRT T Ltd. already has its earlier-filed, ongoing, duplicate case pending in the Court of Queen’s Bench of Alberta, involving the same mothership Canadian companies (i.e., DIRT T Ltd. and Falkbuilt Ltd.), the same subject matter, and strikingly similar claims and remedies

alleged and sought by DIRTT in this case. Mr. Smed is a defendant in the Canadian lawsuit, as are other individuals expressly referenced in DIRTT's FAC in this case (i.e., Mr. Weeks and Ms. Schoning). DIRTT Inc., although a Colorado corporation, has its headquarters in Calgary, and, apparently until recently, also had its principal place of business there.⁴ Falkbuilt, Inc., although a Delaware corporation, also is amenable to process in Calgary.

In addition, Mr. Smed's Employment Agreement with DIRTT expressly states that he and DIRTT Ltd. irrevocably submit to the non-exclusive jurisdiction of the courts of Alberta in respect of all matters relating to that Employment Agreement. Although breach of that Employment Agreement is not claimed in DIRTT's FAC, the Canadian litigation makes clear that the Agreement informs, underlies and relates to all of the claims alleged against Mr. Smed, who was the founder and former CEO of DIRTT. If not dismissed from this case, Mr. Smed could assert one or more defenses arising out of the Agreement. *See PTW Energy Servs., Inc. v. Carriere*, 2019 WL 3996874, at *6 (D. Col. Aug. 23, 2019) (stating that "agreeing to be subject to suit in a specific forum 'is generally enough to make

⁴ *See generally PTW Energy Servs., Inc. v. Carriere*, 2019 WL 3996874 (D. Colo. Aug. 23, 2019) (granting motion to dismiss on *forum non conveniens* grounds and finding that difference in parties (i.e., parent versus subsidiary) is not persuasive given that entities are clearly related).

the alternative forum available” and dismissing case for *forum non conveniens*) (quoting *Gschwind*, 161 F.3d at 606).

Importantly, the Supreme Court has made clear that a foreign venue such as Canada can be adequate even if it does not have the same procedural safeguards or the identical laws or remedies available as in the United States. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250, 256 (1981) (holding that plaintiff may not defeat motion to dismiss for *forum non conveniens* merely by showing substantive law that would be applied in the alternative forum is less favorable to plaintiff than that of chosen forum); *see also Gschwind*, 161 F.3d at 606 (“[T]he remedy provided by the alternate forum need not be the same as that provided by the American court.”). Instead, the foreign venue would only be inadequate if its remedy was so “clearly inadequate ... that it is no remedy at all.” *Piper Aircraft Co.*, 454 U.S., at 254

Courts in the United States have routinely and not surprisingly found that Canadian courts are “adequate forums” in *forum non conveniens* analyses. For example, in *Logan Intern. Inc. v. 1556311 Alberta Ltd.*, 929 F. Supp. 2d 625, 633 (S.D. Tex. 2012), the Southern District of Texas concluded that “the Canadian court [*in which the plaintiff already had filed a related lawsuit in Canada*] is an available and adequate forum for this dispute.” Notably, the plaintiff in *Logan*, like DIRT here, alleged misappropriation of trade secrets and violations of the

Lanham Act, along with several other claims, and cast most of its allegations against the multiple defendants collectively, also as here. *Id.* at 630. Ultimately, the *Logan* court found the Canadian court to be “substantially more convenient” and dismissed the lawsuit.⁵ *Id.* at 635.

Indeed, DIRT Inc. itself has argued and admitted in this case (in its Motion to Dismiss Falkbuilt’s First Amended Counterclaim) that “a Canadian court is certainly competent and adequate” in a *forum non conveniens* analysis, (Dkt. 63 at 11).

And DIRT should be accorded no deference for filing this case in Utah because Utah is not the “home forum” for either DIRT Inc. or DIRT Ltd. While normally there is a presumption in favor of hearing a case in the plaintiff’s chosen forum, that presumption applies with less force if a plaintiff sues outside of its home forum, and, in such a case, the private and public interest factors need not so heavily favor the alternate forum. *Gschwind*, 161 F.3d at 606; *Sinochem*, 549 U.S. at 430; *Piper*, 454 U.S. at 255-56.

⁵ See also *PTW Energy Servs., Inc.*, 2019 WL 3996874, at *6 (D. Col. Aug. 23, 2019) (finding Canadian court to be adequate alternative); *VictoriaTea.com, Inc. v. Cott Beverages, Canada*, 239 F. Supp. 2d 377, 383 (S.D.N.Y. 2003) (finding Canada an adequate forum for contract and tort claims); *EFCO Corp. v. Aluma Systems USA, Inc.*, 268 F.3d 601 (8th Cir. 2001) (finding Canadian court to be adequate forum).

Finally, the Court of Queen’s Bench of Alberta is not just an adequate forum, but the preferred forum because DIRTT Ltd. first-filed its largely duplicative lawsuit against Falkbuilt Ltd. and Mr. Smed in that court on May 9, 2019—*over seven (7) months before* DIRTT Inc. initiated this action and *well over a year before* DIRTT filed the now operative FAC. *See EFCO Corp. v. Aluma Systems USA, Inc.*, 268 F.3d 601 (8th Cir. 2001) (affirming dismissal for *forum non conveniens* because plaintiff there first-filed (although dismissed without prejudice) a lawsuit alleging “a variety of claims that substantially overlap with the claims asserted in” the Southern District of Iowa and noting that plaintiff could re-file the Canadian case); *PTW Energy Servs., Inc.*, 2019 WL 3996874, at *6 (noting that “a Canadian court is already adjudicating this dispute” and dismissing case for *forum non conveniens*).

Accordingly, the Court should find that Alberta, Canada is an adequate forum and that the first threshold criteria for the *forum non conveniens* analysis is satisfied.

B. Canadian Law Is Applicable to DIRTT’s Claims Against Falkbuilt and Mr. Smed.

As to the second threshold criteria, the Court should find that Canadian law is applicable to DIRTT’s claims against Falkbuilt and Mr. Smed.

At the outset, the Court should note that all of DIRT T's claims against Falkbuilt and Mr. Smed in the FAC *sound in tort* (i.e., against Falkbuilt for federal and state (Utah and Pennsylvania) trade secret misappropriation and against Falkbuilt and Mr. Smed for violations of Section 43(a) of the Lanham Act, the Colorado Consumer Protection Act and the Ohio Deceptive Practices Act). These claims also duplicate the factual allegations that DIRT T has made and certainly the relief sought in its Canadian lawsuit.

“The general rule is that federal choice-of-law principles are used in resolving federal causes of action,” *Ellis v. Liberty Life Assurance Co. of Bos.*, 958 F.3d 1271, 1283 (10th Cir. 2020) (citations omitted), and, in doing so, the “[f]ederal common law follows the approach outlined in the Restatement (Second) of Conflict of Laws,” *Born v. Progrexion Teleservices, Inc.*, 2020 WL 4674236, at *10 & n.111 (D. Utah Aug. 11, 2020) (citation omitted). However, a “federal court exercising supplemental jurisdiction over state law claims in a federal question lawsuit generally applies the choice-of-law rules of the state in which it sits.” *Nat’l Staffing Sols., Inc. v. Nat’l Staffing Specialists, LLC*, 2020 WL 6149916, at *5 (D. Utah Oct. 20, 2020). For tort actions like the state law claims here, Utah applies the “most significant relationship” test from the Restatement (Second) of Conflict of Laws to determine which jurisdiction’s laws should apply

to a given circumstance. *See Records v. Briggs*, 887 P.2d 864, 867-68 (Utah Ct. App. 1994) (explaining that Utah has adopted the test for torts).

Thus, under either federal or Utah choice-of-law rules, the same “most significant relationship” applies. And that test considers the following contacts:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.

Waddoups v. Amalgamated Sugar Co., 2002 UT 69, ¶ 18, 54 P.3d 1054, 1060

(citing Restatement (Second) of Conflict of Laws § 145).⁶

First, the “place[s] where the [alleged] injur[ies] occurred” generally appear to include Canada, the United States and possibly elsewhere. (*See generally* FAC, (Dkt. 117).) However, the FAC alleges that the damages were suffered by DIRTT

⁶ Section 145(1) also refers to “the principles stated in § 6,” which include:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws § 6(2).

Ltd. (the parent of DIRTT Inc.), a Canadian company incorporated in Alberta with its headquarters and principal place of business in Calgary. Thus, the FAC alleges substantial injury in Canada. Consequently, this factor weighs in favor of the application of Canadian law.

Second, “the place where the conduct causing the injury occurred” now expressly includes “the United States and Canada and any other location as revealed” for the alleged “theft of DIRTT’s confidential information,” (Dkt. 117, ¶23 (emphasis added)), and unspecified locations and countries for the “improper use of that information *in connection with* the United States market,” (*id.* (emphasis added)), and further unspecified locations and countries for the allegedly false and misleading statements by Falkbuilt representatives and the alleged confusion in the marketplace, (*id.*; *see also id.* ¶¶ 33, 45, 54, 57, 60, 133, 202, 212, 219). Obviously, this factor does not weigh in favor of the application of any particular forum’s law.

Third, “the domicile, ... place of incorporation and place of business of the parties” is Calgary, Alberta for DIRTT Ltd. and DIRTT Inc. (although incorporated in Colorado) as well as Falkbuilt Ltd. and Mr. Smed. When DIRTT filed its FAC, it recentered the case on the two mothership Canadian companies

(Falkbuilt Ltd. and DIRTT Ltd.) and their Canadian founder, Mr. Smed. As a result, this factor weighs heavily in favor of the application of Canadian law.

Fourth, “the place where the relationship, if any, between the parties is centered” is clearly Alberta, Canada where both Falkbuilt and DIRTT have their headquarters and where Mr. Smed, their founder, resides. As a result, this factor too weighs heavily in favor of the application of Canadian law.

Fifth, in addition to the Second Restatement’s Section 145 factors, Mr. Smed’s Employment Agreement with DIRTT contains a “Governing Law” provision requiring that “[t]his Amendment Agreement shall be governed by and construed in accordance with the laws of the Province of Alberta and the laws of Canada applicable therein.” (Ex. 2 at 3, ¶ 3.6 (emphasis added).) Although DIRTT does not specifically allege breach of that Employment Agreement in the FAC, the Canadian litigation makes clear that the Agreement informs, underlies and relates to all of the claims alleged against Mr. Smed. And while it may not bind DIRTT to litigate its FAC claims against Mr. Smed in Canada, the Governing Law provision further suggests that Canadian law should apply.

Sixth, DIRTT Inc. itself has argued and admitted in this case (in its Motion to Dismiss Falkbuilt’s First Amended Counterclaim) that Canadian law should

apply to tort claims between the parties in a *forum non conveniens* analysis. (Dkt. 63 at 5-9, 11.)

Seventh, DIRTT Ltd. already has established that Canadian law can and should apply to this case by the simple fact that it has brought claims in Canada under Canadian law against Falkbuilt and Mr. Smed for, among other things:

(1) “misappropriating and misusing [DIRTT’s] Confidential Information,” (Dkt. 129-1 at 3-4, ¶¶ 14-18; at 12, ¶ 65(a)), *comparable to the three federal and state trade secret misappropriation claims alleged against Falkbuilt in the FAC*; and

(2) “directing [of] public attention to their Goods, services or business in such a way as to cause or be likely to cause confusion in Canada with DIRTT’s goods, services or business, at the time they commenced so to direct attention to them, between their goods, services or business and the goods, services or business of DIRTT” and the “passing off the goods or services of DIRTT, including the ICE Software, as the Defendants own software, as ordered or requested,” (Dkt. 129-1 at 13, ¶¶ 65(m), (n)), *comparable to the alleged violations of Section 43(a) of the Lanham Act, the Colorado Consumer Protection Act, and the Ohio Deceptive Practices Act, alleged against Falkbuilt and Mr. Smed in the FAC.*

Accordingly, the Court should find that Canadian law applies to DIRTT's claims against Falkbuilt and Mr. Smed and that the second threshold criteria for the *forum non conveniens* analysis is satisfied.

C. The Private Interest Factors Strongly Favor Dismissal.

The Court should find that the private interest factors strongly favor dismissal. The private interest factors include: (1) the relative ease of access to sources of proof; (2) availability of compulsory process for compelling attendance of witnesses; (3) cost of obtaining attendance of willing nonparty witnesses; (4) possibility of a view of the premises, if appropriate; and (5) all other practical problems that make trial of the case easy, expeditious and inexpensive. *Yavuz*, 576 F.3d at 1180.

First, the vast majority of the “over 50 DIRTT employees [who] have joined Falkbuilt,” (Dkt. 117, ¶ 39), including Mr. Smed, are Canadian citizens living primarily in the Calgary area. And both Falkbuilt and DIRTT have their headquarters in Calgary. While some of those former DIRTT employees admittedly reside in various parts of the United States, the number of former DIRTT employees in the United States is insignificant compared to the number of former DIRTT employees in Canada, and only one former DIRTT employee, co-Defendant Lance Henderson (who incidentally does not work for Falkbuilt),

resides in Utah. If the case proceeds to trial (and we must assume that it will), virtually all of the witnesses *would have to travel to Utah from Canada or from other states*. In contrast, if the case were tried in Calgary, many of the witnesses for both DIRTT and Falkbuilt would have a short drive to the courthouse. With the case in Calgary instead of Utah, there would be far less need for international, cross border travel. As a result, Canada, not Utah, clearly provides much easier access to the various sources of proof.⁷

Second, some level of “compulsory process for compelling attendance of witnesses” is available in both the United States and Canada. However, as the Southern District of Texas explained, there are advantages of a Canadian venue over a venue in the United States:

Importantly, for purposes of trial in Canada, the district courts in the United States may compel testimony or production of documents from a resident of that district to be used in the litigation in Canada. *See* 28 U.S.C. § 1782(a). There is no indication that Canada provides similar statutory assistance for litigants in the United States to compel testimony and documents from persons residing in Canada. “[T]o fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition is to create a condition not satisfactory to litigants.”

⁷ This ease of access is underscored by the ongoing COVID-19 pandemic restrictions because Canada has for the past several months imposed and continues to prohibit travel across its borders without a fourteen (14) day quarantine period. <https://www.canada.ca/en/immigration-refugees-citizenship/services/coronavirus-covid19/travel-restrictions-exemptions.html> (last visited November 19, 2020).

Logan Intern. Inc., 929 F. Supp. 2d at 633-34 (citation omitted). The Court here should reach a similar finding based on the availability of 28 U.S.C. § 1782(a), and find this factor favors the Canadian forum.

Third, the “cost of obtaining attendance of willing nonparty witnesses” will be considerably more expensive if the case remains in Utah, rather than moving to Canada. Again, the vast majority of former DIRTТ employees now working for Falkbuilt, as well as other employees of Falkbuilt Ltd. and DIRTТ Ltd., reside in or near Calgary. And only one former DIRTТ employee is known to reside in Utah, with the rest spread across the United States. As a result, the cost of obtaining attendance of willing nonparty witnesses will be substantially increased if the case remains in Utah. *See Logan Intern. Inc.*, 929 F. Supp. at 634 (reaching similar conclusion for Canada versus Houston). It also is important to point out that cross-border travel right now is nearly impossible. Although a COVID-19 vaccine may arrive sooner rather than later, there can be no prediction as to what travel the Canadian government will eventually allow, or when.

Fourth, both Falkbuilt and DIRTТ have their headquarters and factories in Calgary, making an inspection of those premises, if necessary, much more accessible if the forum is Calgary.

Fifth, and overall, although the dispute between DIRTT, Falkbuilt and Mr. Smed inarguably spans across international borders between the United States and Canada and also across the borders of several different states within the United States, ultimately the primary alleged injuries are to the parent entity, DIRTT Ltd., and the vast majority of witnesses reside in or around Calgary. It simply makes practical sense for the Court of Queen’s Bench of Alberta, where DIRTT is already litigating its duplicative, overlapping lawsuit, to be the venue. Alberta would be the easiest, most expeditious and least expensive forum. And importantly, “judicial economy favors resolution of all claims in one trial.” *Id.* (finding the fifth private factor to also favor dismissal).

Accordingly, the Court should find that the various private interest factors strongly favor dismissal.

D. The Public Interest Factors Strongly Favor Dismissal.

The Court should find that the public interest factors strongly favor dismissal. The public interest factors include: (1) administrative difficulties of courts with congested dockets which can be caused by cases not being filed at their place of origin; (2) the burden of jury duty on members of a community with no connection to the litigation; (3) the local interest in having localized controversies

decided at home; and (4) the appropriateness of having diversity cases tried in a forum that is familiar with the governing law. *Yavuz*, 576 F.3d at 1180.

First, all courts are busy, but more “administrative difficulties,” inefficiencies and potential delays would result if the case remains in Utah given, as noted above, the large number of witnesses (and documents) located in Canada and that it would be easier to obtain or compel attendance of witnesses in Canada because most witnesses reside there and because the parties could avail themselves of the procedures of 28 U.S.C. § 1782(a) for those who do not. *See also Logan Intern. Inc.*, 929 F. Supp. at 634 (reaching similar conclusion for this factor).

Second, “the burden of jury duty on members of a community with no connection to the litigation” weighs heavily in favor of dismissal and thus the Canadian forum. DIRTT’s case as now pleaded barely involves Utah; instead it focused on two large Canadian companies headquartered in Calgary and their Canadian-resident founder. With so few connections to Utah, a jury here would be burdened and likely confused by this Canada centered case. *Id.* (finding this factor, too, to favor dismissal).

Third, “the local interest in having localized controversies decided at home” also weighs heavily in favor of dismissal. As the Southern District of Texas explained in a similar case, “This is fundamentally a Canadian dispute between

Canadian companies involving alleged trade secret misappropriat[ion] by a Canadian individual in Canada. It is Canada that has significantly greater local interest in the controversy, and it would be unfair to burden citizens in Houston with this Canadian dispute.” *Id.* (finding “public interest factors indicate that the Canadian forum is a **substantially more convenient** alternative”) (emphasis added). The Court should reach a similar conclusion here.

Fourth, the “appropriateness of having diversity cases tried in a forum that is familiar with the governing law” factor arose in the seminal case of *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947), which concerned an interstate analysis and occurred prior to passage of 28 U.S.C. § 1404(a) regarding the interstate change of venue between federal district courts for the convenience of parties. For international *forum non conveniens* analyses, such as here, the Court’s stated concern of “having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself” is a better statement of this factor. 330 U.S. at 509. DIRT likely will point to these concerns and argue that its U.S. federal and state statutory claims against Falkbuilt and Mr. Smed should be heard in the United States, in Utah.

But this argument is a red herring. As noted above, Canadian law should apply to this dispute because it focuses on Canadian companies and their Canadian

founder as well as alleged trade secrets created and owned *in Canada*. Thus, the courts and laws of the United States, while available, certainly have less of an interest in this case. And again, “the remedy provided by the alternate forum need not be the same as that provided by the American court.” *Gschwind*, 161 F.3d at 606; *see also Piper Aircraft*, 454 U.S. at 250, 256; *Logan Intern. Inc.*, 929 F. Supp. at 634 (dismissing alleged violations of Lanham Act and Theft Liability Act for *forum non conveniens*). Accordingly, the Court should find this factor has little bearing on the analysis.

Overall, the Court should conclude that the public interest factors strongly support dismissal.

II. ALTERNATIVELY, THE COURT SHOULD DISMISS THE CLAIMS AGAINST FALKBUILT AND MR. SMED AS A MATTER OF INTERNATIONAL COMITY.

Federal courts generally exercise the jurisdiction given them, *IBC Advanced Technologies, Inc. v. Ucore Rare Metals, Inc.*, 415 F.Supp.3d 1028, 1031 (D. Utah 2019) (citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)), but “a District Court may decline to exercise or postpone the exercise of its jurisdiction” under the doctrine of abstention in “exceptional” circumstances “for reasons of wise judicial administration.” *Colorado River Water Conservation Dist.*, 424 U.S. at 813, 818. Although neither the Supreme Court nor

the Tenth Circuit has applied the *Colorado River* abstention doctrine in a case involving parallel proceedings in a foreign court, *see IBC Advanced Technologies*, 415 F.Supp.3d at 1031 (citation omitted), other Circuit Courts of Appeal have extended this doctrine to such cases. *See Royal and Sun Alliance Ins. Co. of Canada v. Century Intern. Arms, Inc.*, 466 F.3d 88, 93–94 (2d Cir. 2006) (collecting cases).

In extending the *Colorado River* doctrine to the international context, the District of Utah has found the following factors to be relevant: (1) the “similarity of parties and issues involved in foreign litigation”; (2) “the promotion of judicial efficiency”; (3) “adequacy of relief available in the alternative forum”; (4) “issues of fairness to and convenience of the parties, counsel, and witnesses”; (5) “the possibility of prejudice to any of the parties”; and (6) “the temporal sequence of the filing of the actions.” *IBC Advanced Technologies*, 415 F.Supp.3d at 1032 (adopting the factors articulated in *National Union Fire Ins. Co of Pittsburgh, PA v. Kozeny*, 115 F. Supp. 2d 1243, 1247 (D. Colo. 2000)).

Facts and arguments supporting all of these factors are discussed above in the *forum non conveniens* analysis and are similarly applicable here. Therefore, the Court should also dismiss the claims against Falkbuilt and Mr. Smed in the

First Amended Complaint as a matter of international comity based on the abstention doctrine.

CONCLUSION

For the reasons set forth herein, Falkbuilt and Mr. Smed respectfully request that the Court dismiss all claims in the First Amended Complaint against them.

WORD COUNT CERTIFICATION

Pursuant to DUCivR 7-1(a)(3)(A), counsel for Falkbuilt and Mr. Smed hereby certifies that the word count of this Motion, excluding the face sheet, table of contents, table of authorities, signature block, certificate of service, exhibits and this certification, is 6,446 words.

Dated this 19th day of November, 2020.

/s/ Jason W. Hardin

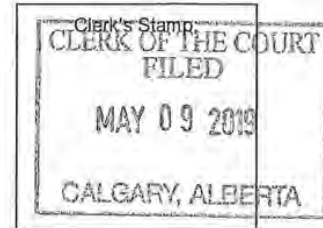
P. Bruce Badger

Jason W. Hardin

FABIAN VANCOTT

*Attorneys for Defendants Falkbuilt Ltd.,
Falkbuilt, Inc. and Mogens Smed*

Form 10
Alberta Rules of Court
Rule 3.25



COURT FILE NUMBER 1901 06550
COURT Court of Queen's Bench of Alberta
JUDICIAL CENTRE Calgary
PLAINTIFF DIRT Environmental Solutions Ltd.
DEFENDANTS Falkbuilt Ltd., Mogens Smed and Barrie Loberg
DOCUMENT **STATEMENT OF CLAIM**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT
Barbara B. Johnston, Q.C. & April Kosten
Dentons Canada LLP
15th Floor, Bankers Court
850 - 2nd Street SW
Calgary, Alberta T2P 0R8
Ph: (403) 268-3030 / Fax: (403) 268-3100
File No: 577195-1

NOTICE TO DEFENDANTS:

Falkbuilt Ltd., Mogens Smed and Barrie Loberg.

You are being sued. You are a defendant.

Go to the end of this document to see what you can do and when you must do it.

Note: State below only facts and not evidence (Rule 13.6)

Statement of facts relied on:

1. DIRT Environmental Solutions Ltd. ("**DIRT**") is a leading technology driven company carrying on business in Alberta and elsewhere around the world.
2. The Defendants, Mogens Smed ("**Smed**") and Barrie Loberg ("**Loberg**"), are former executives of DIRT and are residents of Calgary, Alberta or the surrounding area (the "**Executive Employees**"). At all material times, the Executive Employees were officers and directing minds of DIRT.
3. The Defendant, Falkbuilt Ltd. ("**Falkbuilt**"), is a company incorporated under the laws of Alberta on October 26, 2018. Smed is the sole director of Falkbuilt.

Nature of DIRTT's Business

4. DIRTT was founded in or around 2003 by Smed, Loberg and Geoff Gosling. DIRTT commenced operations in February 2004 and began commercial sales in May 2005.
5. DIRTT is an innovative manufacturing company featuring a proprietary software and virtual reality visualization platform coupled with vertically integrated manufacturing that designs, configures and manufactures prefabricated interior solutions used primarily in commercial spaces across a wide range of industries and businesses. DIRTT combines innovative product design with its industry-leading, proprietary ICE Software (the "**ICE Software**" or "**ICE**"), and technology-driven, lean manufacturing practices and sustainable materials to provide an end-to-end solution for the traditionally inefficient and fragmented interior construction industry. DIRTT creates customized interiors with the aesthetics of conventional construction but with greater cost and schedule certainty, shorter lead times, greater future flexibility, and better environmental sustainability than conventional construction.
6. DIRTT offers interior construction solutions throughout the United States and Canada, as well as in select international markets, through a network of independent distribution partners ("**Distribution Partners**") and an internal sales team. The Distribution Partners use the ICE Software to work with end users to envision and design their spaces. Orders are electronically sent through ICE to DIRTT's manufacturing facilities for production, packing and shipping. DIRTT's Distribution Partners then coordinate the receipt and installations of DIRTT's interior solutions at the end users' locations.
7. In addition to sales and marketing, the Distribution Partners provide value throughout the construction process. At the pre-construction stage, Distribution Partners provide design assistance services to architects and designers. Through the construction process, Distribution Partners act as specialty subcontractors to the general contractors and provide installation and other construction services. Post-move in, Distribution Partners provide warranty work, ongoing maintenance and repurposing support. The Distribution Partners operate under Distribution Partner agreements with DIRTT, which outline sales goals and marketing territories and provide the terms and conditions upon which the Distribution Partners market and sell DIRTT products.
8. DIRTT also operates several Green Learning Centers ("**GLCs**"), which are display areas to showcase DIRTT's products and services. DIRTT generally requires its Distribution Partners to construct and maintain a GLC in their local markets. There are currently over 80 GLCs showcasing DIRTT's products and services across North America, the Middle East and India.

- 3 -

9. DIRTT's head office is located in Calgary, Alberta. DIRTT has manufacturing facilities in Calgary, Alberta, Phoenix, Arizona and Savannah, Georgia.
10. On November 28, 2013, DIRTT went public and listed its common shares for trading on the Toronto Stock Exchange ("TSX").

DIRTT's Confidential and Proprietary Information

11. DIRTT's manufacturing approach is built on a foundation of technology, the center of which is the proprietary ICE Software. DIRTT uses the ICE Software to design, visualize, configure, price, communicate, engineer, specify, order and manage projects. The ICE Software was developed in or around 2005 as a custom interior design and construction software solution to integrate into DIRTT's interior offerings. The ICE Software makes manufactured, fully custom interiors both feasible and profitable while addressing challenges associated with traditional construction, including cost overruns, inconsistent quality, delays and significant material waste. The ICE Software is used throughout the sales process, ensuring consistency across DIRTT's services and products received by all of DIRTT's clients.
12. DIRTT begins manufacturing custom DIRTT products once a file ("**ICE File**") is generated and a purchase order is received. The ICE Software allows an entire project to be tracked and managed across the chain of custody through sales, production, delivery and installation. The ICE File (containing a project's engineering and manufacturing data) generated during the design and specification process can be used for optimizing future reconfigurations, renovations, technology integration initiatives and changes to a client's space.
13. The ICE Software is also licenced to unrelated companies and Distribution Partners of DIRTT.
14. DIRTT's proprietary ICE Software is among a body of DIRTT's valuable intellectual property. The ICE Software is subject to a number of patents in Canada, the United States, Europe and Singapore. DIRTT also has a number of trademark and copyright protections.
15. In addition to the ICE Software, during their employment with DIRTT, the Executive Employees had access to DIRTT's other confidential and proprietary information relating to DIRTT's business, including but not limited to:
 - (a) DIRTT's internal pricing and job costing;
 - (b) DIRTT's customer, supplier and Distribution Partner contacts;
 - (c) DIRTT's sales figures and projections;
 - (d) DIRTT's customer presentations and marketing materials;

- 4 -

- (e) DIRTT's marketing and sales strategies;
- (f) DIRTT's customer, supplier and Distribution Partner order histories, needs, preferences and idiosyncrasies;
- (g) DIRTT's customer proposals, service agreements, contracts and purchase orders;
- (h) DIRTT's plans to expand and target new clients and markets;
- (i) new business opportunities;
- (j) personnel information;
- (k) design specifications and drawings of DIRTT products;
- (l) specialized methods and processes used to create custom prefabricated modular interior wall partitions, other ocular interior components and other DIRTT products;
- (m) research and development of new DIRTT products;
- (n) copyrights, trademarks, trade secrets, patents, patents pending, and intellectual property strategy, including the ICE Software and ancillary programs;
- (o) strategic plans and business plans; and
- (p) such further and other confidential and proprietary information as may be proven at trial (collectively, the "**Confidential Information**").

Executive Employees

Smed

16. Smed was one of the founders of DIRTT and commenced employment with DIRTT in 2003 as Chief Executive Officer ("**CEO**"). Smed held the role of CEO until December 2017, when he moved into the role of Executive Chairman. Smed was also a member of the Board of Directors of DIRTT from September 2003 until September 10, 2018.
17. At all material times, Smed held a key senior and influential position within DIRTT. Smed was the face of DIRTT. As CEO of DIRTT, Smed's responsibilities included, but were not limited to, the following:
 - (a) developing, implementing and maintaining DIRTT's strategic plan;
 - (b) developing new products and new innovation;
 - (c) improving DIRTT's market position to achieve financial growth as outlined in its strategic plan;

- 5 -

- (d) maintaining DIRTT's relationships with current DIRTT customers, Distribution Partners, suppliers, and developing new customers, Distribution Partners and supplier contacts and relationships on behalf of DIRTT;
 - (e) acting as an ambassador of DIRTT toward current and potential DIRTT customers, Distribution Partners and suppliers;
 - (f) developing and implementing DIRTT's overall sales and marketing strategies;
 - (g) identifying new business opportunities, including customers and markets;
 - (h) maintaining extensive knowledge of current market conditions and DIRTT's product;
 - (i) hiring, training and retaining employees and consultants; and
 - (j) such further and other responsibilities as may be proven at trial.
18. DIRTT's customers, Distribution Partners, suppliers, consultants and employees relied heavily upon Smed and trusted his advice regarding DIRTT's products and services. Smed had (and continues to have) a great deal of interaction and influence over DIRTT's customers, Distribution Partners, suppliers, consultants and employees.
19. DIRTT personnel involved in the sales, project management, research, development and manufacturing of DIRTT products and processes worked closely with Smed, reported directly to Smed, received directions from Smed, and Smed had (and continues to have) a great deal of interaction and influence with those DIRTT personnel.
20. Smed had unlimited access to DIRTT's Confidential Information relating to DIRTT's business.
21. Smed had extensive and recurring contact with key customers of DIRTT around the world, in the course of which Smed gained and used an intimate knowledge of those customers' special needs, preferences, idiosyncrasies and plans. DIRTT's key customers relied heavily upon Smed and trusted his advice regarding DIRTT's products and services. Smed had (and continues to have) a great deal of interaction and influence over DIRTT's customers, and in particular, its key customers.
22. Smed had extensive and recurring contact with key suppliers of DIRTT around the world, in the course of which Smed gained and used an intimate knowledge of those suppliers' special needs, preferences, idiosyncrasies and plans. DIRTT's key suppliers relied heavily upon Smed and trusted his advice regarding DIRTT products and services. Smed had (and continues to have) a great deal of interaction and influence over DIRTT's key suppliers.

- 6 -

23. Smed had extensive and recurring contact with DIRTT's Distribution Partners around the world, in the course of which Smed gained and used intimate knowledge of those Distribution Partners' special needs, preferences, idiosyncrasies and plans. DIRTT's Distribution Partners relied heavily on Smed and trusted his advice regarding DIRTT's products and services. Smed had (and continues to have) a great deal of interaction and influence over the Distribution Partners.
24. In 2013, as part of DIRTT's public offering, Smed entered into a written Employment Agreement with DIRTT dated October 21, 2013, amended on January 17, 2018 ("**Smed Agreement**"). Some express and/or implied key terms and conditions, *inter alia*, of the Smed Agreement include the following:
- (a) Smed agreed not to compete directly or indirectly with DIRTT during his employment and for a period of 24 months following the date of his termination;
 - (b) Smed agreed not to directly or indirectly solicit or attempt to solicit any employee or Distribution Partner of DIRTT during his employment and for a period of 24 months following the date of his termination;
 - (c) Smed agreed not to use or disclose any confidential or proprietary information of DIRTT during his employment with DIRTT or anytime after his date of termination;
 - (d) Smed recognized DIRTT's proprietary rights in the tangible and intangible property of DIRTT and acknowledged that he did not obtain or acquire and would not obtain or acquire any right, title or interest, in any of the property of DIRTT or its predecessors, successors, affiliates or related companies, including the ICE Software or any other writing, communications, manuals, documents, instruments, contracts, agreements, files, literature, data, technical information, formulas, products, devices, apparatuses, trademarks, trade names, trade styles, service marks, logos, copyrights or patents, in each case, made or developed using the resources of DIRTT by Smed either alone or in conjunction with others (collectively, the "**Other Materials**");
 - (e) Smed irrevocably waived, for the benefit of DIRTT, all of Smed's moral rights whatsoever in the ICE Software and Other Materials, including any right to the integrity of the ICE Software and Other Materials, any right to be associated with the ICE Software and Other Materials and any right to restrict or prevent the modification or use of the ICE Software and Other Materials in any way whatsoever;
 - (f) Smed irrevocably transferred to DIRTT all rights to restrict any violations of moral rights in the ICE Software and Other Materials, including any distortion, mutilation or other modification;
 - (g) Smed irrevocably and exclusively assigned all such ownership rights in any intellectual property rights in the ICE Software and Other Materials to DIRTT throughout the world, including any renewals, extensions or reversions relating thereto and any right to bring any action or to collect compensation for past infringements;

- 7 -

- (h) Smed agreed that DIRTT had the exclusive right to obtain copyright registrations, letters patent, industrial design registrations, trade-mark registrations or any other protection in respect of the Other Materials and the intellectual property rights relating to the ICE Software and Other Materials anywhere in the world; and
 - (i) Smed agreed that any obligations under the Smed Agreement were in addition to his fiduciary obligations owing to DIRTT.
25. DIRTT terminated Smed's employment on September 10, 2018. As at the termination date (and following, as applicable), Smed was bound by the Smed Agreement, policies and common law duties, including fiduciary duties.

Loberg

26. Loberg was a founder of DIRTT and commenced employment at DIRTT in February 2004 in the position of Vice President, Software Development. He remained in that position until his termination. Loberg was one of the developers and authors of the ICE Software.
27. At all material times, Loberg held a key senior and influential position within DIRTT. In addition, as Vice President, Software Development, Loberg's responsibilities included the following:
- (a) overseeing the information technology system;
 - (b) maintaining the ICE Software;
 - (c) looking for and developing new products and new innovations, including as it relates to the ICE Software;
 - (d) improving DIRTT's market position to achieve financial growth as outlined in its strategic plan;
 - (e) maintaining DIRTT's relationships with current DIRTT customers, Distribution Partners, suppliers, and developing new customers, Distribution Partners, supplier contacts and relationships on behalf of DIRTT;
 - (f) acting as an ambassador of DIRTT toward current and potential DIRTT customers, Distribution Partners and suppliers;
 - (g) developing and implementing DIRTT's overall sales and marketing strategies;
 - (h) identifying new business opportunities, including customers and markets;
 - (i) maintaining extensive knowledge of current market conditions and DIRTT's product;
 - (j) hiring, training and retaining employees and consultants; and
 - (k) such further and other responsibilities as may be proven at trial.

- 8 -

28. DIRTТ personnel involved in the research, development and manufacturing of DIRTТ's proprietary ICE Software and information technology systems worked closely with Loberg, reported directly to Loberg, received directions from Loberg, and Loberg had (and continues to have) a great deal of contact and influence with those DIRTТ personnel.
29. Loberg had unlimited access to DIRTТ's Confidential Information relating to DIRTТ's business.
30. In 2013, as part of DIRTТ's public offering Loberg entered into an Employment Agreement with DIRTТ dated October 21, 2013 ("**Loberg Agreement**"). Some express and/or implied key terms and conditions, *inter alia*, of the Loberg Agreement include the following:
 - (a) Loberg agreed not to compete directly or indirectly with DIRTТ during his employment and for a period of 24 months following the date of his termination;
 - (b) Loberg agreed not to directly or indirectly solicit or attempt to solicit any employee or Distribution Partner of DIRTТ during his employment and for a period of 24 months following the date of his termination;
 - (c) Loberg agreed not to use or disclose any confidential or proprietary information of DIRTТ during his employment with DIRTТ or anytime after his date of termination;
 - (d) Loberg recognized DIRTТ's proprietary rights in the tangible and intangible property of DIRTТ and acknowledged that he did not obtain or acquire and would not obtain or acquire any right, title or interest, in any of the property of DIRTТ or its predecessors, successors, affiliates or related companies, including the ICE Software and Other Materials;
 - (e) Loberg irrevocably waived, for the benefit of DIRTТ, all of Loberg's moral rights whatsoever in the ICE Software and Other Materials, including any right to the integrity of the ICE Software and Other Materials, any right to be associated with the ICE Software and Other Materials and any right to restrict or prevent the modification or use of the ICE Software and Other Materials in any way whatsoever;
 - (f) Loberg irrevocably transferred to DIRTТ all rights to restrict any violations of moral rights in the ICE Software and Other Materials, including any distortion, mutilation or other modification;
 - (g) Loberg irrevocably and exclusively assigned all such ownership rights in any intellectual property rights in the ICE Software and Other Materials to DIRTТ throughout the world, including any renewals, extensions or reversions relating thereto and any right to bring any action or to collect compensation for past infringements;
 - (h) Loberg agreed that DIRTТ had the exclusive right to obtain copyright registrations, letters patent, industrial design registrations, trade-mark registrations or any other protection in respect of the ICE Software and Other Materials and the intellectual property rights relating to the ICE Software and Other Materials anywhere in the world; and

- 9 -

(i) Loberg agreed that any obligations under the Loberg Agreement were in addition to his fiduciary obligations owing to DIRTT.

31. DIRTT terminated Loberg's employment on January 15, 2019. As at the termination date (and following, as applicable) Loberg was bound by the Loberg Agreement, policies and common law duties, including fiduciary duties.

Executive Employees' Additional Obligations

32. The Executive Employees held key, senior and influential positions and played influential roles in DIRTT's business.

33. Throughout the time they were employed by DIRTT, the Executive Employees played a key and influential role in the relationships DIRTT had with its employees, consultants, customers, Distribution Partners and suppliers.

34. Given the key role the Executive Employees played as leaders or integral employees of DIRTT's business, DIRTT is extremely vulnerable to the misuse or disclosure of DIRTT's Confidential Information by the Executive Employees; the solicitation of DIRTT's customers, suppliers, Distribution Partners, consultants and employees by the Executive Employees; and unlawful competition by the Executive Employees.

35. The Executive Employees had extensive and recurring contact with key customers, Distribution Partners and suppliers of DIRTT around the world. The Executive Employees had a great deal of influence over DIRTT's key customers, Distribution Partners and suppliers. DIRTT's key customers, Distribution Partners and suppliers relied heavily on the Executive Employees and trusted their advice regarding DIRTT products and services.

36. In addition to their contractual obligations, the Executive Employees owed, and continue to owe, duties including fiduciary duties, duty of confidence and a duty of fidelity and good faith to DIRTT. The Executive Employees' duties towards DIRTT include, but are not limited to, the following:

- (a) to avoid conflicts of interest and the appropriation of corporate opportunities;
- (b) to maintain the confidentiality of DIRTT's information and not take, reveal or make use of Confidential Information for their own benefit;
- (c) not to take business opportunities they became aware of as employees, officers or directors of DIRTT for their own benefit and to the detriment of DIRTT;
- (d) that they would not, directly or indirectly, solicit the business of DIRTT customers or cause those customers to alter, leave or terminate their relationship with DIRTT;

- 10 -

- (e) that they would not, directly or indirectly, solicit DIRTT employees or consultants to cause those employees or consultants to alter, leave or terminate their relationship with DIRTT;
 - (f) that they would not, directly or indirectly, solicit DIRTT Distribution Partners or suppliers to cause those Distribution Partners or suppliers to alter, leave or terminate their relationship with DIRTT;
 - (g) that they would not unfairly compete with DIRTT;
 - (h) that they would not copy, re-create, use, transfer, assign or utilize in any manner whatsoever the Confidential Information, the ICE Software or Other Materials, or portions thereof, without the express permission of DIRTT; and
 - (i) such further and other particulars to be proven at trial.
37. All DIRTT employees, including the Executive Employees, are further required to comply with the DIRTT Code of Conduct. The DIRTT Code of Conduct includes provisions prohibiting any conflict of interest, ensuring fair business dealings, not using corporate opportunities for personal gain, and the protection of proprietary information.
38. Finally, in addition to the Executive Employees' contractual and common law duties as described above, pursuant to section 122(1) of the Alberta *Business Corporations Act*, as officers and/or directors of DIRTT, the Executive Employees were obligated to act honestly and in good faith with a view to the best interests of DIRTT and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

ICE Software and Other Materials

39. The ICE Software was developed in or around 2005.
40. DIRTT holds valid and subsisting legal copyrights in the ICE Software and the ICE Software is an original work and computer program and/or subsists of original works and computer programs in accordance with the provisions of the Canadian *Copyright Act*, R.S.C. 1985, c. C-42 ("**Copyright Act**"). Furthermore, DIRTT holds valid and subsisting legal copyrights in other works, which fall within the scope of Other Materials.
41. Having regard to the facts set out herein, the Smed Agreement and Loberg Agreement, and the relevant provisions of the *Copyright Act*, including section 13(3), DIRTT is the owner, and is presumed to be the owner, of the ICE Software and Other Materials and all copyrights in the ICE Software and Other Materials.

- 11 -

42. The development of the ICE Software was difficult, time consuming and took a number of years. In order to develop comparable technology or software in a short timeframe, access to the ICE Software and Other Materials would be required.
43. Prior to and following the Executive Employees' respective terminations from DIRTT, the Defendants began, without the consent or authorization of DIRTT, copying, using, re-creating, transferring, assigning and/or utilizing the ICE Software and Other Materials or portions thereof. The full extent of the Defendants' activities is presently unknown to DIRTT.
44. The Defendants' activities have been with full knowledge of DIRTT's copyright interests and, by reason of their blatant disregard for these rights, the Defendants have demonstrated a propensity to further infringe the copyright interests of DIRTT, not only in respect to past and current versions of the ICE Software and Other Materials, but in other works in which DIRTT has or may acquire a copyright interest and works not yet in existence but in respect to which they may become the owner of the copyright or a holder of an interest therein granted by license. The Defendants will likely infringe the copyright in all such works unless enjoined by the Court from doing so.

Breaches of Obligations

45. Prior to and following the Executive Employees' respective terminations from DIRTT, they breached their respective contractual, common law and statutory obligations owing, as applicable, to DIRTT.
46. Prior to and following the Executive Employees' respective terminations from DIRTT, they directly or indirectly founded a new business, Falkbuilt, which is a direct competitor of DIRTT. Smed is the sole director of Falkbuilt.
47. Prior to and following the Executive Employees' respective terminations from DIRTT, the Defendants, or each of them, have been and are engaged in the following wrongful activities:
 - (a) misappropriating and misusing Confidential Information, particulars of which include:
 - (i) directly or indirectly copying and downloading Confidential Information from DIRTT's servers without authorization;
 - (ii) using, re-creating, transferring, assigning and/or utilizing the Confidential Information, the ICE Software and/or Other Materials, or portions thereof, without the express permission of DIRTT;
 - (iii) breaching their obligations of confidentiality by using and disclosing DIRTT's Confidential Information in furtherance of their own interests and the interests of Falkbuilt;

- 12 -

- (iv) using and/or disclosing Confidential Information in carrying out their duties for Falkbuilt;
 - (v) taking advantage of business opportunities, which they became aware of as directors, officers or employees of DIRTT and while providing services to DIRTT; and
 - (vi) such further and other particulars to be proven at trial;
- (b) acting in a breach of confidence;
 - (c) copying the ICE Software and certain Other Materials without the express permission of DIRTT, such particulars to be proven at trial;
 - (d) copying the computer code for the ICE Software, or portions thereof, without the express permission of DIRTT;
 - (e) infringing DIRTT's copyrights contrary to sections 3 and 27(1) of the *Copyright Act*;
 - (f) directly or indirectly inducing and soliciting, taking steps to induce and solicit, and/or attempting to induce and solicit DIRTT customers to not do business with, alter or terminate their relationship with DIRTT;
 - (g) directly or indirectly inducing and soliciting, taking steps to induce and solicit, and/or attempting to induce and solicit Distribution Partners and DIRTT suppliers to not do business with, alter or terminate their relationship with DIRTT;
 - (h) directly or indirectly inducing and soliciting, taking steps to induce and solicit, and/or attempting to induce and solicit DIRTT employees or consultants to not do business with, alter or terminate their relationship with DIRTT;
 - (i) incorporating and controlling Falkbuilt for the purpose of directly or indirectly competing with DIRTT;
 - (j) unlawfully competing with DIRTT through Falkbuilt or otherwise;
 - (k) conspiring to wrongfully profit for themselves and injure DIRTT's reputation, business relationships and economic interests and relations; and
 - (l) such further and other particulars to be proven at trial.
48. The wrongful acts described above were carried out for the direct benefit of the Defendants. The Defendants conspired with each other to engage in those wrongful acts described herein and carried out the agreement causing damage to DIRTT.
49. Prior to and following the Executive Employees' respective terminations from DIRTT, the Defendants have, without legal justification, acquired and used DIRTT's Confidential Information to unfairly compete and solicit DIRTT employees, consultants, customers, Distribution Partners

- 13 -

and suppliers, without consent. Such use of Confidential Information by the Defendants has unlawfully interfered with the business of DIRTT, and was intended by the Defendants to harm DIRTT.

50. Prior to and following the Executive Employees' respective terminations from DIRTT, the Defendants have, without legal justification, used Confidential Information belonging to DIRTT as a springboard for its business, to the detriment of DIRTT.
51. Prior to and following the Executive Employees' respective terminations from DIRTT, the Defendants wrongfully induced over 40 DIRTT employees to commit the breaches alleged above, knowing of the contractual, fiduciary and other duties and obligations the Executive Employees owed to DIRTT. The activities undertaken by the Defendants were calculated and done with the intent to injure the economic interests of DIRTT, were illegal or unlawful and did cause deliberate damage and loss to DIRTT. The Defendants' conduct amounts to unlawful interference with the economic interests and relations of DIRTT.
52. Furthermore, the Defendants knew or ought to have known that contracts of employment existed between other former DIRTT employees and DIRTT. Without legal justification, the Defendants induced other former employees from performing their employment contracts with DIRTT which resulted in the other former employees breaching or failing to perform their respective employment contracts with DIRTT. The Defendants intentionally acted to interfere with the employment contracts between DIRTT and its other former employees, or alternatively, were recklessly indifferent that their actions would result in the former employees breaching or failing to perform their employment contracts. As a result of the Defendants' actions, DIRTT has suffered loss and damage. The Defendants' conduct amounts to interference with the contractual relations of DIRTT.
53. The activities undertaken by the Defendants with respect to DIRTT's other former employees further amounts to the Defendants wrongfully inducing the former employees to breach their employment contracts with DIRTT.
54. Further, or in the alternative, prior to and following the Executive Employees' respective terminations from DIRTT, the Defendants have conspired and intentionally entered into an agreement, lawful or unlawful, to use DIRTT's Confidential Information so as to unfairly compete and solicit DIRTT employees, consultants, customers, Distribution Partners and suppliers, without consent. The Defendants acted with the predominant purpose of causing injury to DIRTT or, alternatively, acted in a manner where their conduct was directed towards DIRTT and they should have known that injury to DIRTT was likely to occur.

- 14 -

55. DIRTT has lost, and continues to lose, contracts, employees, consultants, customers, suppliers, Distribution Partners and profits, and has otherwise suffered damages, a loss of business, goodwill and reputation as a result of the conduct of the Defendants.
56. If the conduct set out above continues, DIRTT will suffer irreparable harm not compensable in damages.
57. The Defendants were aware that these activities would, in fact, cause DIRTT damages but nonetheless undertook activities in a willful and deliberate fashion entitling DIRTT to punitive, aggravated and exemplary damages as against the Defendants.
58. The actions and the conduct of the Defendants have resulted in their unjust enrichment to the detriment of DIRTT, for which there is no juristic reason and for which DIRTT has suffered damages. It would be unjust to allow the Defendants to retain profits or other benefits they have earned from their wrongful conduct.
59. DIRTT pleads and relies upon the *Copyright Act* and its regulations and amendments thereto.
60. DIRTT pleads and relies upon the *Alberta Business Corporations Act*, R.S.A. 2000, c. B-9, and its regulations and amendments thereto.

Breach of Retention Agreements

61. On or about January 17, 2018, each of the Executive Employees entered into a Retention Bonus Agreement (the "**Retention Agreements**") with DIRTT in exchange for the payment of a one-time retention bonus (the "**Retention Bonuses**").
62. The Retention Bonuses paid to each Executive Employee were conditional on, among other things, that the respective Executive Employee was not terminated by DIRTT for just cause prior to certain dates and that the Executive Employees at all times complied with their confidentiality obligations and did not disparage DIRTT (the "**Retention Eligibility Requirements**").
63. The Retention Agreements included clawback provisions whereby 100% of the Retention Bonuses would have to be repaid to DIRTT if at any time prior to September 30, 2018, the respective Executive Employee, among other things, failed to comply with the Retention Eligibility Requirements.
64. Both of the Executive Employees failed to comply with the Retention Eligibility Requirements prior to September 30, 2018, thereby requiring each Executive Employee to pay back to DIRTT 100% of the respective Retention Bonus payments received by each Executive Employee. In particular,

- 15 -

the conduct of the Executive Employees prior to and after their respective terminations, as alleged at paragraphs 45 to 58 above, provide DIRTT with after-acquired just cause to terminate the Executive Employees. Further, the Executive Employees have breached their confidentiality obligations and disparaged DIRTT.

65. In the alternative, if it is determined that the Executive Employees did not breach the Retention Eligibility Requirements prior to September 30, 2018, the Retention Agreements further require that the Executive Employees pay back 50% of their respective Retention Bonuses if they breach the Retention Eligibility Requirements prior to March 31, 2019. As a result, at the very least, the Executive Employees have breached the Retention Eligibility Requirements prior to March 31, 2019 for the reasons set out in paragraph 64 above, thereby requiring the Executive Employees to pay back to DIRTT 50% of their respective Retention Bonuses.
66. DIRTT proposes that the trial of this action be held at Calgary, Alberta. In the opinion of DIRTT, this action will take less than 25 days of trial time.

Relief requested:

67. DIRTT's claim as against the Defendants, jointly and severally, is as follows:
- (a) an interim and permanent injunction:
 - (i) restraining the Defendants from competing against DIRTT, directly or indirectly;
 - (ii) restraining the Defendants from using or disclosing the Confidential Information of DIRTT or otherwise exploiting the Confidential Information;
 - (iii) requiring the Defendants to deliver up all Confidential Information in their possession or control to DIRTT;
 - (iv) restraining the Defendants from using or disclosing the Other Materials or otherwise exploiting the Other Materials;
 - (v) restraining the Defendants from copying, re-creating, using, transferring, assigning, utilizing or exploiting in any way the ICE Software and/or the ICE Software's coding, or portions thereof, in any manner whatsoever;
 - (vi) pursuant to section 39.1 of the *Copyright Act*, restraining the Defendants from making, distributing, selling, exposing or offering for sale, renting, exhibiting in public or parting with possession of, unauthorized copies, in whole or substantial part, of other works or subject matter published, or which will be published in which DIRTT owns copyright or an interest in, copyright granted by license;
 - (vii) requiring the Defendants to deliver up all versions of the ICE Software, related coding, any Other Materials, and any other software, coding or technology

- 16 -

developed by using the ICE Software or Other Materials as a springboard, in their possession or control to DIRTT;

- (viii) in the alternative, requiring that the Defendants immediately destroy all versions and copies of the ICE Software, related coding, any Other Materials, and any other software, coding or technology developed by using the ICE Software or Other Materials as a springboard, in their possession and control;
 - (ix) restraining the Defendants from contacting and soliciting DIRTT clients, directly or indirectly;
 - (x) restraining the Defendants from contacting and soliciting DIRTT employees and consultants, directly or indirectly;
 - (xi) restraining the Defendants from contacting and soliciting DIRTT suppliers, directly or indirectly; and
 - (xii) restraining the Defendants from contacting and soliciting DIRTT Distribution Partners, directly or indirectly;
- (b) a declaration that the Executive Employees breached their duties, including their contractual and fiduciary duties, duty of fidelity, duty of loyalty and good faith and obligations of confidence to DIRTT;
 - (c) a declaration that the Defendants have unlawfully interfered with the economic interests and relations of DIRTT;
 - (d) a declaration that the Defendants have interfered with the contractual relations of DIRTT;
 - (e) a declaration that the Defendants have unlawfully conspired to engage in wrongful acts which cause harm to DIRTT;
 - (f) a declaration that DIRTT at all material times held and continues to hold valid and subsisting copyright(s) in the ICE Software pursuant to the *Copyright Act*, and that DIRTT is the lawful owner of said copyrights;
 - (g) a declaration that DIRTT at all material times held and continues to hold valid and subsisting copyright(s) in certain Other Materials pursuant to the *Copyright Act*, and that DIRTT is the lawful owner of said copyrights, the particulars of which will be proven at trial;
 - (h) a declaration that the Defendants have infringed DIRTT's copyright(s) in the ICE Software, contrary to sections 3 and 27(1) of the *Copyright Act*;
 - (i) a declaration that the Defendants have infringed DIRTT's copyright(s) in certain Other Materials contrary to sections 3 and 27(1) of the *Copyright Act*, the particulars of which will be proven at trial;
 - (j) a declaration that the Defendants have unlawfully copied the ICE Software, its coding, or portions thereof, contrary to section 3 of the *Copyright Act*;

- 17 -

- (k) a declaration that the Defendants have unlawfully copied certain Other Materials contrary to section 3 of the *Copyright Act*, the particulars of which will be proven at trial;
- (l) an order directing the Defendants, and each of them, to return to DIRTT all DIRTT Confidential Information, the ICE Software and Other Materials in the Defendants' possession or control;
- (m) an order directing that Loberg repay to DIRTT his \$500,000 retention bonus payment;
- (n) an order directing that Smed repay to DIRTT his \$1,000,000 retention bonus payment;
- (o) an accounting of revenue and profits of the Defendants at the date of trial;
- (p) judgment requiring the Defendants, jointly and severally, to pay to DIRTT the revenue, profits and other financial gains made by the Defendants, and the damages and losses suffered by DIRTT as a result of the wrongful acts of the Defendants to the date of trial;
- (q) damages in an amount to be proven at trial;
- (r) the costs of recovering and securing DIRTT's Confidential Information;
- (s) special or general damages in the amount of \$12,000,000 or such other amount to be proven at trial;
- (t) damages for copyright infringement in an amount to be proven at trial;
- (u) in the alternative, and at the sole election of DIRTT, an award of statutory damages for all copyright infringements involved in these proceedings, with respect to each infringing work;
- (v) punitive damages in the amount of \$5,000,000;
- (w) aggravated and exemplary damages in an amount to be proven at trial;
- (x) interest pursuant to the terms of the *Judgment Interest Act*, R.S.A. 2000, c. J-1, as amended;
- (y) cost of this action on an indemnity basis, including GST; and
- (z) such further and other relief as this Honourable Court may deem just and appropriate in the circumstances.

- 18 -

NOTICE TO THE DEFENDANTS:

Falkbuilt Ltd., Mogens Smed and Barrie Loberg

You only have a short time to do something to defend yourself against this claim:

20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

2 months if you are served outside Canada

You can respond by filing a statement of defence or a demand for notice in the office of the clerk of the Court of Queen's Bench at Calgary, Alberta, AND serving your statement of defence or a demand for notice on the plaintiff's address for service.

WARNING

If you do not file and serve a statement of defence or a demand for notice within your time period, you risk losing the law suit automatically. If you do not file, or do not serve, or are late in doing either of these things, a court may give a judgment to the plaintiff(s) against you.

39613400_5|NATDOCS

P. Bruce Badger (A4791)
bbadger@fabianvancott.com
Jason W. Hardin (A8793)
jhardin@fabianvancott.com
FABIAN VANCOTT
215 South State Street, Suite 1200
Salt Lake City, UT 84111-2323
Telephone: (801) 531-8900

Attorneys for Defendants Falkbuilt Ltd., Falkbuilt, Inc., and Mogens Smed

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, NORTHERN DIVISION**

DIRTT ENVIRONMENTAL
SOLUTIONS, INC., DIRTT
ENVIRONMENTAL SOLUTIONS
LIMITED,

Plaintiffs,

vs.

LANCE HENDERSON, KRISTY
HENDERSON, FALKBUILT, INC.,
FALKBUILT LTD., MOGENS
SMED, AND FALK MOUNTAIN
STATES, LLC,

Defendants.

Case No. 1:19CV00144-DBB-DBP

NOTICE OF CONSENT:

**(1) TO CANADIAN JURISDICTION
BY FALKBUILT, INC., AND**

**(2) TO ENTRY OF STIPULATED
PRELIMINARY INJUNCTION IN
THE COURT OF QUEEN'S
BENCH, ALBERTA AS TO
FALKBUILT LTD., FALKBUILT,
INC. AND MOGENS SMED**

Honorable David B. Barlow

Magistrate Judge Dustin B. Pead

Pursuant to the order of the Court on May 19, 2021, [Dkt. 162], Defendants Falkbuilt Ltd., Falkbuilt, Inc. (collectively “Falkbuilt”) and Mogens Smed (“Mr. Smed”) hereby file this formal Notice of Consent to the following:

1. In the event of and following this Court’s dismissal of the First Amended Complaint, [Dkt. 117], as to Falkbuilt and Mr. Smed for *forum non conveniens*, Falkbuilt, Inc. consents to service of process in Alberta, Canada, and to the jurisdiction of the Court of Queen’s Bench of Alberta.

2. In the event of and following this Court’s dismissal of the First Amended Complaint, [Dkt. 117], as to Falkbuilt and Mr. Smed for *forum non conveniens*, Falkbuilt and Mr. Smed consent and stipulate that the *Order*:

- *Granting in Part [5] Motion for Preliminary Injunction to Preserve the Status Quo; and*
- *Finding as Moot [6] Motion to Expedite Discovery, entered on March 13, 2020, [Dkt. 61], (the “Stipulated Preliminary Injunction”), may be entered in the Court of Queen’s Bench of Alberta, and they consent to be bound thereby.*

Dated this 21st day of May, 2021.

/s/ Jason W. Hardin
P. Bruce Badger
Jason W. Hardin
FABIAN VANCOTT
*Attorneys for Defendant Falkbuilt Ltd.,
Falkbuilt, Inc., and Mogens Smed*

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May, 2021, I caused a true and correct copy of the foregoing **NOTICE OF CONSENT: (1) TO CANADIAN JURISDICTION BY FALKBUILT, INC., AND (2) TO ENTRY OF STIPULATED PRELIMINARY INJUNCTION IN THE COURT OF QUEEN’S BENCH, ALBERTA AS TO FALKBUILT LTD., FALKBUILT, INC. AND MOGENS SMED** was served via the Court’s electronic filing system as follows:

Alan C. Bradshaw
abradshaw@mc2b.com
Chad R. Derum
cderum@mc2b.com
Jack T. Nelson
jnelson@mc2b.com
Mitch M. Longson
mlongson@mc2b.com
*Manning Curtis Bradshaw & Bednar
PLLC*
136 E. South Temple, Suite 1300
Salt Lake City, Utah 84111
*Attorneys for Defendants Lance
Henderson, Kristy Henderson and Falk
Mountain States, LLC*

Jeffrey J. Mayer (*pro hac vice*)
Jeffrey.mayer@akerman.com
Catherine A. Miller (*pro hac vice*)
Catherine.miller@akerman.com
Timothy K. Sendek (*pro hac vice*)
Tim.sendek@akerman.com
Akerman LLP
71 So. Wacker Drive, 47th Floor
Chicago, IL 60606
Attorneys for Plaintiff

Chad E. Nydegger
cnydegger@wnlaw.com
Workman Nydegger
60 East South Temple, Suite 1000
Salt Lake City, Utah 84111
Attorneys for Plaintiff

/s/ Jason W. Hardin

THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

DIRTT ENVIRONMENTAL SOLUTIONS,
INC., and DIRTT ENVIRONMENTAL
SOLUTIONS, LTD.,

Plaintiffs,

v.

LANCE HENDERSON, KRISTY
HENDERSON, FALKBUILT, INC.,
FALKBUILT LTD., MOGENS SMED, and
FALK MOUNTAIN STATES, LLC,

Defendants.

**MEMORANDUM DECISION AND
ORDER GRANTING [134] MOTION TO
DISMISS FIRST AMENDED
COMPLAINT AS TO DEFENDANTS
FALKBUILT LTD., FALKBUILT INC.
AND MOGENS SMED AND DENYING
PLAINTIFFS' ORAL MOTION TO
AMEND**

Case No. 1:19-cv-00144-DBB

District Judge David Barlow

Before the court is Defendants Falkbuilt, Ltd., Falkbuilt, Inc., and Mogens Smed's Motion to Dismiss First Amended Complaint as to Defendants Falkbuilt, Ltd., Falkbuilt, Inc. and Mogens Smed ("Motion to Dismiss").¹ Plaintiffs filed a memorandum in opposition and Defendants replied.² On May 19, 2021, a hearing on the Motion to Dismiss was held. At that time, the court preliminarily granted the Motion to Dismiss and directed Defendants to file a notice with the court regarding their consent to be bound by the stipulated preliminary injunction and to not object if Plaintiffs seek to have the preliminary injunction entered in the related, ongoing action in Canada.³ At the conclusion of the hearing, Plaintiffs made an oral motion for

¹ [ECF No. 134](#), filed Nov. 19, 2020. Defendants Lance Henderson, Kristy Henderson, and Falk Mountain States, LLC did not join in the motion or otherwise respond.

² Opposition to Motion to Dismiss First Amended Complaint as to Falkbuilt Ltd., Falkbuilt, Inc. and Mogens Smed [Dkt. 134], [ECF No. 139](#), filed Dec. 17, 2020; Reply Memorandum in Support of Motion to Dismiss First Amended Complaint as to Falkbuilt Ltd., Falkbuilt, Inc., and Mogens Smed (Dkt. 134), [ECF No. 143](#), filed Jan. 15, 2021.

³ Minute Entry for Proceedings held before Judge David Barlow, ECF No. 162, entered May 19, 2021.

leave to amend their complaint to address the court's observations about Plaintiffs' collective pleading and the fact that the complaint did not, despite attorney argument, clearly limit alleged injuries and damages to the United States. The court took the motion under advisement.

The court now denies Plaintiff's motion to amend because it would be futile. Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, a party may amend its pleadings, after the time for amending as a matter of course, "only with the opposing party's written consent or the court's leave."⁴ "Although leave to amend shall be freely given when justice so requires, whether leave should be granted is within the trial court's discretion."⁵ "A court properly may deny a motion for leave to amend as futile when the proposed amended complaint would be subject to dismissal for any reason[.]"⁶ The key facts relevant to the court's forum non conveniens decision cannot be changed. The two competitor parent companies in this matter, DIRTT, Ltd. and Falkbuilt, Ltd., are both Canadian companies with their primary places of business in Alberta, Canada. DIRTT, Ltd. initially filed suit against Falkbuilt, Ltd. in Alberta, Canada, alleging that its former CEO, Mogens Smed, a resident of Alberta, Canada, misappropriated trade secrets and wrongfully recruited DIRTT, Ltd. employees when he founded Falkbuilt, Ltd. in Alberta, Canada. The allegedly wrongful actions spread to the United States, involving multiple other related or otherwise involved entities and individuals.

Plaintiffs have proposed that they file a third complaint to clarify their general treatment of DIRTT, Ltd. and DIRTT, Inc. collectively and to expressly aver that they are seeking no damages outside of the United States. While this could have some effect on the forum non

⁴ Fed. R. Civ. P. 15(a).

⁵ *Las Vegas Ice & Cold Storage Co. v. Far w. Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990) (internal citations omitted).

⁶ *Bauchman ex rel. Bauchman v. W. High Sch.*, 132 F.3d 542, 562 (10th Cir. 1997).

conveniens analysis, its impact would be too limited to change the overall outcome. Canada remains an adequate alternative forum, Canadian law is applicable, and the private and public interests favor dismissal.⁷ Although the dispute between the parties has grown beyond Canada, the parent companies are in Alberta, the former CEO of one and current founder of the other is in Alberta, the intellectual property at issue is owned by an Alberta entity, and the first wrongful acts allegedly occurred there. Clarifying the roles of DIRTT, Ltd. (an Alberta, Canada company with its principal place of business in Alberta, Canada) and DIRTT, Inc. (originally identified by Plaintiffs as a Colorado company with its principal place of business in Alberta, Canada, but now allegedly a U.S.-only business) would not result in a different forum non conveniens determination. Neither would limiting the claim for injuries to the United States, though that would make the issue a marginally closer decision. The court in Alberta, Canada where DIRTT, Ltd. first initiated litigation, where depositions already are scheduled, and where the two parent companies are located, clearly is the most convenient forum for the broader litigation and any trial between the parties—including Defendants’ counterclaims which this court recently dismissed at Plaintiff’s request in favor of the Alberta court—no matter what subsequent amendments Plaintiffs might propose in this litigation.

Engaging in a futile exercise simply increases the costs for all involved. Accordingly, the court must deny Plaintiffs’ motion for leave to file a third complaint in this matter, at least for its intended purpose of altering the court’s forum non conveniens decision. The case will continue here against Falk Mountain States, LLC, Lance Henderson, and Kristy Henderson—the Utah entity and individuals only. Should Plaintiffs find a need to file an amended complaint against

⁷ *Archangel Diamond Corp. Liquidating Trust v. Lukoil*, 812 F.3d 799, 804-09 (10th Cir. 2016).

these Utah-based defendants and can show good cause, they may file a timely motion for leave to amend.

ORDER

For the reasons stated on the record at the conclusion of the May 19, 2021 hearing on the motion, Defendants' Motion to Dismiss is GRANTED. Plaintiffs' First Amended Complaint and any claims therein with respect to Defendants Falkbuilt, Ltd., Falkbuilt, Inc., and Mogens Smed are DISMISSED WITHOUT PREJUDICE.


Plaintiffs' oral motion to amend their complaint is DENIED.

Based upon the stipulation of the parties,⁸ the parties agree to be bound by the terms of the preliminary injunction and to facilitate entry of the preliminary injunction by the Canadian court, if Plaintiffs so choose.

Based upon the stipulation of the parties, documents designed as "attorneys-eyes-only" by Plaintiffs and Defendants Falkbuilt, Ltd., Falkbuilt, Inc., and Mogens Smed may be shared with their Canadian counsel, subject to the same confidentiality requirements.

Signed May 21, 2021.

BY THE COURT



David Barlow
United States District Judge

⁸ Defendants filed their notice, confirming their agreement to be bound by the stipulated preliminary injunction. Notice of Consent: (1) To Canadian Jurisdiction by Falkbuilt, Inc., and (2) To Entry of Stipulated Preliminary Injunction in the Court of Queen's Bench, Alberta as to Falkbuilt, Ltd., Falkbuilt, Inc. and Mogens Smed, [ECF No. 163](#), filed May 21, 2021.

1 I don't need to tell you this because you're on
2 Zoom all the time, but I'm going to tell it to you anyway. If
3 you don't want to be overheard including through the court PA
4 system that this is all being fed through, you want to put
5 yourself on mute. And you can disappear until 3:15 with
6 perfect confidence that I'm not going to come back at 3:08 or
7 3:12 and wonder where you are. With that we stand in recess.

8 (Recess.)

9 THE COURT: We're back on the record in case
10 Number 1:19-CV-144. Counsel, let me thank you for the extra
11 time that I took there. I appreciate the advocacy for this
12 case. I'm going to give you a preliminary ruling today. It's
13 going to take me sometime to do. As you understand based on
14 your briefing and your arguments today this is a multifactor
15 analysis that has a number of moving parts, and to do it
16 justice is going to require me to give you a relatively
17 lengthy ruling. I know that both sides are keen to want the
18 results and to know as soon as possible, and this is the
19 fastest way to do that.

20 Let me note at the outset that DIRTT contends in
21 its briefing that Falkbuilt waived its ability to contest
22 jurisdiction in this matter in this court by failing to assert
23 a defense pursuant to FRCP 12(b)(2). I find that DIRTT is
24 incorrect regarding Falkbuilt's argument and request for
25 relief. Falkbuilt in filing its motion to dismiss for forum

1 non conveniens has not contested the Court's jurisdiction over
2 the case. Instead Falkbuilt is requesting that I decline to
3 continue exercising jurisdiction because another more
4 convenient forum exists. Falkbuilt has not waived its ability
5 to request that action.

6 The primary issue before the Court today is whether
7 DIRTT's first amended complaint should be dismissed with
8 respect to defendant's Falkbuilt, Ltd, Falkbuilt, Inc., and
9 Mogens Smed, apologies for any mispronunciation, under the
10 forum non conveniens doctrine. The Court recently underwent
11 this analysis in granting DIRTT's motion to dismiss
12 Falkbuilt's amended counterclaims without prejudice, and now
13 Falkbuilt is requesting the same result for DIRTT's first
14 amended complaint.

15 The standard should be well known to all. The
16 doctrine of forum non conveniens permits a court to dismiss a
17 case when an adequate alternative forum exists in a different
18 judicial system and there is no mechanism by which the case
19 may be transferred. That's the Kelvion case, 10th Circuit
20 2019.

21 The central purpose of any forum non conveniens
22 inquiry is to ensure that the trial is convenient. That's the
23 Piper Aircraft case from the Supreme Court 1981.

24 To determine whether dismissal is appropriate based
25 on forum non conveniens, I examine two threshold questions.

1 First, there must be an adequate alternative forum where the
2 defendant is amenable to process; and second, the court must
3 confirm that foreign law is applicable.

4 If both threshold requirements are met, then the
5 court then proceeds to weigh a set of private and public
6 interest factors. That's the Archangel Diamond case, 10th
7 Circuit, 2016.

8 The forum non conveniens determination is committed
9 to the sound discretion of the trial court through Piper.

10 The first threshold requirement is that there must
11 be an adequate alternative forum where the defendant is
12 amenable to process.

13 Here, Falkbuilt and Smed assert that Canada is an
14 adequate alternative forum and they are amenable to process
15 there. DIRTT, Limited, filed suit against Falkbuilt, Ltd, and
16 Mr. Smed in Alberta, Canada, on May 9, 2019, approximately
17 seven months before DIRTT, Inc., initiated this suit against
18 Falkbuilt, Inc.

19 Falkbuilt argues that DIRTT has not meaningfully
20 distinguished the first amended complaint from its claims in
21 the first filed, ongoing Canadian litigation brought by
22 Falkbuilt, Ltd. Both suits allege misappropriation and misuse
23 of DIRTT's confidential information and assert claims of false
24 advertising and market confusion. DIRTT contests this
25 assertion arguing that the Canadian action is limited to the

1 alleged breach of Mr. Smed's contractual obligations to DIRTT
2 and damages sustained in Canada while the US action is limited
3 to damages in the United States. Both sides have also covered
4 that argument here today.

5 Let me stop here for a moment and note that I
6 reviewed the prayer for relief in the complaint, and I do not
7 find that the prayer for relief limits the damages in this
8 case to those that occurred in the United States.

9 All right. Moving on, then, a careful review of
10 the first amended complaint and the amended statement of claim
11 in the Canada action supports Falkbuilt's position here.
12 While only the Canada action includes contractual claims
13 regarding Mr. Smed, there is significant overlap between the
14 alleged wrongful actions and the relief sought in both
15 actions. Here's some examples.

16 DIRTT alleges that it offers its services
17 throughout the United States, Canada and other international
18 markets and has acquired goodwill and reputation around the
19 world. That's the first amended complaint at Paragraph 3, 7
20 and amended statement of claim at Paragraph 13.

21 Next, DIRTT alleges that Falkbuilt and Mr. Smed
22 have misappropriated and misused DIRTT's confidential
23 information, solicited the business of DIRTT customers and
24 stolen DIRTT employees, unfairly competed with DIRTT, and
25 caused market confusion. That is, for example, the first

1 amended complaint, Paragraphs 33 through 34, 38, and the
2 amended statement of claim, Paragraph 35-44, 61 and 65.

3 DIRTT also seeks a preliminary and permanent
4 injunction restraining defendants from disclosing and using
5 DIRTT's confidential information and trade secrets; and
6 ordering defendants to return DIRTT's confidential
7 information. See, for example, the first amended complaint at
8 Paragraph 77; and the amended statement of claim Paragraph 86.

9 DIRTT also seeks judgments for lost profits caused
10 by defendant's actions, damages, punitive damages, aggravated
11 and exemplary damages, and costs. See for example the first
12 amended complaint 77; the amended statement of claim
13 Paragraph 86.

14 It is true that DIRTT seeks relief under different
15 legal vehicles here in the US, for example, the Lanham Act and
16 in the Canadian action, the copyright act. But DIRTT's
17 pleadings indicate that both courts may address the same
18 alleged wrongful conduct and ultimately may grant substantive
19 relief.

20 The availability of an adequate forum does not
21 depend on the existence of the identical causes of action in
22 the other forum, nor on identical remedies. That's the
23 10th Circuit in the Archangel case, 2016. In that case I
24 might not that the court found that Russia was an adequate
25 alternative forum for the case at bar, for that case.

1 In its briefing DIRTT expressed concern about a
2 Canadian court's ability to enjoin Falkbuilt, Inc., a
3 US entity. It also questioned the enforcement of a Canadian
4 judgment in the US. In support, DIRTT in its briefing cites a
5 number of cases that it says are important that I find that
6 are distinguishable or do not support its position.

7 Let's start with Medellin v. Texas case, Supreme
8 Court, 2008. The case is fully factually inapposite here
9 since it deals with a foreign national seeking reconsideration
10 of his state criminal conviction on the grounds that the
11 International Court of Justice found that he had not been
12 informed of his Vienna Convention rights. It goes without
13 saying that the factual posture there could not be more
14 different than the one case here.

15 The court specifically stated in particular, quote:
16 Our holding does not call into question the ordinary
17 enforcement of foreign judgments, but Medellin does not ask us
18 to enforce a foreign court judgment settling a typical
19 commercial or property dispute.

20 Obviously the case that is here before me today is
21 a commercial dispute, again making Medellin inapposite.

22 Finally, I not that the Medellin court was
23 considering the Restatement Third of foreign relations of the
24 United States, not the Restatement Second of Conflicts. The
25 latter supports the recognition and enforcement of foreign

1 injunctions by US courts under comity principles.

2 DIRTТ also cites the Color Switch, LLC, vs. Fortafy
3 Games case, Eastern District of California, 2019, affirmed by
4 the Ninth Circuit last year. But that case clearly supports
5 finding that Canada is an adequate alternative forum. The
6 Court in Color Switch found that, the key determination is
7 whether the remedy provided by the alternative forum is so
8 clearly inadequate or unsatisfactory that there is no remedy
9 at all. No showing has been made that the Alberta court has
10 so little authority to address the issues in this case that it
11 can afford no remedy at all. DIRTТ's actions in filing there
12 first also practically undermine such concern.

13 The Color Switch court further observed that a
14 party need not be guaranteed identical recourse in the foreign
15 forum, nor is the Court required to predict the outcome of any
16 proceeding in a foreign court.

17 DIRTТ here seeks much of the same relief in this
18 action as it does in the Canadian action. And the Canadian
19 court can clearly provide some relief, not no remedy at all.

20 DIRTТ also cites Silva Cruz vs. General Motors,
21 Eastern District of Michigan 2020, which found that defendant
22 had not met its burden because it provided no evidence that
23 its consent to jurisdiction would be legally meaningful. And,
24 of course, DIRTТ is concerned about Falkbuilt, Inc.'s,
25 representation that it will consent to jurisdiction.

1 In the Silva Cruz case GM argued the action should
2 be litigated in Mexico, but did not specifically identify
3 which Mexican court would have jurisdiction over the action.
4 The Silva Cruz court noted that Mexico has many courts,
5 federal, state and specialized tribunal.

6 It said, quote: An alternative forum is typically
7 available if the defendant is amenable to process there and is
8 generally adequate if it can remedy the alleged harm.

9 So unlike the Silva Cruz case, here Falkbuilt's
10 consent to jurisdiction in Canada should be legally
11 meaningful. There is already another action in Canada in a
12 specific court that exists between the parent companies and
13 includes Mr. Smed, as well. The alleged wrongdoing in
14 Canadian action and requested relief also substantially
15 overlaps with this action.

16 Finally, the Downrange Headquarters, District of
17 Utah, November 2019 has cited:

18 The majority of that opinion as Falkbuilt
19 has correctly notes addresses personal jurisdiction. The case
20 did not deeply analyze the non conveniens factors.
21 Additionally, unlike in Downrange the trade secret in this
22 case is held by a Canadian company, DIRTT, Ltd, not a US
23 entity; and there is a preexisting Canadian case involving the
24 parent company that holds the trade secret.

25 So instead of being support for keeping the case

1 here, it really pretty clearly points to why the case can be
2 in Canada.

3 DIRTT also requested injunctive relief of the
4 Canadian courts in its amended statement of claim. In doing
5 so DIRTT must have believed that the Canadian court had the
6 ability to enter some injunctive relief that would assist it.

7 Finally, I note that a foreign country judgment may
8 be enforced in Utah courts under principles of comity. This
9 has already been decided by the 10th Circuit in the
10 Society of Lloyd's vs. Reinhart case, 2005.

11 Therefore, the first threshold requirement is met.
12 The Canadian court in which DIRTT, Ltd, has already filed a
13 related lawsuit is an available and adequate forum for the
14 claims against defendants Falkbuilt, Ltd; Falkbuilt, Inc.; and
15 Mr. Smed.

16 The second threshold requirement is that foreign
17 law is applicable and domestic law does not control.

18 DIRTT argues that as a preliminary matter to the
19 choice of law analysis Falkbuilt must first establish that a
20 conflict exists between the laws of the relevant
21 jurisdictions. This is simply incorrect. The Snyder case
22 from the District of Utah, 1994, DIRTT cites was assessing
23 which state law to apply, not conducting a forum non
24 conveniens analysis.

25 Piper teaches me that a court ordinarily adopts the

1 choice of law rules of the state in which it sits. On this
2 point, the parties are in agreement that the Court should
3 apply Utah's choice of law rules and the most significant
4 relationship test from the Section 145 of the Restatement
5 Second of Conflict of Laws. This test involves four factors
6 as the parties well know.

7 The first Restatement factor from Section 145
8 involves the place where the injury occurred. DIRTT states in
9 its brief that Falkbuilt stole confidential information in
10 Canada, but that it is only seeking damages based on the
11 alleged improper use of that information in the United States.
12 However, as I noted previously, the first amended complaint
13 does not explicitly limit the injury or the damages sought to
14 the United States and contains numerous statements that are
15 broad regarding the damages and the injury. And I'm not going
16 to pour into the entirety of the complaint a predicate clause
17 from one paragraph and use that to determine that there is
18 absolutely no circumstance under which DIRTT would be seeking
19 damages outside of the United States. Similarly attorney
20 representations are not enough.

21 The first amended complaint alleges or implies
22 economic injury and market confusion in the US and in Canada.
23 It does not explicitly limit the injury and the damages to the
24 United States. A parent company, DIRTT, Ltd, is the owner of
25 the trade secret information at issue and licenses to its

1 subsidiary or its related company DIRTT, Inc. All orders from
2 DIRTT, Ltd, and DIRTT, Inc., are submitted through DIRTT,
3 Ltd.'s, software to DIRTT, Ltd.'s, manufacturing facilities
4 for production, packaging, and shipping. And those facilities
5 have been identified elsewhere.

6 Also DIRTT's generic use of the terms DIRTT and
7 Falkbuilt throughout the first amended complaint makes it
8 impossible to distinguish between the allegations involving
9 the parent and the related company, both in terms of alleged
10 actions and the injury suffered.

11 So, for example, we took some time during the
12 break, and I went back and took a look at a few of the
13 allegations in the lengthy complaint. The first two
14 allegations regarding the parties identified DIRTT, Inc., as a
15 Colorado company with its principal places of business in
16 Georgia and Arizona, although it's been noted at the outset of
17 this litigation that its principal place of business was in
18 fact Canada.

19 Paragraph 2 tells me that DIRTT, Ltd, is a Canadian
20 company. But then the confusion immediately begins through
21 collective allegations and pleading. In Paragraphs 3, 4, 5,
22 6, and 7, DIRTT, Ltd, and DIRTT, Inc., which counsel tells me
23 are totally separate and which are operating on other sides of
24 the border, are referred to either as DIRTT with no
25 distinction or plaintiffs with no distinction and obviously in

1 the plural. If I counted it up correctly just in Paragraphs 2
2 through -- or 3 through 7, so five paragraphs, I count about
3 11 collective plaintiffs/DIRTT without an Ltd or Inc.,
4 reference. So I don't think there is any way I can find the
5 first amendment complaint as alleged to be merely as precise
6 and as distinctive as to the two entities, their conduct,
7 their claims, their injuries and damages as counsel has asked
8 me to do based on his attorney representations.

9 All right. The alleged injury occurred across
10 borders. I will note despite all of the difficulty and
11 confusion that I just went through, that the Court does not
12 weigh this factor in favor of applying Canadian law or
13 domestic law. It's simply not limited to those two in those
14 areas.

15 Second, the Court looks for the place where the
16 conduct causing the injury occurred. DIRTT alleges that
17 Mr. Smed learned of its confidential information and trade
18 secrets while employed by DIRTT, Ltd, in Canada and that he
19 misappropriated that information in Canada.

20 The first amended complaint alleges that conduct
21 causing the injury occurred in the United States and Canada
22 and any other location as revealed for the alleged theft of
23 DIRTT's confidential information. That's the first amended
24 complaint at Paragraph 23. But what has been presented to
25 this court so far primarily points to Canada.

1 Also, through its discovery requests, DIRTT has
2 sought information about Falkbuilt Canadian employees. In its
3 motion to compel production of Falkbuilt, Ltd., information
4 from Canadian employees DIRTT asserts that former DIRTT
5 employees now employed by Falkbuilt in Canada stole DIRTT
6 information and that DIRTT's complaint refers to utilization
7 of DIRTT information, not where it was taken and alleges
8 Canadian wrongdoing. It appears likely that the primary
9 conduct initiating and causing the injury occurred in Canada.

10 While additional conduct very well may have
11 extended beyond Canada based on DIRTT's allegations and
12 Falkbuilt's defenses, Canada has the stronger claim to being
13 the place where the conduct causing the injury occurred, even
14 though that conduct crosses the border. Any theft or
15 misappropriation of DIRTT's confidential information initially
16 occurred in Canada. So this factor favors applying Canadian
17 law.

18 Third, the Court looks to the domicile, residence,
19 nationality, place of incorporation and place of business of
20 the parties. This factor has not changed much since the
21 Court's analysis regarding DIRTT's motion to dismiss
22 Falkbuilt's counterclaims, perhaps not at all. Both parties
23 conduct business internationally. Falkbuilt, Ltd, is
24 incorporated in Calgary, Alberta, Canada, and has its
25 headquarters and principal place of business in Calgary,

1 Alberta, Canada. DIRTT, Ltd is incorporated in Canada and has
2 its headquarters and principal place of business in Calgary,
3 Alberta, Canada. DIRTT, Inc., is a Colorado corporation, and
4 until recently, meaning between the original complaint and the
5 amended complaint had its principal place of business in
6 Calgary, Alberta, Canada. Both parties clearly have
7 undeniably strong ties to and presence in Canada. Falkbuilt
8 acknowledges that DIRTT, Inc., and Falkbuilt, Inc., the two
9 wholly owned US subsidiaries that are not part of the Canadian
10 litigation, but DIRTT, Inc., could easily be joined as a party
11 to the Canadian action, and Falkbuilt, Inc., has represented
12 to this court that it consents to being sued in Canada, and it
13 would be held to that representation.

14 That would allow, if the case was moved to Canada,
15 it would allow this case to proceed on its narrow Utah focus
16 against Lance Henderson, Kristy Henderson, and Falk Mountain
17 States, LLC.

18 Mr. Smed, a citizen and resident of Canada, is at
19 the center of DIRTT's claims against Falkbuilt, further
20 solidifying this factor in favor of applying Canadian law.
21 And I think that really cannot be denied by either side. If
22 anyone has a claim to being the focal point in the litigation
23 though it's broad and involves a number of entities and
24 individuals is clearly Mr. Smed, and it's Canada for Mr. Smed.

25 The fourth and final factor looks to the place

1 where the relationship between the parties is centered. This,
2 too, is clear. The parties' relationship originated and ended
3 up, both Falkbuilt, Ltd, and DIRTT, Ltd, have their
4 headquarters in Canada, and Mr. Smed resides there.

5 It is the Canadian parent company, DIRTT, Ltd, that
6 holds the trade secrets at issue, as I mentioned and
7 originally employed any employees, including its former CEO
8 Mr. Smed, that are alleged to have stolen and misappropriated
9 DIRTT's confidential information. So this factor supports the
10 applicability of Canadian law.

11 Considering all of the choice of law factors
12 together, the factors demonstrate that Canadian law is
13 applicable to DIRTT's claims against Falkbuilt and Smed.

14 Because both threshold requirements have been met,
15 the next step in a forum non conveniens analysis is to weigh a
16 set of private and public interests. Ordinarily, there is a
17 strong presumption in favor of hearing the case in the
18 plaintiff's choice of forum, but that presumption can be
19 overcome when the private and public interest factors weigh in
20 favor of trial in a different forum. In the Piper case, the
21 Supreme Court also made it clear that a foreign plaintiff is
22 entitled to less deference.

23 I was told during oral argument that a Supreme
24 Court or 10th Circuit court had been provided to me that made
25 it clear that any company in the United States, any entity or

1 individual would not be foreign for these purposes. I'm not
2 aware of any such authority, and none has been identified
3 specifically to me.

4 But in any event not only is it my finding that
5 DIRTT, Inc., is in fact a foreign plaintiff, but as this
6 analysis will demonstrate, the fact the private and public
7 factor weights quite heavily in favor of a trial in Canada,
8 nevertheless, even if I were to find that DIRTT, Inc., is not
9 foreign in these purposes.

10 All right. Regarding the privates interests.
11 They're outlined in Archangel. They are as follows.

12 The first private interest, relative ease of access
13 to sources of proof weighs in favor of dismissal based on
14 forum non conveniens. Falkbuilt and DIRTT, the Ltd.'s, both
15 have their principal places of business in Calgary. DIRTT
16 alleges that over 50 DIRTT employees have joined Falkbuilt
17 including Mr. Smed. That's the first amended complaint,
18 Paragraph 39.

19 Relatedly given the likely need for witnesses from
20 the parties' principal places of business, I say likely need,
21 but I think we know realistically it's a certain need,
22 something which DIRTT's discovery requests in this case makes
23 clear, the second and third interests also weigh in favor of
24 dismissal based on forum non conveniens. The number of
25 nonparty, former DIRTT employees residing in the United States

1 appears based on what I have before me likely to be
2 significantly smaller compared to the number of former DIRTT
3 employees residing in Canada. In the course of these
4 proceedings, DIRTT filed a motion to compel discovery of
5 Falkbuilt Canadian employees. That discovery will be more
6 easily obtained in Canada. For the nonparty former DIRTT
7 employees identified in the United States, the district courts
8 in the United States may also compel testimony or production
9 of documents from a resident of that district to be used in
10 litigation in Canada. That is, for example, the Logan
11 International, case, Southern District of Texas, 2012. And
12 that remained unrebutted. And see also 28 USC 1782(a).

13 The fourth interest, a view of the premises, favors
14 dismissal. Both Falkbuilt and DIRTT have their headquarters
15 and factories in Canada. If inspection of those premises is
16 necessary, inspection will be more accessible in a Canadian
17 forum.

18 Finally, all other practical problems weigh in
19 favor of dismissal based on forum non conveniens for the
20 reasons stated, the parties' business presence in Canada,
21 their history there and misappropriation of confidential
22 information in Canada, all of that certainly started there
23 allegedly. Judicial economy favors resolution of the bulk of
24 these claims against Falkbuilt and Mr. Smed in one trial. And
25 that trial should occur in the first filed case at the

1 litigation of the parent companies and Mr. Smed, who as I've
2 noted a couple of times is the former CEO of one and the
3 founder of the other. The alleged wrongful conduct began
4 there and then spread. Those witness and documents would be
5 found there, even though there would be witnesses from other
6 locations, as well.

7 So I find that the private interests, considered
8 together, firmly weigh in favor of dismissal.

9 The relevant public interests just like the private
10 ones are laid out in Archangel, and they are as follows: The
11 first interest, the administrative difficulties of the courts
12 with congested dockets does play a strong role in the court's
13 analysis, really doesn't play any role because there is
14 insufficient information about comparative court congestion.

15 The second interest is the burden of jury duty on
16 members of a community with no connection to the litigation.
17 This interest somewhat favors dismissal.

18 DIRTT has alleged market confusion and injury which
19 transcend any single place. While Utah has some connection to
20 this claim and certainly has connection to the claims against
21 the Hendersons and Falk Mountain States contrast, Albertans
22 are more connected to both sides for the many reasons
23 previously stated. Moreover, DIRTT will still be able to
24 proceed with its claims against the Hendersons and Falk
25 Mountain States, which are more directly tied to Utah.

1 The third interest involves local interests. The
2 alleged actions originated in Canada between Canadian
3 companies and Canadian individuals. Both companies conduct
4 business internationally, and so the interest in deciding the
5 controversy is not entirely localized. Nevertheless, DIRTT's
6 allegations primarily center around confidential information
7 and trade secrets owned by a Canadian company.

8 DIRTT broadly alleges dissemination of that
9 information, that material within Canada and the United
10 States. But with respect to Falkbuilt and Mr. Smed, their
11 alleged behavior appears focused on Canada. Alberta has a
12 much stronger local interest in the broad dispute between
13 DIRTT and Falkbuilt, while Utah has an interest in the
14 proceeding with respect to the Hendersons, the other Utah
15 residents, Falk Mountain States, a Utah company. So this
16 interest favors dismissal of the broader case.

17 The fourth interest weighs most heavily in favor of
18 dismissal based on forum non conveniens. Based on the outcome
19 of the court's choice of law analysis, it seems far more
20 appropriate to allow the case to be decided in a forum
21 familiar with the applicable law. As mentioned, the alleged
22 wrongdoing and relief sought is substantially similar between
23 the two actions. And regarding an important piece of this
24 litigation the trade secrets that are at issue are in fact
25 Canadian trade secrets.

1 The Canadian court action was initiated well before
2 this action, about seven months before. As such, the Canadian
3 court is already familiar with the parent companies. Mr. Smed
4 and other former DIRTT employees named as defendants in the
5 amended statement of claim and referenced in the first amended
6 complaint. Canadian law is applicable to the claims made in
7 the first amended complaint, and so adjudication in Canada
8 rather than Utah is appropriate.

9 Taken together, I find that the private and public
10 interest factors weigh heavily in favor of a forum non
11 conveniens dismissal.

12 This finding that I'm making today, however, is
13 preliminary. Let me sum up and then I'll tell you what it
14 means.

15 At its core, based on the materials I have before
16 me, this dispute primarily involves Canadian actors together
17 with others and their alleged actions in Canada with
18 additional actions and effects outside of Canada, including
19 the United States and perhaps elsewhere. Mr. Smed is at the
20 very center of this action. He is a Canadian citizen; he's a
21 former executive of DIRTT, Ltd, the head executive, in fact,
22 which is DIRTT, Inc.'s, parent company in Canada and is the
23 founder of Falkbuilt in Canada. He gained information about
24 DIRTT operations while employed in Canada. He left DIRTT and
25 started Falkbuilt, Ltd, in Canada.

1 DIRTT claims that Mr. Smed masterminded this theft
2 of DIRTT's confidential information and engaged in other
3 wrongdoing, such as luring away Canadian DIRTT employees and
4 utilizing DIRTT's information to unfairly compete against
5 DIRTT. While DIRTT and Falkbuilt have expanded their
6 operations across the border into the US, the dispute
7 originated in Canada when Mr. Smed left DIRTT, Ltd, in Canada.

8 DIRTT has made substantially similar allegations
9 against Falkbuilt and Mr. Smed in the Canadian action.
10 Although the legal vehicles by which the Canadian court
11 reviews those allegations may be different from a US court,
12 DIRTT has requested substantially similar relief in both
13 actions. Also as noted previously different legal theories
14 and even different relief does not make a forum inadequate.
15 It's a settled matter of Black Letter law.

16 The Canadian court is best suited to handle all of
17 the claims between Falkbuilt, DIRTT, and Mr. Smed in one
18 proceeding, which includes Falkbuilt's counterclaims which I
19 previously dismissed at DIRTT's request at the last hearing.
20 Therefore, the litigation and trial will be more convenient
21 there.

22 Therefore, based on the two threshold issues of an
23 adequate alternative forum and the applicability of Canadian
24 law, the balance of the private and public interests in making
25 a forum non conveniens determination, the court is inclined to

1 dismiss DIRTT's claims in its first amended complaint against
2 defendants Falkbuilt, Ltd; Falkbuilt, Inc.; and Mr. Smed
3 without prejudice.

4 The remaining defendants, Lance Henderson, Kristy
5 Henderson, and Falk Mountain States, LLC, did not join in the
6 motion to dismiss or otherwise respond. The Hendersons and
7 Falk Mountain States have strong Utah connections. The
8 lawsuit against them is properly before this court, and there
9 is not a more convenient forum for it.

10 This action will proceed then if I make this
11 preliminary determination final only with respect to the
12 defendants Lance Henderson, Kristy Henderson and Falk Mountain
13 States, LLC. I'm not going to reach Falkbuilt's alternative
14 argument the case should be dismissed under the doctrine of
15 abstention or international comity.

16 I want to make a couple of notes here. Falkbuilt,
17 Inc., is represented that it would consent to Canadian
18 jurisdiction. Because this case remains with respect to the
19 other defendants, the court expects that if Falkbuilt, Inc.,
20 does not stand by its word to be joined as a party in that
21 suit, that this matter will be brought to my attention so that
22 I may address it.

23 While Mr. Hardin has not had the opportunity yet to
24 speak with his client regarding the concern that Mr. Mayer has
25 expressed about the preliminary injunction and the concern

1 that I am expressing now about the preliminary injunction, I
2 know you would do that promptly.

3 Mr. Hardin, I will grant your clients two days to
4 consider whether they will commit to abiding by the
5 preliminary injunction as it is currently stated in its
6 current form before me now as a previously stipulated to that
7 injunction. We have two days to make that determination, and
8 I will require you to file a notice of whether your clients
9 are going to continue to stand by that preliminary injunction
10 and would seek its entry by the Canadian court. If the answer
11 is not, the court will advise the parties as to what the next
12 steps are.

13 So I have shared with you my analysis today and
14 what my preliminary determination is. My final determination
15 will come after I hear back from Mr. Hardin's client in two
16 days.

17 Are there any matters of clarification regarding
18 this motion which needs to be taken up at the hearing today?

19 MR. MAYER: Yes, Your Honor. And I do appreciate
20 Your Honor's attention to detail. One point, I just want to
21 preserve it for the record, is we are more than willing to
22 amend our complaints to say what we thought it said, which is
23 it's US-only damages.

24 So I would make a formal request that we be
25 permitted to do that to address Your Honor's concerns.

1 Obviously that's in response to Your Honor's ruling today.
2 We'd be happy to put it in a formal motion. But that is our
3 view of what our claim is.

4 So I would make that request or request need to
5 file such a motion if Your Honor would even consider it.

6 THE COURT: Thank you for that, Mr. Mayer.

7 Mr. Hardin, anything from you?

8 MR. HARDIN: Yes, Your Honor. On the two days, I'm
9 just trying to figure out exactly what notice you wanted to
10 say. Notice of agreement to the preliminary injunction, and
11 entry by the Canadian court, as well? I didn't understand
12 that part of it.

13 THE COURT: So why don't you have by the end of the
14 business day on Friday, by 5:00 p.m. on Friday is to file a
15 notice indicating that your clients are willing to be bound by
16 the preliminary injunction that we stipulated to before me and
17 that you would not object to Mr. Mayer's clients seeking to
18 have that preliminary injunction entered before a Canadian
19 court should he choose to do so.

20 MR. HARDIN: Understood. Thank you.

21 THE COURT: Very well.

22 MR. MEYER: Your Honor, one other point of order
23 with regard to your ruling. We have a substantial number of
24 documents that are marked attorney's eyes only or
25 confidential. I think at a minimum I would request that we be

1 allowed to share that, those documents with Canadian counsel,
2 which we have not done. I don't know if you want papers on
3 that, but obviously we have the records. Your Honor has ruled
4 that this dispute belongs in Calgary. And so I believe what's
5 done with them by the Canadian court would be a separate
6 matter. But we have to do something with those documents, and
7 I would respectfully request that we be allowed to share them
8 with Canadian counsel.

9 THE COURT: Mr. Hardin, is there any objection to
10 that request?

11 MR. HARDIN: I don't think so, Your Honor.

12 THE COURT: Okay. I'm going to take that as a no.

13 MR. HARDIN: Yes. No objection. As long as if
14 they'll agree to be bound by the same confidentiality terms.

15 MR. MAYER: I think what I'm suggesting now is
16 that, yes, that they would be considered attorneys under the
17 order. And I'm assuming if they want to change that it would
18 be up to the Canadian court.

19 MR. HARDIN: Okay.

20 MR. MAYER: All I'm saying is if we have an order
21 that says attorney's eyes only or confidential, I don't -- I
22 did not consider Canadian counsel to be within the scope of
23 that order, so I haven't been sending them the documents. But
24 based on the Court's ruling rather than redoing what we've
25 done we can just give those to them. And then whatever

1 happens happens.

2 MR. HARDIN: Right. As long as they're agreed to
3 keep them confidential as we've marked them absent a court
4 order from the Canadian court I would agree with that. Yeah.

5 THE COURT: That will be my ruling. It's a
6 sensible resolution of a practical issue. The attorneys in
7 the Canadian action would be deemed attorneys for the purpose
8 of the attorney's eyes only designations that have already
9 been made and be bound by all of the confidentiality
10 restrictions as the attorneys in this matter.

11 MR. DERUM: Your Honor, this is Chad Derum. I'm
12 actually the lawyer for Falk Mountain States, Lance and Kristy
13 Henderson. I've just been listening to the argument and the
14 court's ruling.

15 On this point about the sharing of documents with
16 Canadian counsel, I assume that that ruling extends only to
17 the matter that has been ruled on by the court with respect to
18 the forum of non conveniens and not with respect to documents
19 that my clients have produced in the litigation for sharing
20 with the Canadian lawyers.

21 THE COURT: Your clients are not first party?

22 MR. DERUM: Right.

23 THE COURT: You're talking only about documents
24 that they have produced.

25 MR. DERUM: That's right.

1 THE COURT: That's correct.

2 MR. DERUM: Thank you.

3 MR. MAYER: Your Honor, one other -- on the
4 injunction, Your Honor, we would -- there was a question about
5 should it be updated or not updated. I don't know if the plan
6 is to review the number of parties that were subject to it or
7 not, but we would request the right to do that. It would not
8 encompass all the new branches. The branches that were served
9 the injunction were ones that were tied to departure from
10 DIRTT. So if someone just started a new branch we're not
11 going to contend they were served with the injunction. But
12 there might be a reason to revisit that. So I'd ask that we
13 just meet and confer on that, and if we have a dispute bring
14 it back before the court.

15 THE COURT: I'm going to let you and Mr. Hardin
16 take that up off line and discuss that.

17 MR. MAYER: And yes. Just to make the record
18 clear, Your Honor, I did make a request to see if we could
19 amend the complaint and your Honor listened, but I didn't get
20 a response. If Your Honor is denying that request I would
21 just like to have that on the record.

22 THE COURT: Sure. I haven't made a decision on the
23 motion.

24 MR. MAYER: Would we have leave to file something
25 on that in writing up front?

1 THE COURT: No, you may not.

2 MR. MAYER: Okay.

3 THE COURT: All right. Thanks you, Mr. Mayer.

4 Thank you, Mr. Hardin. We stand in recess.

5 (Whereupon, the court proceedings were concluded.)

6 * * * * *

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 STATE OF UTAH)

2) ss.

3 COUNTY OF SALT LAKE)

4 I, KELLY BROWN HICKEN, do hereby certify that I am
5 a certified court reporter for the State of Utah;

6 That as such reporter, I attended the hearing of
7 the foregoing matter on May 19, 2021, and thereat reported in
8 Stenotype all of the testimony and proceedings had, and caused
9 said notes to be transcribed into typewriting; and the
10 foregoing pages number from 3 through 85 constitute a full,
11 true and correct report of the same.

12 That I am not of kin to any of the parties and have
13 no interest in the outcome of the matter;

14 And hereby set my hand and seal, this ____ day of
15 _____ 2021.

16

17

18

19

20

KELLY BROWN HICKEN, CSR, RPR, RMR

21

22

23

24

25

Case Nos. 21-4078, 21-4153

In the
United States Court of Appeals
for the
Tenth Circuit

DIRTT ENVIRONMENTAL SOLUTIONS, INC.;
DIRTT ENVIRONMENTAL SOLUTIONS, LTD.,
Plaintiffs-Appellants,

v.

FALKBUILT LTD.; FALKBUILT, INC.; MOGENS SMED,
Defendants-Appellees,

and

LANCE HENDERSON; KRISTY HENDERSON; FALK MOUNTAIN STATES, LLC,
Defendants.

*Appeals from the United States District Court for the District of Utah (Salt Lake City),
Case No. 1:19-CV-00144-DBB-DBP · Honorable David Barlow, U.S. District Judge*

APPELLANTS' SUPPLEMENTAL APPENDIX
VOLUME I OF II – Pages 1 to 274

CHAD E. NYDEGGER
WORKMAN NYDEGGER
60 East South Temple
1000 Eagle Gate Tower
Salt Lake City, Utah 84111
Telephone: (801) 533-9800
cnydegger@wnlaw.com

JEFFREY J. MAYER
CATHERINE A. MILLER
AKERMAN LLP
71 South Wacker Drive, 47th Floor
Chicago, Illinois 60606
Telephone: (312) 634-5700
jeffrey.mayer@akerman.com
catherine.miller@akerman.com

*Attorneys for Plaintiffs and Appellants,
DIRTT Environmental Solutions, Inc. and DIRTT Environmental Solutions, Ltd.*



COUNSEL PRESS · (213) 680-2300

PRINTED ON RECYCLED PAPER



CERTIFICATE OF DIGITAL SUBMISSION

Counsel for Appellants hereby certifies that all required privacy redactions have been made, which complies with the requirements of Federal Rules of Appellate Procedure 25(a)(5).

Counsel also certifies that the hard copies submitted to the Court are exact copies of the ECF filing of March 14, 2022.

Counsel further certifies that the ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program (Vipre software version 12.3.8147; Definitions version 99724 – 7.91378 [March 11, 2022]; Vipre engine version 5.6.8.8 – 3.0), and according to the program, is free of viruses.

Dated: March 14, 2022

Respectfully Submitted,

AKERMAN LLP:

By: /s/ Jeffrey J. Mayer
Jeffrey J. Mayer

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Respectfully Submitted,

AKERMAN LLP:

By: /s/ Jeffrey J. Mayer
Jeffrey J. Mayer

TABLE OF CONTENTS

Docket Entry	Description	Page
VOLUME I OF II – Pages 1 to 274		
199	Motion for Relief from Judgment Pursuant to Fed. R. Civ. Proc. 60(b), Filed September 9, 2021 [REDACTED]	7
199-1	Exhibit A: Memorandum Decision and Order Granting Motion to Dismiss First Amended Complaint as to Defendants Falkbuilt Ltd., Falkbuilt Inc. and Mogens Smed and Denying Plaintiffs’ Oral Motion to Amend	33
201-1	Exhibit B: Lance Henderson’s February 17, 2019 email to Mogens Smed, offering detailed suggestions for Smed’s new business venture, Falkbuilt [UNSEALED]	38
199-3	Exhibit C: (SEALED; <i>See Apx. Vol. II, Dkt. 201-2, page 307</i>)	45
199-4	Exhibit D: (SEALED; <i>See Apx. Vol. II, Dkt. 201-3, page 311</i>)	46
199-5	Exhibit E: (SEALED; <i>See Apx. Vol. II, Dkt. 201-4, page 315</i>)	47
199-6	Exhibit F: (SEALED; <i>See Apx. Vol. II, Dkt. 201-5, page 323</i>)	48
199-7	Exhibit G: (SEALED; <i>See Apx. Vol. II, Dkt. 201-6, page 329</i>)	49
199-8	Exhibit H: (SEALED; <i>See Apx. Vol. II, Dkt. 201-7, page 334</i>)	50
199-9	Exhibit I: (SEALED; <i>See Apx. Vol. II, Dkt. 201-8, page 337</i>)	51
199-10	Exhibit J: (SEALED; <i>See Apx. Vol. II, Dkt. 201-9, page 339</i>)	52
199-11	Exhibit K: (SEALED; <i>See Apx. Vol. II, Dkt. 201-10, page 344</i>)	53
199-12	Exhibit L: (SEALED; <i>See Apx. Vol. II, Dkt. 201-11, page 346</i>)	54
207	Opposition to Motion for Relief from Judgment Pursuant to Fed. R. Civ. Proc. 60(b), Filed September 30, 2021	55
207-1	Exhibit 1: Plaintiff’s Original Complaint	69
207-2	Exhibit 2: Brief in Support of Motion to Dismiss	121
207-3	Exhibit 3: Consent Order	151
207-4	Exhibit 4: Consent Order	174

207-5	Exhibit 5: Letter of August 26, 2021 seeking consent of Falkbuilt Ltd. And Falkbuilt, Inc. to the entry and enforcement of a preliminary injunction	184
207-6	Exhibit 6: Response letter of September 2, 2021	197
207-7	Declaration of John T. Nelson	200
207-8	Declaration of Jason W. Hardin in Support of Opposition to Motion for Relief from Judgment Pursuant to Fed. R. Civ. Proc. 60(b)	225
211	Reply Brief in Support of Motion for Relief from Judgment Pursuant to Fed. R. Civ. Proc. 60(b), Filed October 21, 2021	229
217	Memorandum Decision and Order Denying Motion for Relief from Judgment Pursuant to Fed. R. Civ. Proc. 60(b), Filed December 22, 2021	243
218	Notice of Appeal (Exhibit A omitted to avoid duplication), Filed December 22, 2021	272

**VOLUME II OF II – Pages 275 to 348
(FILED UNDER SEAL)**

201	Motion for Relief from Judgment Pursuant to Fed. R. Civ. Proc. 60(b), Filed September 9, 2021	281
201-2	Exhibit C: July 22, 2019 email exchange between Donna Shirley and Lance Henderson, wherein Lance Henderson describes his efforts for the new Falkbuilt Utah branch	307
201-3	Exhibit D: Email exchange between Lance Henderson, Tony Howells and Mogens Smed (January 29, 2019 and February 19, 2019)	311
201-4	Exhibit E: Mogens Smed’s February 14, 2019 email to Lance Henderson with attachment	315
201-5	Exhibit F: Lance Henderson’s February 18, 2019 email exchange with Joe Dallimore, a Utah business consultant	323
201-6	Exhibit G: Joe Dallimore’s February 20, 2019 email to Lance Henderson	329
201-7	Exhibit H: Lance Henderson’s February 20, 2019 email to Mogens Smed	334

201-8	Exhibit I: Mogens Smed's April 10, 2019 email from his Falkbuilt account to TTMIT recipients	337
201-9	Exhibit J: Rhythm Chopra's April 2, 2019 email to Lance Henderson	339
201-10	Exhibit K: Lance Henderson's July 17, 2019 email to Barrie Loberg	344
201-11	Exhibit L: Email exchange between Scott Wilcox, Lance Henderson and Mogens Smed showing that Mogens Smed had Utah business and industry connections independent of Lance Henderson	346

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DIRTT ENVIRONMENTAL
SOLUTIONS, INC.

Plaintiff,

v.

FALKBUILT, INC. and FALKBUILT
LTD.,

Defendants.

§
§
§
§
§
§
§
§
§
§
§

CIVIL ACTION NO. 3:21-cv-1483

JURY TRIAL DEMANDED

PLAINTIFF’S ORIGINAL COMPLAINT

Plaintiff DIRTT Environmental Solutions, Inc. (“Plaintiff” or “DIRTT”), by and through its attorneys, AKERMAN LLP, files this Original Complaint against Defendants Falkbuilt, Inc. and Falkbuilt Ltd. (collectively “Defendants”, “Falkbuilt”, or the “Falkbuilt Entities”), and alleges as follows:

NATURE OF ACTION

The Falkbuilt Entities have unlawfully used DIRTT confidential information and have intentionally sown confusion in the United States in an attempt to steal customers, opportunities, and business intelligence, with the aim of setting up a competing business in the United States market. Among other matters: (1) ex-DIRTT employee and current Falkbuilt employee Lance Henderson uploaded over 35 gigabytes of DIRTT data, which included confidential and proprietary information, to a personal cloud-based data storage location¹; (2) immediately after her departure from DIRTT, Amanda Buczynski, also a former DIRTT employee, reached out to

¹ DIRTT is seeking redress from Mr. Henderson in the United States District Court for the District of Utah, *DIRTT Env’tl Solutions, Inc. v. Henderson*, Case No. 19-cv-00144.

DIRTT customers on behalf of Falkbuilt in an effort to compete on ongoing U.S. projects and undercut DIRTT's bids by utilizing DIRTT confidential information; (3) upon information and belief, multiple other former DIRTT employees or former employees of DIRTT's parent, all of whom had access to DIRTT's significant confidential and proprietary information and trade secrets pertaining to DIRTT's business ("DIRTT Confidential Business Information"), took steps to access and acquire such information to aid the Falkbuilt Entities' competition with DIRTT in the United States market by disclosing such information within the United States market; (4) the Falkbuilt Entities misleadingly market their products in the United States as having identical or superior characteristics to DIRTT products even though the products are neither similar nor identical in significant part and are inferior for the purposes of the market; and (5) the Falkbuilt Entities continue to trade on an alleged connection with DIRTT products and technology in the United States, while publicly degrading DIRTT's brand and reputation.

THE PARTIES

1. Plaintiff DIRTT Environmental Solutions, Inc. ("DIRTT") is a Colorado company, with its principal places of business in the United States located in Savannah, Georgia and Phoenix, Arizona. DIRTT maintains an executive headquarters and showroom in Plano, Texas. DIRTT is the licensee of the trade secrets at issue in this case. While DIRTT's headquarters are located in Calgary, Alberta, Canada, DIRTT operates exclusively in the United States market.

2. Defendant Falkbuilt, Inc. is a Delaware corporation. Falkbuilt, Inc. was established to emulate DIRTT's business model by departed DIRTT employees.

3. Defendant Falkbuilt Ltd. is a Canadian company with its principal place of business in Calgary, Alberta, Canada. Falkbuilt Ltd. conducts the majority of its business in the United States.

4. Falkbuilt Ltd. conducts business in the U.S. through a network of captive and independent representatives, comprised largely of former DIRTТ employees and representatives, that it refers to as “Falk Branches”. Many United States Falk Branches formerly operated as DIRTТ Regional Partners.

5. Falkbuilt Ltd. operates in the U.S. through 66 Falk Branches, all of which are identified under the “Contact” tab on Falkbuilt Ltd.’s website, www.falkbuilt.com: Anchorage, AK; Atlanta, GA; Austin, TX; Bakersfield, CA; Birmingham, AL; Boise, ID; Boston, MA; Buffalo, NY; Burlington, VT; Charleston, SC; Charlotte, NC; Chicago, IL; Chicago Metro (Batavia, IL); Cincinnati, OH; Cleveland, OH; Columbus, OH; Dallas, TX (Falkbuilt by Bauhaus); Dallas, TX; Denver, CO; Des Moines, IA; Detroit, MI; Fresno, CA; Ft. Lauderdale, FL; Greater Philadelphia (West Chester, PA); Greater Phoenix; Greater Seattle (Kent, WA); Green Bay (Greenville, WI); Greenville, SC; Hartford, CT; Houston, TX; Houston – Falkbuilt by Bauhaus; Huntsville, AL; Indianapolis, IN; Jacksonville, FL; Kansas City, MO; Knoxville, TN; Laguna Beach, CA; Las Vegas, NV; Los Angeles, CA; Louisville, KY; Madison (Waunakee, WI); Manchester, NH; Milwaukee, WI; Minneapolis-St. Paul, MN; Montgomery, AL; Morristown, NJ; Nashville, TN; New York, NY; Newport Beach, CA; Orlando, FL; Philadelphia, PA; Phoenix, AZ; Piedmont-Triad (Winston-Salem, NC); Pittsburgh, PA; Portland, ME; Providence, RI; Raleigh, NC; Salt Lake City, UT; San Diego, CA; Savannah, GA; Seattle, WA – Falkbuilt by Vantis Branch; Seattle, WA; St. Louis, MO; Tampa, FL; Toledo, OH; and

Tulsa, OK – Falkbuilt by Bauhaus. Upon information and belief, these branches are affiliated primarily with Falkbuilt Ltd. Sample pages from Falkbuilt Ltd.’s website are attached as Ex. A.

BACKGROUND

6. On December 11, 2019, DIRTT filed a lawsuit against Falkbuilt Ltd., Falkbuilt, LLC, Falk Mountain States, Lance Henderson, and Kristy Henderson in the United States District Court for the District of Utah, styled *DIRTT, Inc. v. Henderson*, Case No. 1:19-cv-00144. The suit asserted claims for violations of the Federal Defend Trade Secrets Act, the Utah Uniform Trade Secrets Act, the Pennsylvania Uniform Trade Secrets Act, and breaches of contracts (against Henderson).

7. Falkbuilt Ltd., the Canadian defendant, conceding that jurisdiction and venue in the U.S. were proper against it, answered the complaint and filed a counterclaim on February 5, 2020.

8. An injunction was issued on March 13, 2020, prohibiting defendants, the U.S. Falk Branches in existence at the time, and Falkbuilt, Inc. from, among other things, disclosing, relying upon, or disseminating any DIRTT information in the United States market.

9. The parties subsequently engaged in discovery. On October 20, 2020, based on new information, an amended complaint was filed which added as a plaintiff DIRTT Environmental Solutions Ltd., a Canadian company, and defendants Mogens Smed, a Canadian individual, and Falkbuilt, Inc., a United States company.

10. Defendants Falkbuilt Ltd., Falkbuilt, Inc., and Mogens Smed then filed a motion to dismiss based on *forum non conveniens*, arguing that Canada was a more convenient forum and that by adding two additional Canadian parties, plaintiffs had “pled themselves” out of a U.S. court. Judge David Barlow of the Utah district court granted the motion, asserting, among

other matters, that Utah did not have a close connection to the balance of the dispute. DIRTT vehemently disagrees with the ruling, and intends to appeal upon the entry of a Rule 54(b) certification. In reliance upon Judge Barlow's ruling, it has taken three specific steps. First, in this Complaint, DIRTT's Canadian parent is not a party. Second, no claims are asserted against Mr. Smed, the founder of both DIRTT Ltd. and Falkbuilt Ltd. Third, in order to minimize any possible Canadian connection, DIRTT has brought its claims that are more closely tied to Canada (claims that DIRTT still believes can and should be litigated in the United States) in Canada. DIRTT is only seeking relief in this case for wrongful acts in the United States and for United States injury and disclaims any relief for injury received, directly or indirectly, in Canada by DIRTT or its parent company or affiliates.

11. The Utah court's dismissal was conditioned upon Falkbuilt Ltd., Falkbuilt, Inc., and Mogens Smed stipulating that they agreed to be bound by the preliminary injunction that had been entered in the Utah case, should a Canadian court enter the same injunction in Canada. These defendants so consented and filed their stipulation of consent with the Utah court.

12. The present case before the Court does not include either DIRTT Environmental Solutions Ltd. or Mogens Smed as parties. It seeks relief based upon conduct occurring solely in the U.S., injury suffered solely in the U.S., and it only asserts claims arising under codified U.S. statutory law.

RELEVANT BACKGROUND OF THE PARTIES

13. DIRTT is an innovative, technology-driven company that operates solely in the United States. DIRTT's U.S. sales offices in Salt Lake City, Phoenix, New York, and Chicago are supported by its factories and distribution centers across the United States. While DIRTT's

headquarters are located in Calgary, it is a Colorado company that conducts none of its operations in Canada.

14. DIRTT licenses its trade secrets and software from non-party DIRTT Environmental Solutions Ltd. DIRTT Environmental Solutions Ltd. does not operate in the United States.

15. DIRTT offers products and services for the digital design of component, prefabricated construction to build out interior spaces in buildings (referred to as “interior construction”). Among many other services, DIRTT offers clients the ability to utilize virtual-reality to design office, healthcare, and other interior spaces using modular components which can be rapidly and affordably assembled in DIRTT’s factories and on-site. This process provides significant savings in material, cost, and time to install the actual prefabricated building products.

16. DIRTT is an innovator and leader in the prefabricated, interior design, and construction market space.

17. DIRTT employs a proprietary software and virtual-reality visualization platform coupled with vertically-integrated manufacturing that designs, configures and manufactures prefabricated interior construction solutions used primarily in commercial spaces across a wide range of industries and businesses. Plaintiff combines innovative product design with its industry-leading, proprietary ICE Software (“ICE Software” or “ICE”) and technology-driven, lean manufacturing practices and sustainable materials to provide an end-to-end solution for the traditionally inefficient and fragmented interior construction industry. DIRTT creates customized interiors with the aesthetics of conventional construction, but with greater cost and schedule certainty, shorter lead times, greater future flexibility, and better environmental sustainability than conventional construction.

18. DIRTT offers interior construction solutions throughout the United States through a network of independent regional partners (“Regional Partners”) and an internal sales team. Regional Partners use the ICE Software to work with end users to envision and design their spaces. Orders are electronically transmitted through ICE to DIRTT’s manufacturing facilities for production, packing and shipping. DIRTT’s Regional Partners then coordinate the receipt and installation of DIRTT’s interior construction solutions at the end users’ locations.

19. ICE generates valuable proprietary information, including cost and margin information, the components of the bill of materials for individual companies, detailed plans and specifications for projects, and customer requirements.

20. Apart from ICE, DIRTT’s internal restricted information and communications network contains other sources of valuable information, including prospective and current customer databases that contain information on potential projects, as well as the status of all pending projects, and a restricted site for individually-approved users to access called “MyDIRTT”, which contains confidential technical information such as diagrams and other technical know-how.

21. DIRTT’s Regional Partners execute confidentiality agreements and have access to confidential information, including pricing and prospective customers.

22. In addition to sales and marketing, Regional Partners provide value throughout the planning, design and installation/construction process. At the pre-construction stage, Regional Partners provide design assistance services to architects, designers and end clients. Through the installation/construction process, Regional Partners act as specialty subcontractors to the general contractors and provide installation and other construction services. Post move-in, Regional Partners provide warranty work, ongoing maintenance and repurposing support. The

Regional Partners operate under Regional Partner agreements with DIRTT, which outline sales goals and marketing territories and provide the terms and conditions upon which the Regional Partners market and sell DIRTT products. Regional Partners agree in writing to keep information generated through this process confidential.

23. DIRTT also operates several “DIRTT Experience Centers” (“DXCs”) (previously referred to as “Green Learning Centers”), which are display areas used to showcase DIRTT’s products and services. Plaintiff generally requires its Regional Partners to construct and maintain a DXC in their local markets. DIRTT’s newest Experience Center is located in the Dallas/Fort Worth area.

24. DIRTT conducts its U.S. business in a number of cities, including Dallas, Texas; Salt Lake City, Utah; Chicago, Illinois; New York, New York; and Phoenix, Arizona. DIRTT’s U.S. executive headquarters and a DIRTT showroom are located in Plano, Texas. DIRTT operates U.S. manufacturing facilities in Phoenix, Arizona and Savannah, Georgia. In June 2021, DIRTT opened a manufacturing facility in Rock Hill, South Carolina.

25. DIRTT conducts substantial business in Texas, with Regional Partners located in several Texas cities, including Austin, Dallas, and Houston. Key DIRTT executives, including DIRTT’s CEO, General Counsel and Chief Commercial Officer reside in and work from the Dallas/Fort Worth area.

26. Similarly, Falkbuilt conducts a considerable volume of business in Texas, as it has multiple branches across the state, and, upon information and belief, conducts substantial sales activity in the state. On June 14, 2021, Falkbuilt’s CEO issued a Tweet acknowledging that Dallas, Texas is one of Falkbuilt’s “most successful territories to date.” *See* Ex. B.

27. This action concerns the improper use of DIRTT's Confidential Business Information in the United States market. Additionally, this action addresses false and misleading statements by Falkbuilt representatives creating confusion in the U.S. market and causing Plaintiff to suffer financial injuries measured under both federal and state law in the United States.

JURISDICTION AND VENUE

28. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331, as this action arises under the following federal statutes: 15 U.S.C. §1051, *et seq.* and 18 U.S.C. § 1836. This Court has jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367, as they are so related to the claims within the Court's original jurisdiction that they form part of the same case or controversy. The Court also has jurisdiction over the state law claims pursuant to 28 U.S.C. § 1332, as there is complete diversity and the amount in controversy exceeds the statutory minimum.

29. This Court has personal jurisdiction over Falkbuilt, Inc. because Falkbuilt, Inc. regularly conducts business in the State of Texas, and Falkbuilt, Inc. should have reasonably anticipated being haled into a Texas court over claims based on the DIRTT Confidential Business Information it has used to compete with DIRTT in Texas.

30. This Court has personal jurisdiction over Falkbuilt Ltd. because Falkbuilt Ltd. regularly conducts business in the State of Texas, and Falkbuilt Ltd. should have reasonably anticipated being haled into a Texas court over claims based on the DIRTT Confidential Business Information it has used to compete with DIRTT in Texas.

31. Falkbuilt Ltd. also has multiple agents in the United States that hold themselves out as employees and agents of Falkbuilt Ltd., independently establishing jurisdiction over Falkbuilt Ltd.

32. In addition, Falkbuilt Ltd. has availed itself of the protections of United States courts, as it has filed a counterclaim against DIRTT, Inc. and DIRTT Environmental Solutions Ltd. in an action for patent infringement pending against Falkbuilt Ltd. in the Northern District of Illinois, *DIRTT Env't'l Solutions, Ltd. v. Falkbuilt, Ltd.*, Case No. 20-cv-04637. *See* Ex. C for coverage of Falkbuilt Ltd.'s expansion of its U.S. activities. Falkbuilt Ltd. further has invested in some of its United States partners.

33. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(2) as a substantial portion of the events giving rise to this action occurred in this district. For example, Falkbuilt Inc. and Falkbuilt Ltd. have competed with DIRTT in bidding on numerous construction projects within this district and have used DIRTT Confidential Business Information to enable them to undercut DIRTT's pricing to submit winning bids on some of these projects. *See* Ex. D (filed under seal).

FACTUAL BACKGROUND

34. Since at least the fall of 2018, the Falkbuilt Entities have engaged in an ongoing attempt to replicate DIRTT's United States business, steal DIRTT's United States clients, and co-opt DIRTT's product characteristics and business reputation in the United States as Falkbuilt's own, through improper means, including but not limited to using DIRTT confidential information and trade secrets to identify and approach customers and potential customers in the United States, utilizing pricing and margin information to undercut DIRTT's quotes for projects in the United States, and sowing confusion in the U.S. marketplace by drawing false

equivalencies between Falkbuilt's and DIRTT's products and services. These approaches have been made both directly and indirectly through current and former U.S. DIRTT Regional Partners.

35. Despite public statements to the contrary that the Falkbuilt Entities are not competitors of DIRTT, DIRTT determined, based on a forensic study of electronic information, that the Falkbuilt Entities were built upon, and are dependent on, both information and employees obtained from DIRTT. *See* Declaration of Julian Grijns, attached as Ex. E, at ¶¶ 6, 9. In fact, the Falkbuilt Entities would likely not be operating today but for the customer contact information, pricing, estimates and other DIRTT confidential information and trade secrets used in Falkbuilt businesses and by Falk Branches in the United States. Based on information obtained by DIRTT, as well as publicly available information, the Falkbuilt Entities are directly competing with DIRTT in the United States market.

36. In order to compete with DIRTT in the United States market, the Falkbuilt Entities recruited DIRTT employees to work for the Falkbuilt Entities and, based on available forensic information, built Falkbuilt's United States business operations through the improper and unauthorized use of DIRTT Confidential Business Information. Falkbuilt personnel were aware that each of these employees had contractual, statutory, and common law obligations to maintain the confidentiality of DIRTT Confidential Business Information.² Despite the knowledge of these obligations, Falkbuilt leveraged the unauthorized disclosure of DIRTT's Confidential Business Information to compete with DIRTT in the United States.

37. The Falkbuilt Entities have directly bid against DIRTT on projects in the United States using DIRTT Confidential Business Information.

² Damages stemming from these efforts are the subject of other litigation, and not claimed here.

38. Further, while not independently wrongful, the Falkbuilt Entities have built their distribution system for Falkbuilt products in the United States around current and former DIRTT distributors. Those partners target the same customers and U.S. markets as DIRTT, and some have flipped from promoting DIRTT products to exclusively promoting Falkbuilt products.

39. Upon information and belief, to facilitate the use of DIRTT's Confidential Business Information to give Falkbuilt a competitive advantage in the United States market, the Falkbuilt Entities not only actively recruited DIRTT employees to join Falkbuilt, including meeting with certain DIRTT employees in advance of their leaving DIRTT's employ, but also encouraging them to solicit other DIRTT employees to work for or on behalf of Falkbuilt. While such solicitation is not the subject of this litigation, this pattern of solicitation was meant to enable Falkbuilt to obtain DIRTT Confidential Business Information that Falkbuilt, along with its agents and branches, have unlawfully disclosed in the United States. Additionally, on information and belief, the Falkbuilt Entities encouraged the unlawful disclosure and use of DIRTT's confidential, competitive information to assist Falkbuilt in quickly getting up-to-speed and operational in the United States, and to undercut DIRTT's bids and estimates, with the end goal of ultimately taking DIRTT's U.S. customers and projects. It is no coincidence that the Falkbuilt Entities are bidding on the same projects as DIRTT and are contacting DIRTT's customers and prospective customers, as well as preventing DIRTT from ever learning of potential projects by using confidential information to divert business to the Falkbuilt Entities through current and former DIRTT Regional Partners in the United States.

40. As can be seen from Falkbuilt Ltd.'s website, www.falkbuilt.com (advertising interior component construction for healthcare, commercial and office, and education), Falkbuilt Ltd. competes in the same market as DIRTT, www.dirtt.com (advertising projects in education,

healthcare, office space, residential, government, and hospitality). Additionally, Falkbuilt's webpages and designs mimic DIRTT's appearance. To date, several former DIRTT employees have joined Falkbuilt, either working for it or on its behalf.

A. The Falkbuilt Entities' Extensive U.S. Presence

41. In addition to the 66 Falk Branches identified above, Falkbuilt Ltd. is continuing to add new U.S. branches, rapidly expanding its U.S. market presence.

42. The DIRTT Confidential Business Information that the Falkbuilt Entities misappropriated has enabled them to hit the ground running in these new U.S. markets and compete with DIRTT for projects.

43. One locale where the Falkbuilt Entities have extensively competed with DIRTT is the State of Texas. Falkbuilt has established at least five Falk Branches in Texas, including two in Dallas.

44. As reflected in Ex. D (filed under seal), the Falkbuilt Entities have competed with DIRTT on numerous Texas projects, including at least eight projects in the Dallas/Fort Worth area, and have won multiple projects on which they have competed with DIRTT.

B. The Falkbuilt Entities' Campaign of Misinformation in the United States Market

1. Ms. Buczynski's Misattributions in the United States Market

45. Amanda Buczynski was a DIRTT employee between October 17, 2016 and September 17, 2019. She was responsible for DIRTT sales in a territory that included Western Pennsylvania and West Virginia. She maintained an office on site at a DIRTT Regional Partner's facility in Pittsburgh, Pennsylvania.

46. Immediately after her departure from DIRTT, Ms. Buczynski began working for Falkbuilt Ltd., where she is a Director of Design and Construction.

47. On behalf of Falkbuilt, Ms. Buczynski walked at least one potential customer through the showroom of one of DIRTT's Regional Partners in Ohio and misrepresented to this potential customer that the DIRTT installations in the showroom were created by Falkbuilt, not DIRTT. The DIRTT installations in the showroom consisted of ready-for-market examples of DIRTT's products, used to allow DIRTT's customers to place custom orders.

48. Ms. Buczynski has also referred to Falkbuilt as "the new DIRTT" or "DIRTT 2.0" in communications with potential customers, further clouding the issue of which entity originated DIRTT's products and services, and contradicting the Falkbuilt Entities' public representations that the Falkbuilt Entities are not competing with DIRTT or building upon DIRTT technology and information.

49. Ms. Buczynski knew that these statements were false when she made them, and she made them with the intent to deceive potential DIRTT customers into believing that DIRTT's products are actually those of Falkbuilt for the purpose of steering those customers away from DIRTT to Falkbuilt.

2. The Falkbuilt Entities' Misdesignation and Misdescription of the Origin of Their Products and Services in the United States Market

50. Falkbuilt's products and services are demonstrably not equivalent to DIRTT's, yet the Falkbuilt Entities continue to intentionally sow confusion in the U.S. market to leverage DIRTT's products, services, and reputation as their own.

51. The Falkbuilt Entities are also mimicking DIRTT's designs and diagrams in their promotional materials used in the U.S., misdesignating the origin in Falkbuilt Ltd.'s techsheets and brochures as Falkbuilt. DIRTT's designs and diagrams are essential to DIRTT's business in that they allow DIRTT's U.S. customers to place custom orders. Falkbuilt Ltd. issues "techsheets" describing the technical features and performance capabilities of the various

components that it purports to offer. Falkbuilt Ltd. also issues illustrated brochures depicting the various installations that it claims to be able to construct and deliver. *See* Ex. F for examples of Falkbuilt Ltd. techsheets and brochures. These techsheets and brochures are utilized by both Falkbuilt Ltd. and Falkbuilt Inc. The diagrams and products in these techsheets and brochures are so similar to those offered by DIRTT as to be virtually indistinguishable.

52. It took DIRTT years to develop its proprietary products and their components. The Falkbuilt Entities, on the other hand, have purportedly developed their “digital construction” process and their components seemingly overnight. Upon information and belief, the Falkbuilt Entities do not actually currently possess the capabilities they are advertising, necessitating the mimicking of DIRTT’s designs and diagrams, and the misdesignation of the origin of Falkbuilt’s techsheets and brochures as Falkbuilt. As alleged herein, several former DIRTT employees took DIRTT’s confidential and proprietary information with them to the Falkbuilt Entities, and unlawfully used or disclosed such information in the United States, which has inevitably aided the Falkbuilt Entities’ ramp-up efforts in the United States market.

53. The similarity of the Falkbuilt Entities’ promotional material to that of DIRTT is no coincidence. The Falkbuilt Entities’ use of advertising and promotional materials that are virtually indistinguishable from DIRTT’s materials, including the language and images used, the narrative history of Falkbuilt, and the value proposition, is a key part of their overall effort to knowingly deceive potential U.S. customers into believing that Falkbuilt’s work is actually that of DIRTT.

54. However, Falkbuilt’s products do not have the same capabilities and characteristics as DIRTT products. By way of example, to DIRTT’s knowledge, Falkbuilt’s products do not offer tamper-evident tile functionality. Falkbuilt’s products do not offer a

foldable wall system with the same functionality as the rest of the product line, instead offering a third-party stacking wall only. Falkbuilt's products do not possess a system to permit mitered tiles to meet at a corner with no end cap. Falkbuilt's tiles mount only at the verticals, and must end at a vertical post, or the tile must be extended unsupported past the vertical. If the Falkbuilt Entities want a shelf, cabinet or work surface to extend from the tiles, the location must be predetermined and holes must be cut in the tiles. The shelf or cabinet cannot be relocated horizontally without having new tiles cut and internal mounting componentry moved by a technician. DIRTT, though, possesses a horizontal mounting channel that permits any hanging component to be moved on a horizontal axis at will. In fact, the technology underlying Falkbuilt's solutions is not advanced as compared to the technology underlying DIRTT's solutions.

55. Additionally, unlike DIRTT, which uses actual wood veneer, matching the tile veneer perfectly, the Falkbuilt Entities use vinyl-wrap "Falkskin" on their metal components to emulate woodgrain. Falkbuilt's sit-stand solutions also have visible actuator housings, while DIRTT's actuator housings are concealed under the work surface with the drive mechanisms hidden inside the wall.

56. From a functionality standpoint, Falkbuilt products fail to offer the re-configurability of DIRTT's products. For example, DIRTT's sliding door supports allow a door to easily be moved from one point to another or changed out for another door simply by moving the support, which mounts into a horizontal mounting channel, to another location. No screw holes or other marks are left behind. Additionally, should a section of a wall require reconfiguration, such as a glass wall replacing a solid wall, that single section can be removed and replaced without disturbing adjacent wall sections. Falkbuilt's walls, which are built

sequentially, would require each section to be disassembled, beginning at the end of the wall until the section to be replaced was reached. Finally, DIRTT's capabilities allow it to place walls at virtually any angle, with no ramifications when reconfigured to another angle. No drilling or damaging tile at the intersection of the walls is required. In other words, to be the functional equivalent of DIRTT, the Falkbuilt Entities would have to offer an easily reconfigurable wall system including infinite horizontal positioning (and re-positioning) of hanging components, without compromising aesthetics. Falkbuilt's system offers none of these things.

57. Moreover, DIRTT and the Falkbuilt Entities use different materials in their systems, which renders the Falkbuilt Entities unable to provide DIRTT's advantages. DIRTT uses aluminum in its solutions, which allows for much more flexible functionality. The aluminum extrusions used in DIRTT's solutions can be formed in virtually any shape necessary, meaning DIRTT can design any shape needed to accomplish the solution's intended functionality. Falkbuilt, on the other hand, uses steel, which is much more rigid and offers far less flexibility in shaping. Because the Falkbuilt Entities rely on steel, they cannot achieve the flexibility of design and reconfigurability that DIRTT offers in its solutions. For this reason, it is not just the Falkbuilt Entities' false claims of equivalency to DIRTT that are misleading to customers, but also their own promotional material, which touts that Falkbuilt's solutions are "easily reconfigured" and have "endless design options."

58. Similarly, the Falkbuilt Entities do not at present possess in-house design capabilities, which is an aspect of DIRTT's solution that greatly increases customization for DIRTT's customers. Rather, the Falkbuilt Entities rely on external designers to create their solutions, making it much more difficult, if not impossible in some instances, to achieve the customizability necessary to meet the customers' desired functionality.

59. As such, the Falkbuilt Entities' attempts to equate the characteristics of their solutions with those of DIRTT constitute a blatant effort to confuse U.S. customers and capitalize on the superior characteristics of DIRTT's solutions as compared to Falkbuilt's for the same purposes, and suggest that DIRTT and Falkbuilt are the same, or that Falkbuilt's solutions are an equivalent alternative. The fact is, Falkbuilt and DIRTT are simply not equivalents.

60. The Falkbuilt Entities further misrepresent the size and capabilities of their United States operations, as their allegedly independent representatives claim to be Falkbuilt employees.

61. Despite the Falkbuilt Entities' contentions that they do not compete with DIRTT, these efforts are intended to damage, and have damaged, DIRTT by luring potential U.S. customers away from DIRTT to Falkbuilt. For example, a number of existing DIRTT U.S. projects, including several in Texas, have been lost to Falkbuilt, and several have been converted to Falkbuilt projects as a result of the Falkbuilt Entities' interference. *See* Ex. D (filed under seal). Similarly, DIRTT has lost competitive bids on projects to the Falkbuilt Entities as a result of the Falkbuilt Entities' false claims of equivalency with DIRTT. In one instance, DIRTT lost the bid for phase 2 of a project for which DIRTT had done a full solution installation for phase 1 in 2018-2019. Falkbuilt was a competitor on this bid and would not have won the bid but for its false claims of equivalency and use of DIRTT's competitive information. In another example, bid documents from the architects for a particular project for which DIRTT and Falkbuilt were both competing had to be amended to clarify that the basis of the design was Falkbuilt, not DIRTT, but noted that DIRTT was an acceptable equivalent manufacturer. This amendment came after a DIRTT representative had a detailed conversation with the architectural firm issuing the bid documents and explained exactly what Falkbuilt is vis-à-vis DIRTT – *i.e.* a competitor, wholly separate from DIRTT, and not the “new DIRTT.”

62. The Falkbuilt Entities further trade on DIRTT's technology, heritage, and reputation. The Falkbuilt Entities have created a false impression within the U.S. market that they are doing what DIRTT has done in the industry for the last several years, and intentionally attempt to market themselves as associated with, or even part of, DIRTT in order to capitalize on DIRTT's reputation, historical performance, and customer base despite Falkbuilt's inferior products. The Falkbuilt Entities use the same language, the same images, and the same value proposition as DIRTT to further this effort and to confuse customers in the U.S. marketplace.

63. As further evidence of the Falkbuilt Entities' positioning of themselves as the same as DIRTT, upon information and belief, Falkbuilt personnel has approached U.S. clients of DIRTT to be references for Falkbuilt, based only on their past experience with DIRTT, not Falkbuilt.

64. As a result, the U.S. marketplace is highly convoluted and confused. Customers who have a history with DIRTT are now being approached by a company or companies who employ several former DIRTT employees, sell a purportedly similar product, and tout a nearly identical value proposition and origin story. In other words, as a result of the Falkbuilt Entities' tactics of passing themselves off as "DIRTT 2.0," many U.S. customers view the Falkbuilt Entities as having some positive association with DIRTT. Some customers have even misunderstood Falkbuilt to be either a new division of DIRTT or the same company, but with a new name.

65. In another recent example of confusion in the U.S. market, a general contractor listed the drywall and glass specification on a contract as the "DIRTT Falkbuilt system." There can be no clearer illustration of the penetration of the Falkbuilt Entities' false equivalence efforts into the U.S. market.

C. Ex-DIRTT Employees' Misuse of DIRTT Confidential Business Information in the United States

66. Upon information and belief, former employees of DIRTT, and former employees of DIRTT's parent, have aided the Falkbuilt Entities' scheme to gain a competitive advantage against DIRTT in the U.S. market through the unlawful and unauthorized disclosure and use of DIRTT's Confidential Business Information in the United States.

67. As one example, former DIRTT employee Amanda Buczynski stole, disclosed, and otherwise misused DIRTT Confidential Business Information on behalf of the Falkbuilt Entities in the Pittsburgh, Pennsylvania market.

68. As part of her job responsibilities with DIRTT in its Pittsburgh market, Ms. Buczynski had access to proprietary databases of customer relationships, pricing, costing, and forecasts accessible only to herself, the CEO, and the COO of DIRTT's Regional Partner in the Pittsburgh market.

69. Ms. Buczynski, as part of her employment with DIRTT, agreed to a confidentiality agreement which provided, among other things, that she would not "without the prior written consent of DIRTT, either during the period of [her] employment or at any time thereafter, disclose or cause to be disclosed any of the Confidential Information in any manner ..." *See* Ex. G (filed under seal).

70. Ms. Buczynski also agreed to confidentiality provisions in the DIRTT offer letter she executed on September 30, 2016.

71. Ms. Buczynski resigned from DIRTT effective September 17, 2019, falsely stating to her colleagues that she was not leaving to work for Falkbuilt.

72. On Ms. Buczynski's last day, she plugged a USB device with a serial number that included 4A3BCF57-0 into her DIRTT-provided laptop. She also accessed a number of files and

folders on her work computer's hard drive related to ongoing DIRTT projects. Ms. Buczynski did not possess authorization to undertake any of these acts. *See* Ex. H (filed under seal); Ex. E at ¶ 9.

73. On August 30, 2019, prior to her departure from DIRTT, Ms. Buczynski copied over 40 files, including one identified as "PPT 'Large Clients'" to a Dropbox directory/folder. *See* Ex. I (filed under seal); Ex. E at ¶ 9.

74. In fact, as noted above, Ms. Buczynski started working for Falkbuilt immediately following her departure from DIRTT.

75. Immediately after leaving DIRTT's employ, Ms. Buczynski reached out to one or more U.S. DIRTT customers on behalf of Falkbuilt in an effort to compete on ongoing projects and to underbid DIRTT by utilizing DIRTT's Confidential Business Information and information obtained from DIRTT's partner. *See* Ex. J; Ex. E at ¶ 9.

76. On information and belief, Ms. Buczynski also worked to advance Falkbuilt's interests to the detriment of DIRTT in the U.S. by either hiding or sitting on leads that she received in the time leading up to her departure, including inquiries from potential U.S. partners interested in working with DIRTT.

77. After submitting her resignation to DIRTT, Ms. Buczynski also emailed to her personal email account DIRTT customer contact information, and DIRTT pricing and estimates. *See* Ex. J.

78. Ms. Buczynski's conduct is part of a pattern of a larger number of former U.S. DIRTT employees solicited by the Falkbuilt Entities. *See* Ex. E at ¶ 9. These other former DIRTT employees, who presently work for or on behalf of Falkbuilt, include Christina Engelbert and Laura Shadow.

79. Other former DIRTT, Ltd. employees also took and forwarded DIRTT Confidential Business Information prior to their departures for Falkbuilt, which the Falkbuilt Entities have used to compete with DIRTT in the U.S. market. These former employees include Clayton Smed, David Weeks and Ingrid Schoning.

80. The information downloaded and forwarded by these individuals was disseminated by the Falkbuilt Entities in the United States and used to assist the Falkbuilt Entities in undercutting DIRTT's pricing for projects in the United States for which the Falkbuilt Entities were directly competing with DIRTT.

81. The Falkbuilt Entities have misappropriated DIRTT Confidential Business Information, are using the DIRTT Confidential Business Information in the United States, and DIRTT has reason to believe that these actions are ongoing and widespread in the U.S. market.

82. Plaintiff has reason to believe, based upon direct knowledge of information actually taken, the facial similarity of DIRTT and Falkbuilt products, and the direct approach of the Falkbuilt Entities to DIRTT's U.S. customers and partners with purportedly similar products, that the use of DIRTT Confidential Business Information in the United States is far more widespread than currently known.

83. DIRTT seeks all relief available at law and in equity including, but not limited to, preliminary and permanent injunctive relief to restrain Defendants from using or disclosing DIRTT Confidential Business Information in the U.S. DIRTT requests entry of the injunction consented to by Falkbuilt, Inc. and Falkbuilt Ltd. should the Court of Queen's Bench of Alberta, Canada in *DIRTT Env'tl Solutions, Ltd. v. Falkbuilt, Ltd., et al.*, Case No. 1901-06550 issue it, to protect itself from irreparable injuries caused by Defendants' conduct and to prevent further

harm in the United States (the “Prior Injunction”). DIRTT also seeks an award of compensatory damages, exemplary damages, and attorney’s fees.

D. DIRTT Confidential Business Information Constitutes Trade Secrets

84. DIRTT’s manufacturing approach is built on a foundation of technology, the center of which is the proprietary ICE Software. DIRTT uses ICE Software to design, visualize, configure, price, communicate, engineer, specify, order and manage projects. The ICE Software was developed in or around 2005 as a custom interior design and construction software solution to integrate into DIRTT’s offerings. The ICE Software makes manufactured, fully custom interiors both feasible and profitable while addressing challenges associated with traditional construction, including cost overruns, inconsistent quality, delays, and significant material waste. The ICE Software is used throughout the sales process, ensuring consistency across the services and products received by all of DIRTT’s clients in the United States.

85. DIRTT begins manufacturing custom DIRTT products once a file (an “ICE File”) is generated and a purchase order is received. The ICE Software allows an entire project to be tracked and managed across the entire production cycle through design, sales, production, delivery and installation. The ICE File (containing a project’s engineering and manufacturing data) generated during the design and specification process can be used for optimizing future reconfigurations, renovations, technology integration initiatives and changes to a client’s space.

86. The ICE Software is licensed to unrelated companies and Regional Partners of DIRTT, but only for certain limited information and only if the parties agree to be bound by a confidentiality agreement.

87. ICE files generated by ICE Software contain proprietary costing information that would be of substantial benefit to a competitor seeking to undercut DIRTT on price. Costing is a

closely-guarded secret at DIRTT for this reason, and because of the substantial efforts utilized to generate it.

88. In addition to the ICE Software, during their employment with DIRTT, Ms. Buczynski and other former DIRTT employees had access to DIRTT Confidential Business Information, including but not limited to:

- (a) DIRTT's job costing;
- (b) DIRTT's customer and supplier lists, and a list of prospects and projects;
- (c) DIRTT's sales figures and projections;
- (d) DIRTT's pre-use customer presentations and marketing materials;
- (e) DIRTT's marketing and sales strategies;
- (f) DIRTT's customer, supplier and Regional Partner order histories, needs, and preferences;
- (g) DIRTT's customer proposals, service agreements, contracts and purchase orders;
- (h) DIRTT's plans to expand and target new clients and markets;
- (i) design specifications and drawings of DIRTT products;
- (j) specialized methods and processes used to create custom prefabricated modular interior wall partitions, other ocular interior components and other DIRTT products;
- (k) research and development of new DIRTT products;
- (l) trade secrets and intellectual property strategy, including strategy regarding the ICE Software and ancillary programs;
- (m) strategic plans and business plans; and
- (n) library of prior projects and customer needs, impossible to replicate without access to DIRTT's confidential system.

This information comprises DIRTT Confidential Business Information.

89. DIRT Confidential Business Information constitutes trade secrets of DIRT. It is vital to DIRT's business success and enables it to compete effectively in an extremely competitive marketplace. DIRT takes reasonable measures to protect and maintain the confidentiality of DIRT Confidential Business Information, including the measures described above.

90. DIRT derives substantial economic value from maintaining the secrecy of its DIRT Confidential Business Information, including, among other things, its pricing, its customer, prospect, and supplier information, its sales figures and projections, its marketing and sales strategies, its technical-know-how, its design specifications, and its strategic and business plans. Any of this information would be immensely valuable to a competitor, and a global theft of the information would allow a competitor an unfair advantage in bidding against DIRT on projects. DIRT has incurred and devoted significant costs and expenses in developing its DIRT Confidential Business Information.

91. DIRT Confidential Business Information, including, among other things, pricing, its customer, prospect and supplier information, its sales figures and projections, its marketing and sales strategies, its design specifications, and strategic and business plans, is neither generally known, nor is it readily ascertainable, to the general public, to DIRT's competitors, or to any other person or entity that could obtain value from such information.

92. DIRT takes reasonable measures to protect and maintain the secrecy of DIRT Confidential Business Information, including, among other things, its pricing, its customer, prospect, and supplier information, its sales figures and projections, its marketing and sales strategies, its design specifications, and its strategic and business plans.

93. DIRTT limits access to DIRTT Confidential Business Information and requires network passwords to access DIRTT Confidential Business Information on DIRTT's computers, confidential agreements, warranty on ICE Software, and partner confidentiality agreements. DIRTT also has policies and procedures in place governing the access to and use of DIRTT Confidential Business Information, including efforts described above to identify attempts to improperly transfer DIRTT Confidential Business Information.

E. The Falkbuilt Entities directly and unlawfully compete with DIRTT, Inc. in the United States Market

94. Despite the Falkbuilt Entities' claims to the contrary, since their formation, the Falkbuilt Entities have attempted to compete in the same market as DIRTT. The Falk Branches are investors in Falkbuilt, Ltd. and many hold themselves out as employees or principals of Falkbuilt, Ltd. The email servers utilized by these purported "independent businesses" are controlled and maintained by Falkbuilt, Ltd.

95. The Falkbuilt Entities have demonstrated a pattern of using DIRTT's partner network in an effort to gain exposure to DIRTT's competitive information and use such information to gain a competitive advantage against DIRTT in the U.S. market.

96. The Falkbuilt Entities have created confusion in the United States marketplace by:

- (a) Presenting Falkbuilt services to customers, including DIRTT's U.S. customers and prospects, and misrepresenting the characteristics of such products and services by stating and representing that Falkbuilt products can replace DIRTT products with the full range of customization and functionality. In fact, for one project, the U.S. customer was so misled by Falkbuilt's statements concerning the similarity between DIRTT and Falkbuilt that the project documents had to be formally amended to clarify that the design was based on Falkbuilt's solution, and

that DIRTT was an acceptable alternative as a manufacturer. This change was only made after a DIRTT representative had an in-depth conversation with the architect for the project, explaining the substantial difference between DIRTT products and Falkbuilt products.

(b) Repeatedly and falsely claiming an affiliation with DIRTT, wrongly suggesting an affiliation, and that Falkbuilt's technology is a lawful outgrowth of DIRTT's technological heritage.

(c) Degrading DIRTT to DIRTT's U.S. customers and partners by falsely announcing departures of DIRTT's U.S. Regional Partners, falsely representing DIRTT's ability to perform its obligations with its customers, and falsely referring to the destruction of the company by current management.

97. DIRTT has been injured in the United States by the Falkbuilt Entities' actions. Plaintiff has an interest in the integrity of DIRTT Confidential Business Information. Plaintiff also has lost revenue and faces the risk of further lost revenue in the United States.

COUNT I – VIOLATION OF LANHAM ACT
(15 U.S.C. § 1051, et seq.)

98. The allegations contained in the preceding paragraphs set forth above are incorporated as if fully set forth herein.

99. The Lanham Act provides a private cause of action for misidentification of the origin of goods and services.

100. Specifically, the Lanham Act provides:

§1125 FALSE DESIGNATIONS OF ORIGIN, FALSE DESCRIPTIONS, AND DILUTION FORBIDDEN

(a) Civil action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities.

101. In this case, the Falkbuilt Entities have presented themselves in the United States marketplace as providing equivalent services to DIRTT. As explained above in Paragraphs 50-65, Falkbuilt's solutions are demonstrably not equivalent to those of DIRTT. Falkbuilt's solutions lack the flexibility or customizability of DIRTT's solutions, and rely on considerably older technology.

102. The Falkbuilt Entities violated the prohibitions of the Lanham Act in the United States market in four separate ways:

(a) Repeatedly misrepresenting the nature and character of Falkbuilt's goods and services by drawing false comparisons between DIRTT products and Falkbuilt products, which is likely to cause confusion among U.S. consumers, as explained in Paragraphs 45-65, 96 above. Specifically, the Falkbuilt Entities have misrepresented the capability of Falkbuilt solutions. Similarly, the Falkbuilt

Entities' false comparisons to DIRTT solutions misrepresent the Falkbuilt Entities' access to DIRTT's proprietary methods, which are protected by patents. The Falkbuilt Entities further misrepresent the cost of Falkbuilt products over the life of the products. Upon information and belief, such misrepresentations are not limited to individual instances, but are widespread and ongoing. At least one specific example, as explained in Paragraph 61 above, is presently known to DIRTT in which the Falkbuilt Entities' misrepresentations as to the equivalency between DIRTT products and Falkbuilt products were such that when the reality was discovered, project documents had to be formally amended.

(b) Repeatedly and falsely representing an association or affiliation with DIRTT through social media, which is likely to cause confusion among U.S. consumers by, for example, creating an illusion that the Falkbuilt Entities have access to DIRTT's resources and clientele, and co-opting DIRTT's reputation. This is part of an ongoing effort to persuade consumers that Falkbuilt's products and services are equivalent to DIRTT's products and services. Specifically, the Falkbuilt Entities' agents have issued numerous Tweets that either (1) falsely create the illusion of his continued association with DIRTT for U.S. consumers or; (2) detail false information about DIRTT in the United States and/or its U.S. customers. These Tweets were directed to the U.S. marketplace as a whole and are attached as Ex. K.

(c) Ms. Buczynski, on behalf of Falkbuilt, passed off the ready-for-market products in DIRTT's showroom as those of Falkbuilt and, when discussing Falkbuilt with consumers, referred to it as "the new DIRTT" or "DIRTT 2.0."

Upon information and belief, Falkbuilt partners and employees continue to make similar misrepresentations, which are directed at consumers and at the marketplace, generally.

(d) The Falkbuilt Entities knowingly misdesignated the origin of Falkbuilt's techsheets and brochures, as well as similar information included on Falkbuilt, Ltd.'s website, mimicking DIRTТ's diagrams and products even though, as explained in Paragraphs 50-65 above, there is no real equivalence between DIRTТ's and Falkbuilt's interior construction solutions. Such information and promotional materials were distributed, and continue to be distributed, widely in the marketplace to U.S. consumers.

103. There is a high likelihood of consumer confusion as to the origin of the goods and services caused by the Falkbuilt Entities' false designations of origin in the United States market. DIRTТ is harmed by the false designation of DIRTТ products as those of Falkbuilt because such false attribution diverts existing and potential customers, in the health care sector and others, from DIRTТ to the Falkbuilt Entities, resulting in damages to DIRTТ.

104. Upon information and belief, it is due to the Falkbuilt Entities' false descriptions that several DIRTТ projects in the United States, including several projects in Texas, were obtained by the Falkbuilt Entities, either by flipping projects that had previously been awarded to DIRTТ, or winning bids on projects that would otherwise have gone to DIRTТ but for the Falkbuilt Entities' misrepresentations.

105. Pursuant to the Lanham Act, DIRTТ is entitled to U.S. damages in the amount of: (1) the Falkbuilt Entities' profits related to the violations; (2) damages sustained by DIRTТ; (3) DIRTТ's costs of the action; and (4) DIRTТ's attorney's fees.

COUNT II – ENTRY AND ENFORCEMENT OF CANADIAN INJUNCTION

106. Pursuant to principles of comity, this Court is empowered to enforce an injunction entered by a foreign court.

107. The Court of Queen’s Bench of Alberta will soon be requested to enter a preliminary injunction against Falkbuilt, Ltd., Falkbuilt, Inc. and multiple Falk Branches.

108. Falkbuilt, Ltd. and Falkbuilt, Inc. have agreed to be bound by a preliminary injunction entered by Court of Queen’s Bench of Alberta, and filed their consent with the United States District Court for the District of Utah. *See Ex. L.*

109. If the preliminary injunction is issued by the Canadian court, DIRTT respectfully requests that the Court enforce the injunction in the United States and bind Falkbuilt Ltd., Falkbuilt, Inc. and the Falk Branches identified in the injunction to the terms of the injunction.

110. Defendants have no legal basis to oppose entry of this injunction.

COUNT III - VIOLATION OF TEXAS UNIFORM TRADE SECRETS ACT

111. The allegations contained in the preceding paragraphs set forth above are incorporated as if fully set forth herein.

112. The Texas Uniform Trade Secrets Act (“TUTSA”) provides a private right of action for misappropriation of trade secrets. Tex. Civ. Prac. and Rem. Code § 134A.001 *et seq.*

113. A “trade secret” is defined as all forms and types of information, including business, scientific, technical, economic, or engineering information, and any formula, design, prototype, pattern, plan, compilation, program device, program, code, device, method, technique, process, procedure, financial data, or list of actual or potential customers or suppliers, whether tangible or intangible and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if:

(A) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

Tex. Civ. Prac. and Rem. Code § 134A.002(6).

114. The term “misappropriation” includes “(a) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or (b) disclosure or use of a trade secret of another without express or implied consent by a person who: (i) used improper means to acquire knowledge of the trade secret; or (ii) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was: (A) derived from or through a person who had utilized improper means to acquire it; (B) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or (iii) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.” Tex. Civ. Prac. and Rem. Code § 134A.002(3).

115. The term “improper means” includes “theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.” Tex. Civ. Prac. and Rem. Code § 134A.002(2).

116. The Falkbuilt Entities have competed against DIRTT for projects in Texas on numerous occasions. The Falkbuilt Entities have used DIRTT’s trade secrets, which they know

were improperly taken in violation of strict confidentiality agreements, and disseminated these trade secrets to their agents within the State of Texas, to aid their efforts to undercut DIRTT's pricing and give them an unfair advantage in bidding for projects against DIRTT in the State of Texas.

117. The Falkbuilt Entities' violations of the TUTSA caused DIRTT substantial damage. Among other things, DIRTT was required to hire attorneys and computer forensic experts to investigate and attempt to mitigate Defendants' misappropriation of DIRTT's trade secrets and discover the extent to which the Falkbuilt Entities have, or will be able to, use or disclose DIRTT's trade secrets in Texas.

118. DIRTT also suffered damage as a result of the loss or diminishment of value of DIRTT Confidential Business Information and other confidential and proprietary information, and diminishment of business value and competitive standing in the United States generally, and in Texas specifically.

119. The Falkbuilt Entities compete directly with DIRTT in the United States, and Defendants continue to use the misappropriated DIRTT trade secrets to gain an unfair competitive advantage in the United States marketplace. Upon information and belief, it is at least in part due to the Falkbuilt Entities' illegal use of DIRTT's trade secrets that several DIRTT projects were stolen by the Falkbuilt Entities, and the reason why DIRTT lost bids to the Falkbuilt Entities on the same projects. A list of such projects currently known to DIRTT is attached as Ex. D (filed under seal). The Falkbuilt Entities are each liable for violations of the TUTSA because they used DIRTT trade secrets (which include DIRTT Confidential Business Information) without express or implied permission from DIRTT and because the Falkbuilt Entities knew or had reason to know that their ex-DIRTT employees had acquired DIRTT's trade

secrets under circumstances giving rise to a duty to maintain their secrecy or limit their use, and these employees had divulged DIRTТ’s trade secrets when they owed a duty to DIRTТ to maintain their secrecy or limit their use.

120. DIRTТ has been and continues to be irreparably injured in the State of Texas by these Defendants’ misappropriations of its trade secrets. Pursuant to Section 134A.004, DIRTТ seeks actual and exemplary damages, as well as injunctive relief, as a result of Defendants’ misappropriations.

COUNT IV – FEDERAL DEFEND TRADE SECRETS ACT
(18 U.S.C. § 1836)

121. The allegations contained in the preceding paragraphs set forth above are incorporated as if fully set forth herein.

122. The Federal Defend Trade Secrets Act provides a private right of action for an “owner of a trade secret that is misappropriated . . . if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce.” 18 U.S.C. § 1836(b)(1).

123. A “trade secret” means:

all forms and types of financial, business, scientific, technical, economic or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically or in writing if (A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

18 U.S.C. § 1836(3).

124. The term “misappropriation” includes the “disclosure or use of a trade secret of another without express or implied consent by a person who . . . at the time of disclosure or use,

knew or had reason to know that the knowledge of the trade secret was . . . derived from or through a person who owed a duty to the person seeking relief to maintain the secrecy of the trade secret.” 18 U.S.C. § 1839(5)(B)(ii)(III).

125. The term “improper” includes “breach of a duty to maintain secrecy ...” 18 U.S.C. §1839(6).

126. DIRTT Confidential Business Information is a “trade secret” under the Federal Defend Trade Secrets Act because it comprises confidential and proprietary customer information, including marketing plans, strategies and data, artwork, financial information, customer information, account histories and other information which DIRTT takes reasonable measures to maintain secret.

127. Such information derives independent economic value because it provides DIRTT with a competitive commercial advantage from not being known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

128. Upon information and belief based upon available objective information, the Falkbuilt Entities have conspired to misappropriate a large number of other DIRTT trade secrets. Plaintiff is aware of, for example, DIRTT pricing information, design documents, client specific project documents, and other trade secrets that were misappropriated. However, due to the potentially thousands of individual trade secrets at issue (i.e. individual design files, pricing documents, and client project information), DIRTT cannot reasonably identify each trade secret at issue in this Litigation until or unless the Falkbuilt Entities participate in discovery, as the information necessary for such identification is in the possession of the Falkbuilt Entities and in

the possession of those former DIRTT employees who took part in the Falkbuilt Entities' conspiracy to unlawfully use DIRTT's trade secrets in the United States.

129. The DIRTT trade secrets misappropriated (i.e., through unlawful disclosure) by Falkbuilt Ltd. and Falkbuilt, Inc. are used in interstate commerce to bid for, design, and construct projects throughout the United States.

130. As former DIRTT employees, those employees who have actively participated in the scheme to unlawfully compete in the United States with DIRTT by misappropriating trade secrets and confidential information, had contractual and fiduciary duties to maintain the secrecy of DIRTT's trade secrets and not misappropriate the information for their own use or for the use of DIRTT's competitors.

131. At all relevant times, those employees were aware of the duty to maintain the secrecy of DIRTT's trade secrets and not misappropriate such information for their own use, or for the use of DIRTT's competitors.

132. In violation of this duty, those former DIRTT employees misappropriated DIRTT's trade secrets, including, but not limited to, marketing data and analyses, customer histories and payment histories, by knowingly disclosing such information without DIRTT's express or implied consent in order to unlawfully compete with DIRTT in the United States.

133. Defendants' violations of the Federal Defend Trade Secrets Act caused DIRTT substantial damage in the United States. Among other things, DIRTT was required to hire attorneys and computer forensic experts to investigate and attempt to mitigate Defendants' misappropriation of DIRTT's trade secrets.

134. DIRTT also suffered damage in the United States as a result of the loss or diminishment of value of DIRTT's trade secrets, and diminishment of business value and competitive standing.

135. The Falkbuilt Entities compete directly with DIRTT in the United States, and Defendants continue to use the misappropriated DIRTT trade secrets to gain an unfair competitive advantage in the U.S. marketplace. Upon information and belief, it is at least in part based on the Falkbuilt Entities' illegal use of DIRTT's trade secrets that several DIRTT U.S. projects were stolen by the Falkbuilt Entities, and the reason why DIRTT lost bids to the Falkbuilt Entities on the same projects. A list of such projects currently known to DIRTT is attached as Ex. D and filed under seal.

136. Falkbuilt, Inc. and Falkbuilt Ltd. are also directly liable for violations of the Defend Trade Secrets Act because they acquired DIRTT trade secret information through their agents, each of whom are former DIRTT employees and/or partners, knowing that such information was obtained by improper means in the United States and/or knowingly disclosed trade secrets in the United States without DIRTT's express or implied consent, including violations of those agents' explicit and implied duties of confidentiality.

137. The Falkbuilt Entities are liable for violations of the Defend Trade Secrets Act because they used DIRTT trade secrets without express or implied permission from DIRTT, and the Falkbuilt Entities knew or had reason to know that ex-DIRTT employees had acquired the DIRTT trade secrets under circumstances giving rise to a duty to maintain their secrecy or limit their use; and had divulged DIRTT trade secrets when those employees owed a duty to DIRTT to maintain their secrecy or limit their use.

**COUNT V – VIOLATION OF PENNSYLVANIA UNIFORM
TRADE SECRETS ACT (12 P.S. § 5302)**

138. The allegations contained in the preceding paragraphs set forth above are incorporated as if fully set forth herein.

139. The Pennsylvania Uniform Trade Secrets Act (“PUTSA”) provides a private right of action for misappropriation of trade secrets.

140. A “trade secret” is defined as “information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” 12 P.S. § 5302.

141. The term “misappropriation” includes “(a) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or (b) disclosure or use of a trade secret of another without express or implied consent by a person who: (i) used improper means to acquire knowledge of the trade secret; or (ii) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was: (A) derived from or through a person who had utilized improper means to acquire it; (B) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or (iii) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.” 12 P.S. § 5302.

142. The term “improper means” includes “theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.” 12 P.S. § 5302.

143. Ms. Buczynski, a former DIRTT employee working in Pennsylvania, had access to DIRTT’s trade secrets, including DIRTT Confidential Business Information consisting of confidential customer and account information, marketing strategies and techniques, marketing and development plans for client contact information, price lists, specific contract pricing and payment histories. Such information derives economic value because it gives DIRTT a commercial competitive advantage from not being generally known to and not readily ascertainable by the public or any person who can obtain economic value from its disclosure or use.

144. As a DIRTT employee, Ms. Buczynski was aware of the confidential nature of DIRTT’s trade secrets and agreed to ensure the continued confidentiality of such information.

145. As a DIRTT employee, Ms. Buczynski was also aware that DIRTT placed confidence in her to maintain the confidentiality of DIRTT’s trade secrets.

146. At all relevant times, DIRTT made, and continues to make, reasonable efforts to maintain the secrecy of DIRTT Confidential Business Information, by, among other things, requiring Ms. Buczynski to sign a confidentiality agreement.

147. Upon information and belief, Defendants have conspired to misappropriate a large number of other DIRTT trade secrets. Plaintiff is aware of, for example, DIRTT pricing information, design documents, client specific project documents, and other trade secrets that were misappropriated. However, due to the potentially thousands of individual trade secrets at issue (i.e. individual design files, pricing documents, and client project information), DIRTT

cannot reasonably identify each trade secret at issue, as the information necessary for such identification is in possession of Defendants and in the possession of those former DIRTT employees who took part in Defendants' conspiracy.

148. In violation of her duty to refrain from using or disclosing DIRTT's trade secrets, Ms. Buczynski, on her own and as part of a conspiracy with and at the direction of Falkbuilt, Inc. and Falkbuilt Ltd., misappropriated DIRTT's trade secrets. These activities of Ms. Buczynski constituted a breach of her duty to maintain the secrecy of DIRTT's trade secrets.

149. The Falkbuilt Entities' violations of the PUTSA caused DIRTT substantial damage. Among other things, DIRTT was required to hire attorneys and computer forensic experts to investigate and attempt to mitigate the Falkbuilt Entities' misappropriation of DIRTT Confidential Business Information.

150. DIRTT also suffered damage as a result of the loss or diminishment of value of DIRTT Confidential Business Information and other confidential and proprietary information, and diminishment of business value and competitive standing in the United States market.

151. The Falkbuilt Entities compete directly with DIRTT in the United States, and Defendants continue to use the misappropriated DIRTT trade secrets to gain a competitive advantage in the United States marketplace. Upon information and belief, several DIRTT projects were stolen by the Falkbuilt Entities, and DIRTT lost bids to the Falkbuilt Entities on the same projects, at least in part due to the Falkbuilt Entities' illegal use of DIRTT's trade secrets. A list of such projects currently known to DIRTT is attached as Ex. D and filed under seal.

152. DIRTT further believes that the Falkbuilt Entities are improperly using DIRTT's confidential information gained from the Falk Branches to gain a competitive edge over DIRTT

in direct competition on projects. The Falkbuilt Entities have used, and continue to use, confidential information obtained from DIRTT to undercut DIRTT's pricing on project bids for which DIRTT and the Falkbuilt Entities are in competition. In many cases, DIRTT has lost bids to the Falkbuilt Entities by mere hundreds of dollars. In one example, DIRTT lost the bid for the second phase of a project for which DIRTT had already bid, won, and completed the first phase in 2018 to 2019. DIRTT had informed its Regional Partner of the opportunity to bid on the second phase, which the partner then wrongfully disclosed to the Falkbuilt Entities.

153. The Falkbuilt Entities are directly liable for violations of the PUTSA because they actively participated with Ms. Buczynski in misappropriating DIRTT's trade secrets.

154. Falkbuilt, Inc. and Falkbuilt Ltd. are also directly liable for violations of the PUTSA because they acquired DIRTT trade secret information through their agent, Ms. Buczynski, knowing that such information was obtained by improper means, including violations of Ms. Buczynski's explicit and implied duties of confidentiality.

155. Falkbuilt, Inc. and Falkbuilt Ltd. are liable for violations of the PUTSA because they used DIRTT trade secrets without express or implied permission from DIRTT, and the Falkbuilt Entities knew or had reason to know that Ms. Buczynski had acquired the DIRTT trade secrets under circumstances giving rise to a duty to maintain their secrecy or limit their use; and had divulged DIRTT's trade secrets when she owed a duty to DIRTT to maintain their secrecy or limit their use.

156. DIRTT has been and continues to be irreparably injured by the Falkbuilt Entities' misappropriations of DIRTT's trade secrets. Pursuant to Sections 5303 and 5304 of the Act, DIRTT seeks injunctive relief, as well as monetary and exemplary damages.

**COUNT VI – VIOLATION OF COLORADO CONSUMER
PROTECTION ACT (Colo. Rev. Stat. § 6-1-101, et seq.)**

157. The allegations contained in the preceding paragraphs set forth above are incorporated as if fully set forth herein.

158. The Colorado Consumer Protection Act (“CCPA”) provides a private cause of action to citizens of Colorado, including businesses such as DIRTT which are incorporated there.

159. Defendants Falkbuilt, Inc. and Falkbuilt Ltd. are liable for violating the CCPA because they engaged in unfair or deceptive trade practices by:

- (a) Repeatedly misrepresenting the nature and character of Falkbuilt’s goods and services by drawing false comparisons between DIRTT products and Falkbuilt products, which is likely to cause confusion among U.S. and Colorado consumers, as explained in Paragraphs 50-65 above. Specifically, the Falkbuilt Entities have misrepresented the capability of Falkbuilt’s interior construction solutions. Similarly, the Falkbuilt Entities’ false comparisons to DIRTT solutions misrepresent Falkbuilt’s access to DIRTT’s proprietary methods, which are protected by patents. The Falkbuilt Entities further misrepresent the cost of their products over the life of the products. Upon information and belief, such misrepresentations are not limited to individual instances, but are widespread and ongoing. At least one specific example, as explained in Paragraph 61 above, is presently known to DIRTT in which the Falkbuilt Entities’ misrepresentations as to the equivalency between DIRTT products and Falkbuilt products was such that when the reality was discovered, project documents had to be formally amended. And DIRTT believes that it lost the bid for that project in January 2020 based on the Falkbuilt Entities’ misrepresentations.

(b) Repeatedly and falsely representing an association or affiliation with DIRTT through social media, which is likely to cause confusion among consumers by, for example, creating an illusion that the Falkbuilt Entities have access to DIRTT's resources and clientele, and co-opting DIRTT's reputation. This is part of an ongoing effort to persuade consumers that Falkbuilt's products and services are equivalent to DIRTT's products and services. Specifically, Falkbuilt's agents have issued numerous Tweets that either: (1) falsely create the illusion of his continued association with DIRTT for U.S. consumers or; (2) detail false information about DIRTT in the United States and/or its U.S. customers. These Tweets were directed to the U.S. marketplace as a whole, and are attached as Ex. K.

(c) Ms. Buczynski, on behalf of Falkbuilt, passed off the ready-for-market products in DIRTT's showroom as those of Falkbuilt and, when discussing Falkbuilt with consumers, referred to it as "the new DIRTT" or "DIRTT 2.0". Upon information and belief, Falk Branches and employees continue to make similar misrepresentations, which are directed at consumers and at the marketplace, generally. In fact, Falkbuilt's own promotional material touts the fact that it has no showrooms, which may explain why Falk Branches and employees rely on DIRTT's showrooms to provide Falkbuilt customers with in-person demonstrations – passing off DIRTT solutions as their own.

(d) The Falkbuilt Entities knowingly misdesignated the origin of Falkbuilt's techsheets and brochures, and similar information included on Falkbuilt, Ltd.'s website, mimicking DIRTT's diagrams and products even though, as explained in

Paragraphs 50-65 above, there is no real equivalence between DIRTT's and Falkbuilt's interior construction solutions. Such information and promotional materials were distributed, and continue to be distributed, widely in the marketplace to U.S. consumers, including consumers in Colorado.

160. All of these acts and false statements of facts occurred in the course of the Falkbuilt Entities' business, and these Defendants' efforts to create confusion are directed generally to the United States marketplace for DIRTT's goods and services.

161. The Defendants' acts and false statements of facts constitute an ongoing fraud on the consumer public.

162. These acts and false statements of facts significantly impact the public as actual or potential consumers of DIRTT's goods and services because they create a high likelihood of confusion among actual or potential consumers of those goods and services as to the origin of those goods and services.

163. The end users of DIRTT's goods and services, including U.S. hospitals and medical clinics, are not necessarily knowledgeable about the technological nuances of the process by which these units are constructed. Thus, the Defendants' efforts to misstate the origin of these goods and services have the capacity, and are highly likely, to deceive consumers. These U.S. consumers are likely to have to expend time and effort to determine the actual origin of the goods and services. Unless restrained and enjoined by this Court, the Defendants' actions will continue to cause confusion in the U.S. marketplace as to the origin of DIRTT's goods and services.

164. Defendants' conduct has caused, and unless restrained and enjoined by this Court, will continue to cause, irreparable damage to DIRTT, a Colorado corporation, by confusing

consumers as to the origin of its goods and services and by creating doubt about DIRTT's stability with respect to its partner network. Defendants' deceptive conduct has directly and negatively impacted DIRTT's reputation, business value, and competitive standing. Upon information and belief, it is as a result of Defendants' false statements of fact that several DIRTT projects were stolen by the Falkbuilt Entities, and the reason why DIRTT lost bids to the Falkbuilt Entities on the same projects. A list of such projects currently known to DIRTT is attached as Ex. D and filed under seal.

165. Pursuant to Colo. Rev. Stat. § 6-1-113, DIRTT is entitled to recover an amount equal to three times its actual damages, and reasonable attorneys' fees.

COUNT VII – VIOLATION OF OHIO DECEPTIVE PRACTICES ACT
(Ohio Rev. Code Ann. § 4165.01, et seq.)

166. The allegations contained in the preceding paragraphs set forth above are incorporated as if fully set forth herein.

167. The Ohio Deceptive Practices Act ("ODPA") provides a private cause of action when, among other things, "in the course of [a] person's business, vocation or occupation, the person causes likelihood of confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services." Ohio Rev. Code Ann. § 4165.02(A)(2).

168. Falkbuilt, Inc. and Falkbuilt Ltd. are liable for violations of the ODPA because they knowingly engaged in deceptive trade practices by falsely designating the source of goods and services originated by DIRTT by:

- (a) Repeatedly misrepresenting the nature and character of the goods and services by drawing false comparisons between DIRTT products and Falkbuilt products, which is likely to cause confusion among U.S. consumers, including consumers in Ohio, as explained in Paragraphs 50-65 above. Specifically, the

Falkbuilt Entities have misrepresented the capability of Falkbuilt's interior construction solutions. Similarly, the Falkbuilt Entities' false comparisons to DIRTT solutions misrepresent Falkbuilt's access to DIRTT's proprietary methods, which are protected by patents. The Falkbuilt Entities further misrepresent the cost of Falkbuilt products over the life of the products. Upon information and belief, such misrepresentations are not limited to individual instances, but are widespread and ongoing. At least one specific example, as explained in Paragraph 61 above, is presently known to DIRTT in which the Falkbuilt Entities' misrepresentations as to the equivalency between DIRTT products and Falkbuilt products was such that when the reality was discovered, project documents had to be formally amended. And DIRTT believes that it lost the bid for that project in January 2020 due to the Falkbuilt Entities' misrepresentations.

(b) Repeatedly and falsely representing an association or affiliation with DIRTT through social media, which is likely to cause confusion among consumers by, for example, creating an illusion that the Falkbuilt Entities have access to DIRTT's resources and clientele, and co-opting DIRTT's reputation. This is part of an ongoing effort to persuade consumers that Falkbuilt's products and services are equivalent to DIRTT's products and services. Specifically, Falkbuilt's agents have issued numerous Tweets that either: (1) falsely create the illusion of his continued association with DIRTT for U.S. consumers or; (2) detail false information about DIRTT in the United States and/or its U.S. customers.

These Tweets were directed to the U.S. marketplace as a whole, including to consumers in Ohio, and are attached hereto as Ex. K.

(c) Ms. Buczynski, on behalf of Falkbuilt, passed off the ready-for-market products in DIRTT's showroom as those of Falkbuilt and, when discussing Falkbuilt with consumers, referred to it as "the new DIRTT" or "DIRTT 2.0". Upon information and belief, Falk Branches and employees continue to make similar misrepresentations, which are directed at U.S. consumers and at the U.S. marketplace generally. In fact, Falkbuilt's own promotional material touts the fact that it has no showrooms, which may explain why Falkbuilt partners and employees rely on DIRTT's showrooms to provide Falkbuilt customers with in-person demonstrations, passing off DIRTT's solutions as their own.

(d) The Falkbuilt Entities knowingly misdesignated the origin of Falkbuilt's techsheets and brochures, and similar information included on Falkbuilt's website, mimicking DIRTT's diagrams and products even though, as explained in Paragraphs 50-65 above, there is no real equivalence between DIRTT's and Falkbuilt's interior construction solutions. Such information and promotional materials were distributed, and continue to be distributed, widely in the marketplace to U.S. consumers, including consumers in Ohio.

169. There is a high likelihood of confusion or misunderstanding on the part of the buying public as to the source of DIRTT's goods and services caused by the Defendants' false designations of origin. The Defendants knew that their actions were deceptive. DIRTT is harmed by the false designation of DIRTT products as those of Falkbuilt because such false attribution

diverts existing and potential customers, in the health care sector and others, from DIRTT to Falkbuilt, resulting in monetary damages to DIRTT.

170. Defendants' intentional efforts to misstate the origin of these goods and services have the capacity, and are highly likely, to deceive U.S. consumers, including consumers in Ohio. Unless restrained and enjoined by this Court, Defendants' actions will continue to cause confusion in the United States marketplace, including Ohio, as to the origin of DIRTT's goods and services.

171. Defendants' deceptive conduct has directly and negatively impacted DIRTT's reputation, business value, and competitive standing. The extent of this damage is not yet known, but will be proven at trial.

172. Pursuant to ODPa, DIRTT is entitled to an injunction enjoining Falkbuilt, Inc. and Falkbuilt Ltd. from violating the ODPa and creating a likelihood of confusion among the buying public as to the source of DIRTT's goods and services. DIRTT is further entitled under the ODPa to recover its actual damages and, due to Defendants' willful violations of the statute, DIRTT is also entitled to recover its reasonable attorneys' fees.

DEMAND FOR JURY TRIAL

173. DIRTT demands that all issues be determined by jury.

PRAYER FOR RELIEF

WHEREFORE, DIRTT respectfully requests the following relief against Defendants for injury in the United States market:

- a. Enter judgment for it and against Falkbuilt Ltd. and Falkbuilt, Inc. on Counts I, II, III, IV, V, VI, and VII for injury in the United States market;
- b. Enter the Prior Injunction according to its terms immediately;
- c. Order Defendants, and all persons and entities in active concert with any of them, to provide a full accounting as to the whereabouts of all of DIRTT's trade secrets,

DIRTT Confidential Business Information and other DIRTT property in their possession, custody, or control (including information on the personal cloud drives of Defendants' employees) to the extent any such information is located in, or has otherwise been disclosed or used in the United States;

- d. Enter judgment that Falkbuilt Ltd. and Falkbuilt, Inc. are jointly and severally liable to DIRTT for its actual damages for losses resulting from these Defendants' misappropriation of DIRTT's trade secrets in the United States, including but not limited to lost U.S. profits proximately caused by Defendants' misappropriation, or in the alternative, a reasonable royalty for Defendants' misappropriation of DIRTT's trade secrets in violation of the Texas Uniform Trade Secrets Act and/or Federal Defend Trade Secrets Act only for injury in the United States market;
- e. Enter judgment that Falkbuilt Ltd. and Falkbuilt, Inc. are jointly and severally liable to DIRTT for exemplary damages for these Defendants' willful, wanton or reckless disregard of DIRTT's rights under the Texas Uniform Trade Secrets Act and/or Federal Defend Trade Secrets Act only for injury in Texas;
- f. Enter judgment that Falkbuilt Ltd. and Falkbuilt, Inc. are jointly and severally liable to DIRTT for DIRTT's attorneys' fees for these Defendants' willful, wanton or reckless disregard of DIRTT's rights under the Texas Uniform Trade Secrets Act and/or Federal Defend Trade Secret only for injury in Texas;
- g. Enter judgment that Falkbuilt, Inc. and Falkbuilt Ltd. are liable to DIRTT for its actual damages for losses resulting from their misappropriation of DIRTT's trade secrets in the United States or use and disclosure of such trade secrets in the United States, including lost profits proximately caused by Falkbuilt, Inc.'s and Falkbuilt Ltd.'s misappropriation of DIRTT's trade secrets, or, in the alternative, a reasonable royalty for their misappropriation of DIRTT's trade secrets in violation of the Pennsylvania Uniform Trade Secrets Act;
- h. Enter judgment that Falkbuilt, Inc. and Falkbuilt Ltd. are liable to DIRTT for disgorgement of all compensation paid to Ms. Buczynski by DIRTT during and after her breaches, and disgorgement of any and all profits Falkbuilt, Inc. and Falkbuilt Ltd. earned as a result of the misappropriation of DIRTT's trade secrets in violation of the Pennsylvania Uniform Trade Secrets Act;
- i. Enter judgment that Falkbuilt, Inc. and Falkbuilt Ltd. are liable to DIRTT for exemplary damages for their willful, wanton or reckless disregard of DIRTT's rights under the Pennsylvania Uniform Trade Secrets Act;
- j. Enter judgment that Falkbuilt, Inc. and Falkbuilt Ltd. are jointly and severally liable to DIRTT for DIRTT's attorneys' fees for their willful, wanton or reckless disregard of DIRTT's rights under the Pennsylvania Uniform Trade Secrets Act;
- k. Enter judgment that Falkbuilt, Inc. and Falkbuilt Ltd. are jointly and severally liable to DIRTT for their violation of the Lanham Act in the United States market;

- l. Enter judgment that Falkbuilt, Inc. and Falkbuilt Ltd. are jointly and severally liable to DIRTT for the Falkbuilt Entities' profits related to their violation of the Lanham Act; damages sustained by DIRTT in the United States; DIRTT's costs of the action; and DIRTT's attorney's fees for their violation of the Lanham Act;
- m. Enter judgment that Falkbuilt, Inc. and Falkbuilt Ltd. are jointly and severally liable to DIRTT for three times the amount of DIRTT's actual damages for their willful, wanton or reckless disregard of DIRTT's rights under the Colorado Consumer Protection Act;
- n. Enter judgment that Falkbuilt, Inc. and Falkbuilt Ltd. are jointly and severally liable to DIRTT for DIRTT's attorney's fees for Defendants' violation of the Colorado Consumer Protection Act;
- o. Enter judgment that Falkbuilt, Inc. and Falkbuilt Ltd. are jointly and severally liable to DIRTT for DIRTT's actual damages for their violation of the Ohio Deceptive Practices Act;
- p. Enter judgment that Falkbuilt, Inc. and Falkbuilt Ltd. are jointly and severally liable to DIRTT for DIRTT's attorney's fees for their willful violation of the Ohio Deceptive Practices Act;
- q. Enter an injunction enjoining Falkbuilt, Inc. and Falkbuilt Ltd. from violating the Ohio Deceptive Practices Act and creating a likelihood of confusion among the buying public as to the source of DIRTT's goods and services; and
- r. Award such other and further relief that this Court determines to be just and proper under the circumstances.

Dated: June 24, 2021

Respectfully submitted,

/s/ Robert E. Weitzel

Robert E. Weitzel
Texas Bar No. 24070823
Robert.weitzel@akerman.com
AKERMAN LLP
2001 Ross Avenue, Suite 3600
Dallas, Texas 75201
Telephone: 214.720.4300
Facsimile: 214.981.9339

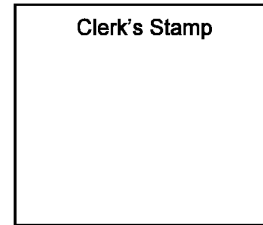
and

Jeffrey J. Mayer
Illinois Bar No. 6194013
jeffrey.mayer@akerman.com
Pro Hac Vice application to be filed
Catherine Miller
Illinois Bar No. 6270278
catherine.miller@akerman.com
Pro Hac Vice application to be filed
AKERMAN LLP
71 S. Wacker Drive, 47th Floor
Chicago, Illinois 60606
Telephone: 312.634.5700
Facsimile: 312.424.1900

**ATTORNEYS FOR PLAINTIFF
DIRTT ENVIRONMENTAL
SOLUTIONS, INC.**

Schedule "A"

Form 10
Alberta Rules of Court
Rule 3.25



COURT FILE NUMBER 1901-06550

COURT Court of Queen's Bench of Alberta

JUDICIAL CENTRE Calgary

PLAINTIFFS DIRTT Environmental Solutions Ltd. and DIRTT Environmental Solutions, Inc.

DEFENDANTS Falkbuilt Ltd., Falkbuilt, Inc., Mogens Smed, Barrie Loberg, Saad Fahssi, David Weeks, Nathan McLean, Hamidullah Wafa, 2179086 Alberta Ltd. (operating in its own right or as Echo), Ingrid Schoning and Tara Murray

DOCUMENT **AMENDED AMENDED AMENDED STATEMENT OF CLAIM**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT **^ Burnet, Duckworth & Palmer LLP**
 2400, 525- 8th Avenue SW
 Calgary, Alberta T2P 1G1

Lawyers: James D. Murphy | Richard F. Steele
 Phone: (403) 260-0152 | (403) 260-0151
 Fax: (403) 260-0332
 Email: jdm@bdplaw.com | rfs@bdplaw.com

NOTICE TO DEFENDANTS:

Falkbuilt Ltd., Falkbuilt, Inc., Mogens Smed, Barrie Loberg, Saad Fahssi, David Weeks, Nathan McLean, Hamidullah Wafa, 2179086 Alberta Ltd. (operating in its own right or as Echo), Ingrid Schoning and Tara Murray. You are being sued. You are a defendant.

Go to the end of this document to see what you can do and when you must do it.

Note: State below only facts and not evidence (Rule 13.6)

Statement of facts relied on:

1. DIRTT Environmental Solutions Ltd. ("**DIRTT Ltd.**") is a leading technology driven company carrying on business in Alberta and elsewhere around the world.
2. DIRTT Environmental Solutions, Inc. ("**DIRTT Inc.**") is an affiliate of DIRTT Ltd. incorporated under the laws of the State of Colorado, with its principal offices located in Calgary, Alberta.
3. Together, DIRTT Ltd. and DIRTT Inc. will be referred to as "DIRTT".

4. The Defendants, Mogens Smed ("**Smed**") and Barrie Loberg ("**Loberg**"), are former executives of DIRTT and are residents of Calgary, Alberta or the surrounding area (the "**Executive Employees**"). At all material times, the Executive Employees were officers and directing minds of DIRTT.
5. The Defendants, Saad Fahssi ("**Fahssi**"), David Weeks ("**Weeks**"), Nathan McLean ("**McLean**"), Hamidullah Wafa ("**Wafa**"), Ingrid Schoning ("**Shoning**") and Tara Murray ("**Murray**") are former employees of DIRTT. Excepting Weeks and Schoning, all of the former employees are residents of Calgary, Alberta or the surrounding area. Weeks worked remotely from Prince Edward Island and Schoning worked in Ontario. Together, these additional employees will be referred to as the "**Additional Departed Employees**".
6. The Defendant, Falkbuilt Ltd. ("**Falkbuilt Ltd.**"), is a company incorporated under the laws of Alberta on October 26, 2018. Smed is the sole director of Falkbuilt Ltd.
7. The Defendant, Falkbuilt, Inc. ("**Falkbuilt Inc.**"), is an affiliate of Falkbuilt Ltd. incorporated under the laws of the State of Delaware on January 29, 2019, with its principle offices located in Calgary, Alberta. Smed is the sole director of Falkbuilt Inc.
8. Together, Falkbuilt Ltd. and Falkbuilt Inc. will be referred to as "**Falkbuilt**".
9. The Defendant, 2179086 Alberta Ltd. (operating in its own right or as Echo) ("**217 Ltd.**"), is a company incorporated under the laws of Alberta on or about March 13, 2019. Smed is the sole director of 217 Ltd.

Nature of DIRTT's Business

10. DIRTT was founded in or around 2003 by Smed, Loberg and Geoff Gosling. DIRTT commenced operations in February 2004 and began commercial sales in May 2005.
11. DIRTT is an innovative manufacturing company featuring a proprietary software and virtual reality visualization platform coupled with vertically integrated manufacturing that designs, configures and manufactures prefabricated interior solutions used primarily in commercial spaces across a wide range of industries and businesses. DIRTT combines innovative product design with its industry-leading, proprietary ICE Software (the "**ICE Software**" or "**ICE**"), and technology-driven, lean manufacturing practices and sustainable materials to provide an end-to-end solution for the traditionally inefficient and fragmented interior construction industry. DIRTT creates customized interiors with the aesthetics of conventional construction but with greater cost and schedule certainty, shorter lead times, greater future flexibility, and better environmental sustainability than conventional construction.
12. DIRTT offers interior construction solutions throughout the United States and Canada, as well as in select international markets, through a network of independent distribution partners ("**Distribution Partners**") and an internal sales team. The Distribution Partners use the ICE Software to work with end users to envision and design their spaces. Orders are electronically sent through ICE to DIRTT's manufacturing facilities for production, packing and shipping. DIRTT's Distribution Partners then coordinate the receipt and installations of DIRTT's interior solutions at the end users' locations.
13. In addition to sales and marketing, the Distribution Partners provide value throughout the construction process. At the pre-construction stage, Distribution Partners provide design

assistance services to architects and designers. Through the construction process, Distribution Partners act as specialty subcontractors to the general contractors and provide installation and other construction services. Post-move in, Distribution Partners provide warranty work, ongoing maintenance and repurposing support. The Distribution Partners operate under Distribution Partner agreements with DIRT, which outline sales goals and marketing territories and provide the terms and conditions upon which the Distribution Partners market and sell DIRT products.

14. DIRT also operates several DIRT Experience Centers ("DXC"), previously known as Green Learning Centers, which are display areas to showcase DIRT's products and services. DIRT generally requires its Distribution Partners to construct and maintain a DXC in their local markets. There are currently over 80 DXCs showcasing DIRT's products and services across North America, the Middle East and India.
15. DIRT's head office is located in Calgary, Alberta. DIRT has manufacturing facilities in Calgary, Alberta, Phoenix, Arizona and Savannah, Georgia.
16. On November 28, 2013, DIRT went public and listed its common shares for trading on the Toronto Stock Exchange ("**TSX**").
17. Based on the foregoing, DIRT has acquired goodwill and reputation around the world, including, but not limited to in Canada and North America.

DIRT's Confidential and Proprietary Information

18. DIRT's manufacturing approach is built on a foundation of technology, the center of which is the proprietary ICE Software. DIRT uses the ICE Software to design, visualize, configure, price, communicate, engineer, specify, order and manage projects. The ICE Software was developed in or around 2005 as a custom interior design and construction software solution to integrate into DIRT's interior offerings. The ICE Software makes manufactured, fully custom interiors both feasible and profitable while addressing challenges associated with traditional construction, including cost overruns, inconsistent quality, delays and significant material waste. The ICE Software is used throughout the sales process, ensuring consistency across DIRT's services and products received by all of DIRT's clients.
19. DIRT begins manufacturing custom DIRT products once a file ("**ICE File**") is generated and a purchase order is received. The ICE Software allows an entire project to be tracked and managed across the chain of custody through sales, production, delivery and installation. The ICE File (containing a project's engineering and manufacturing data) generated during the design and specification process can be used for optimizing future reconfigurations, renovations, technology integration initiatives and changes to a client's space.
20. The ICE Software is also licenced to unrelated companies and Distribution Partners of DIRT.
21. DIRT's proprietary ICE Software is among a body of DIRT's valuable intellectual property. The ICE Software is subject to a number of patents in Canada, the United States, Europe and Singapore. DIRT also has a number of trademark and copyright protections.
22. In addition to the ICE Software, during their employment with DIRT, the Executive Employees had access to DIRT's other confidential and proprietary information relating to DIRT's business, including but not limited to:

- 4 -

- (a) DIRTT's internal pricing and job costing;
- (b) DIRTT's customer, supplier and Distribution Partner contacts;
- (c) DIRTT's sales figures and projections;
- (d) DIRTT's customer presentations and marketing materials;
- (e) DIRTT's marketing and sales strategies;
- (f) DIRTT's customer, supplier and Distribution Partner order histories, needs, preferences and idiosyncrasies;
- (g) DIRTT's customer proposals, service agreements, contracts and purchase orders;
- (h) DIRTT's plans to expand and target new clients and markets;
- (i) new business opportunities;
- (j) personnel information;
- (k) design specifications and drawings of DIRTT products;
- (l) specialized methods and processes used to create custom prefabricated modular interior wall partitions, other ocular interior components and other DIRTT products;
- (m) research and development of new DIRTT products;
- (n) copyrights, trademarks, trade secrets, patents, patents pending, and intellectual property strategy, including the ICE Software and ancillary programs;
- (o) strategic plans and business plans; and
- (p) such further and other confidential and proprietary information as may be proven at trial (collectively, the "**Confidential Information**").

Executive Employees

Smed

- 23. Smed was one of the founders of DIRTT and commenced employment with DIRTT in 2003 as Chief Executive Officer ("**CEO**"). Smed held the role of CEO until December 2017, when he moved into the role of Executive Chairman. Smed was also a member of the Board of Directors of DIRTT from September 2003 until September 10, 2018.
- 24. At all material times, Smed held a key senior and influential position within DIRTT. Smed was the face of DIRTT. As CEO of DIRTT, Smed's responsibilities included, but were not limited to, the following:
 - (a) developing, implementing and maintaining DIRTT's strategic plan;

- (b) developing new products and new innovation;
 - (c) improving DIRTT's market position to achieve financial growth as outlined in its strategic plan;
 - (d) maintaining DIRTT's relationships with current DIRTT customers, Distribution Partners, suppliers, and developing new customers, Distribution Partners and supplier contacts and relationships on behalf of DIRTT;
 - (e) acting as an ambassador of DIRTT toward current and potential DIRTT customers, Distribution Partners and suppliers;
 - (f) developing and implementing DIRTT's overall sales and marketing strategies;
 - (g) identifying new business opportunities, including customers and markets;
 - (h) maintaining extensive knowledge of current market conditions and DIRTT's product;
 - (i) hiring, training and retaining employees and consultants; and
 - (j) such further and other responsibilities as may be proven at trial.
25. DIRTT's customers, Distribution Partners, suppliers, consultants and employees relied heavily upon Smed and trusted his advice regarding DIRTT's products and services. Smed had (and continues to have) a great deal of interaction and influence over DIRTT's customers, Distribution Partners, suppliers, consultants and employees.
26. DIRTT personnel involved in the sales, project management, research, development and manufacturing of DIRTT products and processes worked closely with Smed, reported directly to Smed, received directions from Smed, and Smed had (and continues to have) a great deal of interaction and influence with those DIRTT personnel.
27. Smed had unlimited access to DIRTT's Confidential Information relating to DIRTT's business.
28. Smed had extensive and recurring contact with key customers of DIRTT around the world, in the course of which Smed gained and used an intimate knowledge of those customers' special needs, preferences, idiosyncrasies and plans. DIRTT's key customers relied heavily upon Smed and trusted his advice regarding DIRTT's products and services. Smed had (and continues to have) a great deal of interaction and influence over DIRTT's customers, and in particular, its key customers.
29. Smed had extensive and recurring contact with key suppliers of DIRTT around the world, in the course of which Smed gained and used an intimate knowledge of those suppliers' special needs, preferences, idiosyncrasies and plans. DIRTT's key suppliers relied heavily upon Smed and trusted his advice regarding DIRTT products and services. Smed had (and continues to have) a great deal of interaction and influence over DIRTT's key suppliers.
30. Smed had extensive and recurring contact with DIRTT's Distribution Partners around the world, in the course of which Smed gained and used intimate knowledge of those Distribution Partners' special needs, preferences, idiosyncrasies and plans. DIRTT's Distribution Partners relied heavily

on Smed and trusted his advice regarding DIRTT's products and services. Smed had (and continues to have) a great deal of interaction and influence over the Distribution Partners.

31. In 2013, as part of DIRTT's public offering, Smed entered into a written Employment Agreement with DIRTT dated October 21, 2013, amended on January 17, 2018 ("**Smed Agreement**"). Some express and/or implied key terms and conditions, *inter alia*, of the Smed Agreement include the following:
- (a) Smed agreed not to compete directly or indirectly with DIRTT during his employment and for a period of 24 months following the date of his termination;
 - (b) Smed agreed not to directly or indirectly solicit or attempt to solicit any employee or Distribution Partner of DIRTT during his employment and for a period of 24 months following the date of his termination;
 - (c) Smed agreed not to use or disclose any confidential or proprietary information of DIRTT during his employment with DIRTT or anytime after his date of termination;
 - (d) Smed recognized DIRTT's proprietary rights in the tangible and intangible property of DIRTT and acknowledged that he did not obtain or acquire and would not obtain or acquire any right, title or interest, in any of the property of DIRTT or its predecessors, successors, affiliates or related companies, including the ICE Software or any other writing, communications, manuals, documents, instruments, contracts, agreements, files, literature, data, technical information, formulas, products, devices, apparatuses, trademarks, trade names, trade styles, service marks, logos, copyrights or patents, in each case, made or developed using the resources of DIRTT by Smed either alone or in conjunction with others (collectively, the "**Other Materials**");
 - (e) Smed irrevocably waived, for the benefit of DIRTT, all of Smed's moral rights whatsoever in the ICE Software and Other Materials, including any right to the integrity of the ICE Software and Other Materials, any right to be associated with the ICE Software and Other Materials and any right to restrict or prevent the modification or use of the ICE Software and Other Materials in any way whatsoever;
 - (f) Smed irrevocably transferred to DIRTT all rights to restrict any violations of moral rights in the ICE Software and Other Materials, including any distortion, mutilation or other modification;
 - (g) Smed irrevocably and exclusively assigned all such ownership rights in any intellectual property rights in the ICE Software and Other Materials to DIRTT throughout the world, including any renewals, extensions or reversions relating thereto and any right to bring any action or to collect compensation for past infringements;
 - (h) Smed agreed that DIRTT had the exclusive right to obtain copyright registrations, letters patent, industrial design registrations, trade-mark registrations or any other protection in respect of the Other Materials and the intellectual property rights relating to the ICE Software and Other Materials anywhere in the world; and
 - (i) Smed agreed that any obligations under the Smed Agreement were in addition to his fiduciary obligations owing to DIRTT.

32. DIRTT terminated Smed's employment on September 10, 2018. As at the termination date (and following, as applicable), Smed was bound by the Smed Agreement, policies and common law duties, including fiduciary duties.

Loberg

33. Loberg was a founder of DIRTT and commenced employment at DIRTT in February 2004 in the position of Vice President, Software Development. He remained in that position until his termination. Loberg was one of the developers and authors of the ICE Software.

34. At all material times, Loberg held a key senior and influential position within DIRTT. In addition, as Vice President, Software Development, Loberg's responsibilities included the following:

- (a) overseeing the information technology system;
- (b) maintaining the ICE Software;
- (c) looking for and developing new products and new innovations, including as it relates to the ICE Software;
- (d) improving DIRTT's market position to achieve financial growth as outlined in its strategic plan;
- (e) maintaining DIRTT's relationships with current DIRTT customers, Distribution Partners, suppliers, and developing new customers, Distribution Partners, supplier contacts and relationships on behalf of DIRTT;
- (f) acting as an ambassador of DIRTT toward current and potential DIRTT customers, Distribution Partners and suppliers;
- (g) developing and implementing DIRTT's overall sales and marketing strategies;
- (h) identifying new business opportunities, including customers and markets;
- (i) maintaining extensive knowledge of current market conditions and DIRTT's product;
- (j) hiring, training and retaining employees and consultants; and
- (k) such further and other responsibilities as may be proven at trial.

35. DIRTT personnel involved in the research, development and manufacturing of DIRTT's proprietary ICE Software and information technology systems worked closely with Loberg, reported directly to Loberg, received directions from Loberg, and Loberg had (and continues to have) a great deal of contact and influence with those DIRTT personnel.

36. Loberg had unlimited access to DIRTT's Confidential Information relating to DIRTT's business.

37. In 2013, as part of DIRTT's public offering Loberg entered into an Employment Agreement with DIRTT dated October 21, 2013 ("**Loberg Agreement**"). Some express and/or implied key terms and conditions, *inter alia*, of the Loberg Agreement include the following:

- (a) Loberg agreed not to compete directly or indirectly with DIRTT during his employment and for a period of 24 months following the date of his termination;
 - (b) Loberg agreed not to directly or indirectly solicit or attempt to solicit any employee or Distribution Partner of DIRTT during his employment and for a period of 24 months following the date of his termination;
 - (c) Loberg agreed not to use or disclose any confidential or proprietary information of DIRTT during his employment with DIRTT or anytime after his date of termination;
 - (d) Loberg recognized DIRTT's proprietary rights in the tangible and intangible property of DIRTT and acknowledged that he did not obtain or acquire and would not obtain or acquire any right, title or interest, in any of the property of DIRTT or its predecessors, successors, affiliates or related companies, including the ICE Software and Other Materials;
 - (e) Loberg irrevocably waived, for the benefit of DIRTT, all of Loberg's moral rights whatsoever in the ICE Software and Other Materials, including any right to the integrity of the ICE Software and Other Materials, any right to be associated with the ICE Software and Other Materials and any right to restrict or prevent the modification or use of the ICE Software and Other Materials in any way whatsoever;
 - (f) Loberg irrevocably transferred to DIRTT all rights to restrict any violations of moral rights in the ICE Software and Other Materials, including any distortion, mutilation or other modification;
 - (g) Loberg irrevocably and exclusively assigned all such ownership rights in any intellectual property rights in the ICE Software and Other Materials to DIRTT throughout the world, including any renewals, extensions or reversions relating thereto and any right to bring any action or to collect compensation for past infringements;
 - (h) Loberg agreed that DIRTT had the exclusive right to obtain copyright registrations, letters patent, industrial design registrations, trade-mark registrations or any other protection in respect of the ICE Software and Other Materials and the intellectual property rights relating to the ICE Software and Other Materials anywhere in the world; and
 - (i) Loberg agreed that any obligations under the Loberg Agreement were in addition to his fiduciary obligations owing to DIRTT.
38. DIRTT terminated Loberg's employment on January 15, 2019. As at the termination date (and following, as applicable) Loberg was bound by the Loberg Agreement, policies and common law duties, including fiduciary duties.

Additional Departed Employees

39. Fahssi commenced employment with DIRTT on or about February 28, 2005. Fahssi was most recently part of the General Production team at DIRTT. Fahssi was subject to contractual confidentiality obligations owing to DIRTT, including a confidentiality agreement. Fahssi resigned from DIRTT on or about February 8, 2019.

40. Weeks commenced employment with DIRTT on or about September 4, 2012. Weeks was a project manager with the Remote Solutions team at DIRTT. Weeks was subject to contractual confidentiality obligations owing to DIRTT. Weeks resigned from DIRTT on or about March 1, 2019.
41. McLean commenced employment with DIRTT on or about June 2, 2014. McLean was part of the Sheet Metal team at DIRTT. McLean was subject to contractual confidentiality obligations owing to DIRTT, including a confidentiality agreement. McLean resigned from DIRTT on or about December 1, 2018.
42. Wafa commenced employment with DIRTT on or about November 11, 2007. Wafa was part of the Millwork team at DIRTT. Wafa was subject to contractual confidentiality obligations owing to DIRTT, including a confidentiality agreement. Wafa resigned from DIRTT on or about March 12, 2019.
43. Murray commenced employment with DIRTT on or about October 3, 2013. Murray was part of the project development group. Murray was subject to contractual confidentiality obligations owing to DIRTT, including a proprietary rights agreement. Murray resigned on or about January 10, 2019, and her last day of employment with DIRTT was on or about January 30, 2019.
44. Schoning commenced employment at DIRTT as a sales representative in or around September 2005. Schoning was subject to contractual confidentiality obligations owing to DIRTT, including a confidentiality agreement.
45. Schoning held a key senior and influential position within DIRTT. Schoning was actively involved in soliciting and locating business opportunities for DIRTT and for managing customer relationships. Most recently, Schoning was the lead person involved in preparing an RFP for a project with a large DIRTT customer. In assisting with this RFP, Schoning had access to significant Confidential Information, including but not limited to financial, pricing, shipping, forecast (market opportunities) and labour information. Schoning played a key and influential role in the relationship DIRTT had with a number of customers.
46. In or around August 2019, Schoning resigned from DIRTT. Her last day of employment with DIRTT was on or about September 13, 2019.
47. The Additional Departed Employees have commenced employment with Falkbuilt since their respective departures from DIRTT.
48. Prior to and following their departures the Additional Departed Employees have acted in their own right and as agents of the Executive Employees.

Executive Employees' and Additional Departed Employees' Additional Obligations

49. The Executive Employees held key, senior and influential positions and played influential roles in DIRTT's business. The Additional Departed Employees were also integral to DIRTT's business.
50. Throughout the time they were employed by DIRTT, the Executive Employees played a key and influential role in the relationships DIRTT had with its employees, consultants, customers, Distribution Partners and suppliers.
51. Given the key role the Executive Employees played as leaders or integral employees of DIRTT's business, DIRTT is extremely vulnerable to the misuse or disclosure of DIRTT's Confidential

Information by the Executive Employees and Additional Departed Employees; the solicitation of DIRTТ's customers, suppliers, Distribution Partners, consultants and employees by the Executive Employees and Additional Departed Employees; and unlawful competition by the Executive Employees and Additional Departed Employees.

52. The Executive Employees had extensive and recurring contact with key customers, Distribution Partners and suppliers of DIRTТ around the world. The Executive Employees had a great deal of influence over DIRTТ's key customers, Distribution Partners and suppliers. DIRTТ's key customers, Distribution Partners and suppliers relied heavily on the Executive Employees and trusted their advice regarding DIRTТ products and services.
53. In addition to their contractual obligations, the Executive Employees owed, and continue to owe, duties including fiduciary duties, duty of confidence and a duty of fidelity and good faith to DIRTТ.
54. In addition to their contractual obligations, the Additional Departed Employees owed and continue to owe a duty of confidence and duty of fidelity and good faith to DIRTТ. In addition, by virtue of acting as agents of the Executive Employees, the Additional Departed Employees are further subject to additional duties, including fiduciary duties.
55. The Executive Employees' and Additional Departed Employees' duties towards DIRTТ include, but are not limited to, the following:
 - (a) to avoid conflicts of interest and the appropriation of corporate opportunities;
 - (b) to maintain the confidentiality of DIRTТ's information and not take, reveal or make use of Confidential Information for their own benefit;
 - (c) not to take business opportunities they became aware of as employees, officers or directors of DIRTТ for their own benefit and to the detriment of DIRTТ;
 - (d) that they would not, directly or indirectly, solicit the business of DIRTТ customers or cause those customers to alter, leave or terminate their relationship with DIRTТ;
 - (e) that they would not, directly or indirectly, solicit DIRTТ employees or consultants to cause those employees or consultants to alter, leave or terminate their relationship with DIRTТ;
 - (f) that they would not, directly or indirectly, solicit DIRTТ Distribution Partners or suppliers to cause those Distribution Partners or suppliers to alter, leave or terminate their relationship with DIRTТ;
 - (g) that they would not unfairly compete with DIRTТ;
 - (h) that they would not copy, re-create, use, transfer, assign or utilize in any manner whatsoever the Confidential Information, the ICE Software or Other Materials, or portions thereof, without the express permission of DIRTТ; ^
 - (i) ^;
 - (j) ^ and

(k) such further and other particulars to be proven at trial.

56. All DIRTT employees, including the Executive Employees and Additional Departed Employees, are further required to comply with the DIRTT Code of Conduct. The DIRTT Code of Conduct includes provisions prohibiting any conflict of interest, ensuring fair business dealings, not using corporate opportunities for personal gain, and the protection of proprietary information.
57. Finally, in addition to the Executive Employees' contractual and common law duties as described above, pursuant to section 122(1) of the Alberta *Business Corporations Act*, as officers and/or directors of DIRTT, the Executive Employees were obligated to act honestly and in good faith with a view to the best interests of DIRTT and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

ICE Software and Other Materials

58. The ICE Software was developed in or around 2005.
59. [^]
60. Having regard to the facts set out herein, the Smed Agreement and Loberg Agreement, [^], DIRTT is the owner, and is presumed to be the owner, of the ICE Software and Other Materials and all copyrights in the ICE Software and Other Materials.
61. The development of the ICE Software was difficult, time consuming and took a number of years. In order to develop comparable technology or software in a short timeframe, access to the ICE Software and Other Materials would be required.
62. Prior to and following the Executive Employees' and Additional Departed Employees' respective terminations from DIRTT, the Defendants began, without the consent or authorization of DIRTT, copying, using, re-creating, transferring, assigning and/or utilizing the ICE Software and Other Materials or portions thereof. The full extent of the Defendants' activities is presently unknown to DIRTT.
63. [^]

Breaches of Obligations

64. Prior to and following the Executive Employees' and Additional Departed Employees' respective terminations from DIRTT, they breached their respective contractual, common law and statutory obligations owing, as applicable, to DIRTT. The Additional Departed Employees have acted in their own right committing these breaches and as agents of the Executive Employees.
65. Prior to and following the Executive Employees' respective terminations from DIRTT, they directly or indirectly founded a new business, Falkbuilt, which is a direct competitor of DIRTT. Smed is the sole director of Falkbuilt.
66. On or about March 13, 2019, 217 Ltd. was incorporated. Smed is the sole director of 217 Ltd. 217 Ltd. is operating as Echo, a cloud-based end-to-end software solution of the construction industry. Based on this description, this is equivalent to the ICE Software.

67. ^
 _
68. ^
 _
69. Prior to and following the Executive Employees' and Additional Departed Employees' respective terminations from DIRTT, the Defendants, or each of them, have been and are engaged in the following wrongful activities:
- (a) misappropriating and misusing Confidential Information, particulars of which include:
 - (i) directly or indirectly copying and downloading Confidential Information from DIRTT's servers without authorization;
 - (ii) using, re-creating, transferring, assigning and/or utilizing the Confidential Information, the ICE Software and/or Other Materials, or portions thereof, without the express permission of DIRTT;
 - (iii) breaching their obligations of confidentiality by using and disclosing DIRTT's Confidential Information in furtherance of their own interests and the interests of Falkbuilt and/or 217 Ltd.;
 - (iv) using and/or disclosing Confidential Information in carrying out their duties for Falkbuilt and/or 217 Ltd.;
 - (v) taking advantage of business opportunities, which they became aware of as directors, officers or employees of DIRTT and while providing services to DIRTT; and
 - (vi) such further and other particulars to be proven at trial;
 - (b) acting in a breach of confidence;
 - (c) copying the ICE Software and certain Other Materials without the express permission of DIRTT, such particulars to be proven at trial;
 - (d) copying the computer code for the ICE Software, or portions thereof, without the express permission of DIRTT;
 - (e) ^
 _
 - (f) directly or indirectly inducing and soliciting, taking steps to induce and solicit, and/or attempting to induce and solicit DIRTT customers to not do business with, alter or terminate their relationship with DIRTT;
 - (g) directly or indirectly inducing and soliciting, taking steps to induce and solicit, and/or attempting to induce and solicit Distribution Partners and DIRTT suppliers to not do business with, alter or terminate their relationship with DIRTT;

- (h) directly or indirectly inducing and soliciting, taking steps to induce and solicit, and/or attempting to induce and solicit DIRTТ employees or consultants to not do business with, alter or terminate their relationship with DIRTТ;
 - (i) incorporating and controlling Falkbuilt and/or 217 Ltd. for the purpose of directly or indirectly competing with DIRTТ;
 - (j) unlawfully competing with DIRTТ through Falkbuilt and/or 217 Ltd. or otherwise;
 - (k) conspiring to wrongfully profit for themselves and injure DIRTТ's goodwill, reputation, business relationships and economic interests and relations; and
 - (l) ^;
 - (m) ^;
 - (n) ^;
 - (o) such further and other particulars to be proven at trial.
70. The wrongful acts described above were carried out for the direct benefit of the Defendants. The Defendants conspired with each other to engage in those wrongful acts described herein and carried out the agreement causing damage to DIRTТ.
71. Prior to and following the Executive Employees' and Additional Departed Employees' respective terminations from DIRTТ, the Defendants have, without legal justification, acquired and used DIRTТ's Confidential Information to unfairly compete and solicit DIRTТ employees, consultants, customers, Distribution Partners and suppliers, without consent. Such use of Confidential Information by the Defendants has unlawfully interfered with the business of DIRTТ, and was intended by the Defendants to harm DIRTТ.
72. Prior to and following the Executive Employees' and Additional Departed Employees' respective terminations from DIRTТ, the Defendants have, without legal justification, used Confidential Information belonging to DIRTТ as a springboard for its business, to the detriment of DIRTТ.
73. Prior to and following the Executive Employees' and Additional Departed Employees' respective terminations from DIRTТ, the Defendants wrongfully induced over 45 DIRTТ employees to commit the breaches alleged above, knowing of the contractual, fiduciary and other duties and obligations the Executive Employees and Additional Departed Employees owed to DIRTТ. The activities undertaken by the Defendants were calculated and done with the intent to injure the economic interests of DIRTТ, were illegal or unlawful and did cause deliberate damage and loss to DIRTТ. The Defendants' conduct amounts to unlawful interference with the economic interests and relations of DIRTТ.
74. Furthermore, the Defendants knew or ought to have known that contracts of employment existed between other former DIRTТ employees and DIRTТ. Without legal justification, the Defendants induced other former employees from performing their employment contracts with DIRTТ which resulted in the other former employees breaching or failing to perform their respective employment contracts with DIRTТ. The Defendants intentionally acted to interfere with the employment contracts between DIRTТ and its other former employees, or alternatively, were recklessly

indifferent that their actions would result in the former employees breaching or failing to perform their employment contracts. As a result of the Defendants' actions, DIRTT has suffered loss and damage. The Defendants' conduct amounts to interference with the contractual relations of DIRTT.

75. The activities undertaken by the Defendants with respect to DIRTT's other former employees further amounts to the Defendants wrongfully inducing the former employees to breach their employment contracts with DIRTT.
76. Further, or in the alternative, prior to and following the Executive Employees' and Additional Departed Employees' respective terminations from DIRTT, the Defendants have conspired and intentionally entered into an agreement, lawful or unlawful, to use DIRTT's Confidential Information so as to unfairly compete and solicit DIRTT employees, consultants, customers, Distribution Partners and suppliers, without consent. The Defendants acted with the predominant purpose of causing injury to DIRTT or, alternatively, acted in a manner where their conduct was directed towards DIRTT and they should have known that injury to DIRTT was likely to occur.
77. DIRTT has lost, and continues to lose, contracts, employees, consultants, customers, suppliers, Distribution Partners and profits, and has otherwise suffered damages, a loss of business, goodwill and reputation as a result of the conduct of the Defendants.
78. If the conduct set out above continues, DIRTT will suffer irreparable harm not compensable in damages.
79. The Defendants were aware that these activities would, in fact, cause DIRTT damages but nonetheless undertook activities in a willful and deliberate fashion entitling DIRTT to punitive, aggravated and exemplary damages as against the Defendants.
80. The actions and the conduct of the Defendants have resulted in their unjust enrichment to the detriment of DIRTT, for which there is no juristic reason and for which DIRTT has suffered damages. It would be unjust to allow the Defendants to retain profits or other benefits they have earned from their wrongful conduct.
81. ^
82. DIRTT pleads and relies upon the Alberta *Business Corporations Act*, R.S.A. 2000, c. B-9, and its regulations and amendments thereto.
83. DIRTT pleads and relies upon rules 11.25 and 11.26 of the Alberta Rules of Court, Alta Reg 124/2010.

Breach of Retention Agreements

84. On or about January 17, 2018, each of the Executive Employees entered into a Retention Bonus Agreement (the "**Retention Agreements**") with DIRTT in exchange for the payment of a one-time retention bonus (the "**Retention Bonuses**").
85. The Retention Bonuses paid to each Executive Employee were conditional on, among other things, that the respective Executive Employee was not terminated by DIRTT for just cause prior to certain dates and that the Executive Employees at all times complied with their confidentiality obligations and did not disparage DIRTT (the "**Retention Eligibility Requirements**").

86. The Retention Agreements included clawback provisions whereby 100% of the Retention Bonuses would have to be repaid to DIRTT if at any time prior to September 30, 2018, the respective Executive Employee, among other things, failed to comply with the Retention Eligibility Requirements.
87. Both of the Executive Employees failed to comply with the Retention Eligibility Requirements prior to September 30, 2018, thereby requiring each Executive Employee to pay back to DIRTT 100% of the respective Retention Bonus payments received by each Executive Employee. In particular, the conduct of the Executive Employees prior to and after their respective terminations, as alleged at paragraphs 60 to 76 above, provide DIRTT with after-acquired just cause to terminate the Executive Employees. Further, the Executive Employees have breached their confidentiality obligations and disparaged DIRTT.
88. In the alternative, if it is determined that the Executive Employees did not breach the Retention Eligibility Requirements prior to September 30, 2018, the Retention Agreements further require that the Executive Employees pay back 50% of their respective Retention Bonuses if they breach the Retention Eligibility Requirements prior to March 31, 2019. As a result, at the very least, the Executive Employees have breached the Retention Eligibility Requirements prior to March 31, 2019 for the reasons set out in paragraph 83 above, thereby requiring the Executive Employees to pay back to DIRTT 50% of their respective Retention Bonuses.
89. DIRTT proposes that the trial of this action be held at Calgary, Alberta. In the opinion of DIRTT, this action will take less than 25 days of trial time.

Relief requested:

90. DIRTT's claim as against the Defendants, jointly and severally, is as follows:
 - (a) an interim and permanent injunction:
 - (i) restraining the Defendants from competing against DIRTT, directly or indirectly;
 - (ii) restraining the Defendants from using or disclosing the Confidential Information of DIRTT or otherwise exploiting the Confidential Information;
 - (iii) requiring the Defendants to deliver up all Confidential Information in their possession or control to DIRTT;
 - (iv) restraining the Defendants from using or disclosing the Other Materials or otherwise exploiting the Other Materials;
 - (v) restraining the Defendants from copying, re-creating, using, transferring, assigning, utilizing or exploiting in any way the ICE Software and/or the ICE Software's coding, or portions thereof, in any manner whatsoever;
 - (vi) ^
 - (vii) requiring the Defendants to deliver up all versions of the ICE Software, related coding, any Other Materials, and any other software, coding or technology

developed by using the ICE Software or Other Materials as a springboard, in their possession or control to DIRTT;

(viii) in the alternative, requiring that the Defendants immediately destroy all versions and copies of the ICE Software, related coding, any Other Materials, and any other software, coding or technology developed by using the ICE Software or Other Materials as a springboard, in their possession and control;

(ix) restraining the Defendants from contacting and soliciting DIRTT clients, directly or indirectly;

(x) restraining the Defendants from contacting and soliciting DIRTT employees and consultants, directly or indirectly;

(xi) restraining the Defendants from contacting and soliciting DIRTT suppliers, directly or indirectly; and

(xii) restraining the Defendants from contacting and soliciting DIRTT Distribution Partners, directly or indirectly;

(xiii) ^;

(xiv) ^;

(xv) ^;

(b) a declaration that the Executive Employees and Additional Departed Employees' breached their duties, including their contractual and fiduciary duties, duty of fidelity, duty of loyalty and good faith and obligations of confidence to DIRTT;

(c) a declaration that the Defendants have unlawfully interfered with the economic interests and relations of DIRTT;

(d) a declaration that the Defendants have interfered with the contractual relations of DIRTT;

(e) a declaration that the Defendants have unlawfully conspired to engage in wrongful acts which cause harm to DIRTT;

(f) ^;

(g) ^;

(h) ^;

(i) ^;

(j) ^;

(k) ^;

- (l) an order directing the Defendants, and each of them, to return to DIRTT all DIRTT Confidential Information, the ICE Software and Other Materials in the Defendants' possession or control;
- (m) an order directing that Loberg repay to DIRTT his \$500,000 retention bonus payment;
- (n) an order directing that Smed repay to DIRTT his \$1,000,000 retention bonus payment;
- (o) an accounting of revenue and profits of the Defendants at the date of trial;
- (p) judgment requiring the Defendants, jointly and severally, to disgorge and pay to DIRTT the revenue, profits and other financial gains made by the Defendants, and the damages and losses suffered by DIRTT as a result of the wrongful acts of the Defendants to the date of trial;
- (q) damages in an amount to be proven at trial;
- (r) the costs of recovering and securing DIRTT's Confidential Information;
- (s) special or general damages in the amount of \$12,000,000 or such other amount to be proven at trial;
- (t) ^;
- (u) ^;
- (v) punitive damages in the amount of \$5,000,000;
- (w) aggravated and exemplary damages in an amount to be proven at trial;
- (x) interest pursuant to the terms of the *Judgment Interest Act*, R.S.A. 2000, c. J-1, as amended;
- (y) cost of this action on an indemnity basis, including GST; and
- (z) such further and other relief as this Honourable Court may deem just and appropriate in the circumstances.

NOTICE TO THE DEFENDANTS:

Falkbuilt Ltd., Falkbuilt, Inc., Mogens Smed, Barrie Loberg, Saad Fahssi, David Weeks, Nathan McLean, Hamidullah Wafa, 2179086 Alberta Ltd. (operating in its own right or as Echo), Ingrid Schoning

You only have a short time to do something to defend yourself against this claim:

20 days if you are served in Alberta

- 18 -

1 month if you are served outside Alberta but in Canada

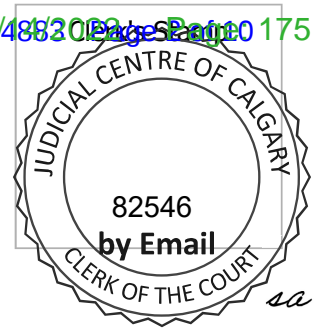
2 months if you are served outside Canada

You can respond by filing a statement of defence or a demand for notice in the office of the clerk of the Court of Queen's Bench at Calgary, Alberta, AND serving your statement of defence or a demand for notice on the plaintiff's address for service.

WARNING

If you do not file and serve a statement of defence or a demand for notice within your time period, you risk losing the law suit automatically. If you do not file, or do not serve, or are late in doing either of these things, a court may give a judgment to the plaintiff(s) against you.

11011860.4



COURT FILE NUMBER 1901-06550
 COURT COURT OF QUEEN'S BENCH OF ALBERTA
 JUDICIAL CENTRE CALGARY
 PLAINTIFFS DIRTT ENVIRONMENTAL SOLUTIONS LTD. and DIRTT ENVIRONMENTAL SOLUTIONS, INC.

DEFENDANTS FALKBUILT LTD., FALKBUILT, INC., MOGENS SMED, BARRIE LOBERG, SAAD FAHSSI, DAVID WEEKS, NATHAN MCLEAN, HAMIDULLAH WAFA, 2179086 ALBERTA LTD. (operating in its own right or as Echo), INGRID SCHONING and TARA MURRAY

PLAINTIFFS BY COUNTERCLAIM FALKBUILT LTD., MOGENS SMED AND BARRIE LOBERG

DEFENDANTS BY COUNTERCLAIM DIRTT ENVIRONMENTAL SOLUTIONS LTD. AND KEVIN O'MEARA

DOCUMENT **CONSENT ORDER**

PARTIES FILING THIS DOCUMENT **Burnet, Duckworth & Palmer LLP**
 ADDRESS FOR SERVICE AND Eighth Avenue Place, East Tower
 CONTACT INFORMATION OF 2400, 525 – 8th Avenue SW
 PARTY FILING THIS DOCUMENT Calgary, Alberta T2P 1G1

Lawyers: James D. Murphy/Richard F. Steele
 Phone: (403) 260-0152/(403) 260-0151
 Fax: (403) 260-0332
 Email: jdm@bdplaw.com/rfs@bdplaw.com

DATE ON WHICH ORDER WAS PRONOUNCED: _____

LOCATION OF HEARING OR TRIAL: Calgary, AB

NAME OF JUSTICE WHO MADE THIS ORDER: _____

UPON THE APPLICATION of DIRTT Environmental Solutions Ltd. (**DIRTT**); AND UPON reviewing the order granted by the Honorable Judge David B. Barlow in the United States District Court for the District of Utah attached as **Schedule "A"** (the **Order**); AND UPON reviewing the Notice to Consent filed by Falkbuilt Ltd., Falkbuilt, Inc. and Mogens Smed in the United States District Court for the District of Utah attached as **Schedule "B"**; AND UPON noting the consent of Falkbuilt Ltd., Falkbuilt Inc., and Mogens Smed, and the consent of Counsel for each of the other Parties;

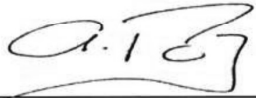
1. The Order attached hereto as Schedule A is hereby made an order of this Court, and Falkbuilt Ltd., Falkbuilt Inc. and Mogens Smed will continue to be bound thereby.
2. There shall be no order as to costs.



 Justice of the Court of Queen's Bench of Alberta

CONSENTED TO THIS 18 DAY OF AUGUST, 2021:

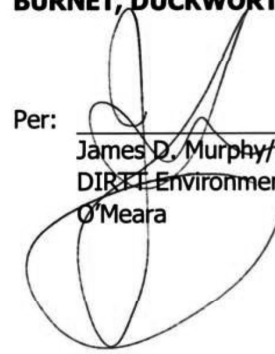
BORDEN LADNER GERVAIS LLP



Per: _____
 For: Duncan Marsden
 Counsel for Falkbuilt Ltd., Falkbuilt, Inc.,
 Mogens Smed and 2179086 Alberta Ltd.
 (operating in its own right or as Echo)

CONSENTED TO THIS 20th DAY OF AUGUST, 2021:

BURNET, DUCKWORTH & PALMER LLP



Per: _____
 James D. Murphy/Richard F. Steele Counsel for
 DIRECT Environmental Solutions Ltd. and Kevin
 O'Meara

SCHEDULE A

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

<p>DIRTT ENVIRONMENTAL SOLUTIONS, INC.,</p> <p style="text-align: center;">Plaintiff,</p> <p>vs.</p> <p>LANCE HENDERSON, KRISTY HENDERSON, FALKBUILT, LLC, FALKBUILT LTD., AND FALK MOUNTAIN STATES, LLC,</p> <p style="text-align: center;">Defendants.</p>	<p>ORDER:</p> <ul style="list-style-type: none"> • GRANTING IN PART [5] MOTION FOR PRELIMINARY INJUNCTION TO PRESERVE THE STATUS QUO; AND • FINDING AS MOOT [6] MOTION TO EXPEDITE DISCOVERY <p>Civil No. 1:19-CV-00144-DBB-DBP</p> <p style="text-align: center;">District Judge David B. Barlow</p> <p style="text-align: center;">Magistrate Judge Dustin B. Pead</p>
--	---

Before the court is Plaintiff’s Motion for a Preservation Order and, Following Expedited Discovery, a Limited Preliminary Injunction to Preserve The Status Quo (the “Motion”).¹ Based upon the stipulation and consent of the parties,² and for good cause appearing:

IT IS HEREBY ORDERED that the Motion is GRANTED IN PART as to the entry of a preliminary injunction that preserves the status quo. Pursuant to the stipulation of the parties,³ IT IS FURTHER ORDERED AS FOLLOWS:

1. Pursuant to Fed. R. Civ. P. 65(d)(1)(A), this Preliminary Injunction to Preserve the Status Quo is issued based upon Defendants’ Consent to its issuance and based upon a

¹ Plaintiff’s Motion for a Preservation Order and, Following Expedited Discovery, a Limited Preliminary Injunction to Preserve The Status Quo, ECF No. 5, filed December 12, 2019.

² See Status Report at 1, ECF No. 57, filed March 2, 2020.

³ *Id.*

finding by this Court that entry of this Preliminary Injunction to Preserve the Status Quo will serve to economize the resources of the parties and the Court and maintain the status quo pending resolution of the Lawsuit.

2. Pursuant to Fed. R. Civ. P. 65(d)(2), this Preliminary Injunction to Preserve the Status Quo binds the following parties and individuals upon receipt of actual notice of the injunction by personal service, electronic mail, or otherwise:

- a. Defendants Falkbuilt, Ltd., Lance Henderson, Kristy Henderson and Falk Mountain States, LLC, and for purposes of this Preliminary Injunction, Falkbuilt Ltd.'s U.S. subsidiary, Falkbuilt, Inc.;
- b. Defendants' officers, agents, servants, employees and attorneys, which for purposes of this Preliminary Injunction include those of Falkbuilt Ltd.'s U.S. subsidiary, Falkbuilt, Inc.; and
- c. Other persons who are in active concert or participation with anyone described in the preceding subparagraphs 2.a. and 2.b., which for purposes of this Stipulated Preliminary Injunction include the companies identified on Falkbuilt Ltd.'s website (www.falkbuilt.com) under the "Contact" tab as the Anchorage Branch, Atlanta Branch, Bakersfield Branch, Chicago Branch, Cincinnati Branch, Columbus Branch, Dallas-North Branch, Dallas Branch, Des Moines Branch, Fresno Branch, Indianapolis Branch, Kansas City Branch, Los Angeles Branch, Louisville Branch, Morristown New Jersey Branch, Newport Beach Branch, Philadelphia Branch, Phoenix Branch, Pittsburgh Branch, Salt Lake City Branch, San Diego Branch, Inland Empire Branch, Seattle Branch, and Tulsa Branch, and their employees and agents, including any new or additional Falkbuilt Ltd. branches in the United States.

Plaintiff may seek to add new or additional parties if such information is developed during discovery.

- d. For purposes of enforcing this Order, each Defendant will, within twenty-eight (28) days, either disclose or itemize all information in its possession, custody or control that any of the enjoined parties removed from DIRTT Environmental Solutions, Inc., including but not limited to customer contact information, prospective or current customer projects or preferences, pricing, estimates, ICE files, Standard Factory Net (“SFN”) summaries, job costing, sales figures and projections, marketing and sales strategies, design specifications and drawings, and strategic and business plans, whether or not any Defendant considers such information confidential (hereafter, “DIRTT Information”). To the extent any Defendant is unable to complete this task within twenty-eight (28) days, it will disclose or itemize such information that it does have and continue to supplement its disclosure on an ongoing basis. All such disclosures will be treated as attorneys’ eyes only under the Standard Protective Order.

3. Pursuant to Fed. R. Civ.P. 65(d)(1)(B) and (C), the specifically stated terms of this Preliminary Injunction to Preserve the Status Quo, and the description of the acts restrained are as follows:

- a. All individuals and entities identified in Paragraph 2 above are enjoined from using (except for purposes of this Lawsuit), relying upon, disclosing, disseminating, deleting or disposing of any DIRTT Information within their possession, custody or control; and
- b. This Preliminary Injunction to Preserve the Status Quo shall remain in effect until

such time as it is modified or vacated by further order of the Court.

4. Falkbuilt Ltd. shall provide actual notice of this preliminary injunction to all entities identified in Paragraph 2 (c) and provide copies of all such notices to all other parties.

IT IS ALSO ORDERED that the entry of this stipulated preliminary injunction that preserves the status quo MOOTS the Plaintiff's pending Motion for Expedited Discovery.⁴

Signed March 12, 2020

BY THE COURT



David Barlow
United States District Judge

⁴ Plaintiff's Motion for Expedited Discovery, ECF No. 6, filed December 12, 2019.

SCHEDULE B

P. Bruce Badger (A4791)
bbadger@fabianvancott.com
Jason W. Hardin (A8793)
jhardin@fabianvancott.com
FABIAN VANCOTT
215 South State Street, Suite 1200
Salt Lake City, UT 84111-2323
Telephone: (801) 531-8900

Attorneys for Defendants Falkbuilt Ltd., Falkbuilt, Inc., and Mogens Smed

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, NORTHERN DIVISION**

DIRTT ENVIRONMENTAL
SOLUTIONS, INC., DIRTT
ENVIRONMENTAL SOLUTIONS
LIMITED,

Plaintiffs,

vs.

LANCE HENDERSON, KRISTY
HENDERSON, FALKBUILT, INC.,
FALKBUILT LTD., MOGENS
SMED, AND FALK MOUNTAIN
STATES, LLC,

Defendants.

Case No. 1:19CV00144-DBB-DBP

NOTICE OF CONSENT:

**(1) TO CANADIAN JURISDICTION
BY FALKBUILT, INC., AND**

**(2) TO ENTRY OF STIPULATED
PRELIMINARY INJUNCTION IN
THE COURT OF QUEEN'S
BENCH, ALBERTA AS TO
FALKBUILT LTD., FALKBUILT,
INC. AND MOGENS SMED**

Honorable David B. Barlow

Magistrate Judge Dustin B. Pead

Pursuant to the order of the Court on May 19, 2021, [Dkt. 162], Defendants Falkbuilt Ltd., Falkbuilt, Inc. (collectively “Falkbuilt”) and Mogens Smed (“Mr. Smed”) hereby file this formal Notice of Consent to the following:

1. In the event of and following this Court’s dismissal of the First Amended Complaint, [Dkt. 117], as to Falkbuilt and Mr. Smed for *forum non conveniens*, Falkbuilt, Inc. consents to service of process in Alberta, Canada, and to the jurisdiction of the Court of Queen’s Bench of Alberta.

2. In the event of and following this Court’s dismissal of the First Amended Complaint, [Dkt. 117], as to Falkbuilt and Mr. Smed for *forum non conveniens*, Falkbuilt and Mr. Smed consent and stipulate that the *Order*:

- *Granting in Part [5] Motion for Preliminary Injunction to Preserve the Status Quo; and*
- *Finding as Moot [6] Motion to Expedite Discovery, entered on March 13, 2020, [Dkt. 61], (the “Stipulated Preliminary Injunction”), may be entered in the Court of Queen’s Bench of Alberta, and they consent to be bound thereby.*

Dated this 21st day of May, 2021.

/s/ Jason W. Hardin
P. Bruce Badger
Jason W. Hardin
FABIAN VANCOTT
*Attorneys for Defendant Falkbuilt Ltd.,
Falkbuilt, Inc., and Mogens Smed*

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May, 2021, I caused a true and correct copy of the foregoing **NOTICE OF CONSENT: (1) TO CANADIAN JURISDICTION BY FALKBUILT, INC., AND (2) TO ENTRY OF STIPULATED PRELIMINARY INJUNCTION IN THE COURT OF QUEEN’S BENCH, ALBERTA AS TO FALKBUILT LTD., FALKBUILT, INC. AND MOGENS SMED** was served via the Court’s electronic filing system as follows:

Alan C. Bradshaw
abradshaw@mc2b.com
Chad R. Derum
cderum@mc2b.com
Jack T. Nelson
jnelson@mc2b.com
Mitch M. Longson
mlongson@mc2b.com
*Manning Curtis Bradshaw & Bednar
PLLC*
136 E. South Temple, Suite 1300
Salt Lake City, Utah 84111
*Attorneys for Defendants Lance
Henderson, Kristy Henderson and Falk
Mountain States, LLC*

Jeffrey J. Mayer (*pro hac vice*)
Jeffrey.mayer@akerman.com
Catherine A. Miller (*pro hac vice*)
Catherine.miller@akerman.com
Timothy K. Sendek (*pro hac vice*)
Tim.sendek@akerman.com
Akerman LLP
71 So. Wacker Drive, 47th Floor
Chicago, IL 60606
Attorneys for Plaintiff

Chad E. Nydegger
cnydegger@wnlaw.com
Workman Nydegger
60 East South Temple, Suite 1000
Salt Lake City, Utah 84111
Attorneys for Plaintiff

/s/ Jason W. Hardin

THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

DIRTT ENVIRONMENTAL SOLUTIONS,
INC. and DIRTT ENVIRONMENTAL
SOLUTIONS LTD.,

Plaintiffs,

v.

LANCE HENDERSON, KRISTY
HENDERSON, and FALK MOUNTAIN
STATES, LLC,

Defendants.

**MEMORANDUM DECISION AND
ORDER DENYING [201] MOTION FOR
RELIEF FROM JUDGMENT
PURSUANT TO FED. R. CIV. PROC.
60(b)**

Case No. 1:19-cv-144 DBB

District Judge David Barlow

Before the court is Plaintiffs’ Motion for Relief from Judgment Pursuant to Fed. R. Civ. Proc. 60(b) (Motion).¹ Having considered the briefing and the relevant law, the court concludes the motion may be resolved without oral argument.² For the reasons stated herein, the court DENIES the Motion.

BACKGROUND

In 2003, Mogens Smed and two others founded Plaintiff DIRTT Environmental Solutions, Ltd. (DIRTT, Ltd.).³ DIRTT, Ltd. “is a Canadian company, incorporated in the Province of Alberta and with its headquarters and principal place of business in Calgary, Alberta, Canada.”⁴ It now is a public company and is listed on the Toronto Stock Exchange.⁵

¹ ECF No. 201, filed September 9, 2021.

² See DUCivR 7-1(f).

³ Canadian Statement of Claim (Exhibit 1 to Falkbuilt Defendants’ Motion to Dismiss First Amended Complaint) at ¶¶ 4-5, ECF No. 134-1, filed November 19, 2020.

⁴ First Amended Complaint at ¶ 2, ECF No. 117, filed October 20, 2020.

⁵ Statement of Claim at ¶ 10.

In addition to founding DIRTT, Ltd., Smed was its CEO for 14 years and then its Executive Chairman until September 2018, when DIRTT, Ltd. terminated his employment.⁶ DIRTT, Ltd. describes Smed as one of its “directing minds.”⁷ Shortly after his termination, Smed founded Defendant Falkbuilt, Ltd. under the laws of Alberta.⁸ Falkbuilt, Ltd.’s offices are in Calgary, Alberta.⁹ Smed is the sole director and/or CEO of Falkbuilt, Ltd. and resides Calgary.¹⁰

DIRTT, Ltd. is the head of an international enterprise. It operates in the United States and in other countries through its affiliated “partners”: “DIRTT offers interior construction solutions throughout the United States and Canada, as well as international markets, through a network of independent distribution partners.”¹¹ DIRTT, Ltd. also is the parent¹² of DIRTT, Inc., a company incorporated in Colorado, which Plaintiffs originally described as having “its headquarters and principal place of business in Calgary, Alberta, Canada.”¹³ Later, Plaintiffs dropped the reference to Calgary and said instead that DIRTT, Inc.’s “principal places of business” were “in Savannah, Georgia and Phoenix, Arizona.”¹⁴ Later still, Plaintiffs told a Canadian court that DIRTT, Inc.’s “principal offices [are] located in Calgary, Alberta.”¹⁵ Plaintiffs allege that Smed “directly or indirectly” controlled both DIRTT, Ltd. and DIRTT, Inc. as “the Calgary-based CEO.”¹⁶

⁶ *Id.* at ¶¶ 16, 25.

⁷ *Id.* at ¶ 2.

⁸ Canadian Amended Amended Amended Statement of Claim (Exhibit 3 to Falkbuilt Defendant’s Opposition to Plaintiffs’ Rule 60(b) Motion) at ¶ 6, ECF No. 207-3, filed September 30, 2021.

⁹ First Amended Complaint at ¶ 20.

¹⁰ Canadian Statement of Claim at ¶ 2, ECF No. 134-1; Canadian Amended Amended Amended Statement of Claim at ¶ 6, ECF No. 207-3; First Amended Complaint at ¶ 150 (describing Smed as the “founder and CEO of Falkbuilt”).

¹¹ Canadian Statement of Claim at ¶ 6.

¹² First Amended Complaint at ¶ 2.

¹³ Verified Complaint at ¶ 1, ECF No. 2, filed December 11, 2019.

¹⁴ First Amended Complaint at ¶ 1.

¹⁵ Canadian Amended Amended Amended Statement of Claim at ¶ 2, ECF No. 207-3.

¹⁶ First Amended Complaint at ¶ 21.

DIRTT, Ltd. alleges that Smed misappropriated and misused trade secrets, copyrighted material, and other proprietary information from it while he worked for the Alberta company and after he was terminated from it.¹⁷ Smed and Falkbuilt, Ltd. also engaged in other alleged misconduct by luring away DIRTT, Ltd. employees and customers and directly competing against DIRTT, Ltd.¹⁸

As a result, DIRTT, Ltd. filed suit against Smed and Falkbuilt, Ltd. in Calgary.¹⁹ The case alleged that Smed, Falkbuilt, and another individual violated the Canadian Copyright Act, the Alberta Business Corporations Act, their contracts, and Canadian common law by the foregoing and other related actions. The claim seeks an interim and permanent injunction, numerous declaratory judgments, compensatory damages, punitive damages, exemplary damages, costs of the action, interest, and accounting of the defendants’ revenue and profits. It requests a trial in Calgary, Alberta. The claim says nothing about limiting the conduct challenged, the damages suffered, or the relief sought solely to Canada.²⁰

Seven months later, DIRTT, Inc., the subsidiary of DIRTT, Ltd., filed suit in this court.²¹ The Complaint states that DIRTT, Inc., which is described as a Colorado company with headquarters and its principal place of business in Calgary, “operates in Canada, the United States and other jurisdictions around the world.”²² In the Complaint, DIRTT, Inc. does not say that it is a subsidiary of DIRTT, Ltd., that DIRTT, Ltd. already has filed a related suit in Calgary,

¹⁷ See Canadian Statement of Claim at ¶¶ 43-44, 47, ECF No. 134-1.

¹⁸ Canadian Statement of Claim at ¶ 47.

¹⁹ See Canadian Statement of Claim.

²⁰ See generally, Canadian Statement of Claim.

²¹ Verified Complaint, ECF No. 2.

²² *Id.* at ¶¶ 1-2.

that the trade secrets at issue belong to DIRTT, Ltd., or even mention DIRTT, Ltd. at all.²³ The Complaint’s background section starts by stating:

Since his difficult departure from DIRTT in September 2018, Mr. Smed and those acting in concert with him, including the newly-formed Falk entities, have engaged in an ongoing attempt to replicate DIRTT’s business, products and business model through improper means, including but not limited to utilizing DIRTT confidential information and trade secrets to identify and approach customers and potential customers, utilizing pricing and margin information to undercut DIRTT’s quotes, and utilizing DIRTT’s patented and trade secret technology to gain an unfair advantage in product offerings.²⁴

The Complaint then goes on to allege further detail about Smed’s additional and related alleged misconduct and discuss Defendants Lance and Kristy Henderson’s misconduct in misappropriating confidential information, setting up Falk Mountain States to compete with DIRTT, Inc., and contacting “at least one prospective customer of DIRTT.”²⁵ The Complaint also alleges misconduct by various non-parties elsewhere in the United States and Canada.²⁶

Subsequently, Falkbuilt, Ltd. counterclaimed for defamation and intentional interference with economic relations.²⁷ DIRTT, Inc. then moved to dismiss the counterclaim on the grounds of *forum non conveniens*, arguing that the counterclaim should be litigated in Canada.²⁸ The court granted the motion.²⁹ The Falkbuilt Defendants also moved to dismiss the entire action on the grounds of *forum non conveniens*, in favor of the first-filed action in Calgary.³⁰ The court

²³ See generally Verified Complaint.

²⁴ *Id.* at ¶ 26.

²⁵ *Id.* at ¶¶ 29–64.

²⁶ *Id.* at ¶¶ 65–83.

²⁷ Falkbuilt, Ltd.’s Answer to Verified Complaint and Counterclaim at 29–48, ECF No. 42, filed February 5, 2020; Falkbuilt, Ltd.’s First Amended Counterclaim, ECF No. 62, filed March 18, 2020.

²⁸ Plaintiff’s Motion to Dismiss First Amended Counterclaim, ECF No. 63, filed April 1, 2020.

²⁹ See Order dated March 30, 2021, ECF Nos. 156; Transcript of Hearing on Motion to Dismiss held on 03/30/21, ECF No. 157.

³⁰ Motion to Dismiss, ECF No. 134, filed November 19, 2020.

granted that motion in part, keeping the part of the action that involved the Utah defendants, who had not joined in the motion.³¹

Plaintiffs later filed a notice appealing the order on the Falkbuilt Defendants' motion to dismiss.³² That appeal is currently pending before the Tenth Circuit.

On September 9, 2021, Plaintiffs also filed this Motion seeking relief under Rule 60(b).³³

LEGAL STANDARD

Federal Rule of Civil Procedure 60(b) provides that “the court may relieve a party or its legal representative from a final judgment, order, or proceeding” under certain circumstances.³⁴ Plaintiffs rely on two provisions of Rule 60(b). First, under Rule 60(b)(2), relief may be granted where there is “newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b).”³⁵ Second, under Rule 60(b)(6), relief may also be appropriate for “any other reason that justifies relief.”³⁶

As a “general matter the filing of a notice of appeal is an event of jurisdictional significance that confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.”³⁷ But the rule in civil cases “is that after an appeal has been taken the district court retains jurisdiction to consider and deny a Rule 60(b) motion on the merits.”³⁸ The court also is permitted to enter an order indicating that it

³¹ Order dated May 21, 2021, ECF No. 164; Transcript of Motion Hearing held on 05/19/21, ECF No. 166.

³² Notice of Appeal, ECF No. 171, filed June 16, 2021.

³³ Motion at 1, ECF No. 201.

³⁴ Fed. R. Civ. P. 60(b).

³⁵ Fed. R. Civ. P. 60(b)(2).

³⁶ Fed. R. Civ. P. 60(b)(6).

³⁷ *Burgess v. Daniels*, 576 Fed. App'x 809, 813 (10th Cir. 2014) (cleaned up) (quoting *United States v. Battles*, 745 F.3d 436 (10th Cir. 2014)).

³⁸ *Burgess*, 576 Fed. App'x at 813 (“Accordingly, although the district court here lacked jurisdiction to grant Mr. Burgess’s Rule 60(b) motion, it was not in fact precluded from considering and denying the motion on its merits.”).

would grant the 60(b) motion on remand, in which case the court of appeals would decide whether to remand the case back to the district court so that it may do so.³⁹

DISCUSSION

I. Plaintiffs Have Not Satisfied the Rule 60(b)(2) Standard.

A. The Rule 60(b)(2) Requirements

Plaintiffs submitted eleven new email chains in support of their motion. To meet the Rule 60(b)(2) standard, Plaintiffs must show that (1) the emails were newly discovered; (2) they were diligent in discovering the new evidence; (3) the newly discovered evidence “could not be merely cumulative or impeaching,” (4) the newly discovered evidence is material; and (5) the newly discovered evidence would probably produce a different result.⁴⁰

The court assumes, without deciding, that Plaintiffs have met the requirements of the first four factors. The fifth factor requires Plaintiffs to show that the newly discovered evidence would “probably produce a different result.”⁴¹

B. The Eleven Emails at Issue

The emails chains are summarized as follows:

- 1/29/19 email from Tony Howells at Everlast Capital Partners to Mogens Smed pitching Utah as a production site. Howells’ email indicates that Smed showed “little interest” in Salt Lake City a week earlier, states that Smed may be “more receptive” now, but that Smed should let Howells know if “this is still a non-starter.” No response from Smed is included. Howells then forwards the email to Henderson and the two discuss meeting.⁴²
- 2/14/19 email from Henderson to Smed forwarding an idea for using “Falk-Tech.” Materials attached to the email state that Henderson did “a quick beta-test.”

³⁹ Fed R. Civ. P. 62.1.

⁴⁰ See *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 727 (10th Cir. 1993) (referring to the standard for new evidence post trial); see also *Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1290 (10th Cir. 2005).

⁴¹ *Lyons*, 994 F.2d at 727.

⁴² Exhibit D, ECF No. 201-3.

Henderson begins the email with “PLEASE read this idea” and ends with “This is a good idea – Consider it!” Smed responds “This is great Lance.”⁴³

- 2/17/19 email from Henderson to Smed stating “Had a few ideas I wanted to throw out—some are better than others—so please read them all” followed by various ideas observations, and information, including a construction budget for a different company that Henderson says shows “SLC [Salt Lake City] construction costs.” Smed forwards the email to a group email and says, “Some very interesting ideas.”⁴⁴
- 2/18/19 email chain between Henderson and Joe Dallimore regarding developing a business plan for a company called NuCo or Take-1. The email references a “Sept 1 launch day,” recounts a conversation with Smed about the plan, and states that “Smed will be coming to SLC in two weeks and we will sit down again.”⁴⁵ Subsequent emails discuss Henderson and Dallimore scheduling a meeting for the two of them.⁴⁶
- Exhibit G is a duplicate of the foregoing email chain except that it does not include the full chain.⁴⁷
- 2/21/19 email from Henderson to Smed regarding various ideas Henderson had about building a “web app.” Henderson says “Sorry this is such a long introduction—I’m excited to hear back. If there is no Falk interest, I’d like to present this concept to some friends of mine who I believe would run with the idea to develop[] the platform at which point we could look at it again and consider using the service merely as a client.”⁴⁸ Henderson also references a prior construction project “in Salt Lake City (home of future Falk manufacturing ;-).”⁴⁹ No response from Smed is included.
- 4/2/19 email chain in which Smed asks a Falkbuilt employee to book the Hendersons flights to Calgary.⁵⁰ Subsequent emails between the Hendersons and the Falkbuilt employee show the flight plans.⁵¹

⁴³ Exhibit E, ECF No. 201-4.

⁴⁴ Exhibit B, ECF No. 201-1.

⁴⁵ Exhibit F, ECF No. 201-5.

⁴⁶ *Id.*

⁴⁷ Exhibit G, ECF No. 201-6.

⁴⁸ Exhibit H, ECF No. 201-7.

⁴⁹ *Id.*

⁵⁰ Exhibit J, ECF No. 201-9.

⁵¹ *Id.*

- 4/10/19 email from Smed to an email group stating that “Falk will have absolutely the most compelling folding wall offering in the industry” and “will be using components from proven folding wall manufacturers and adapting them to our own criteria.”⁵²
- 5/20/19 email from Scott Wilcox at Interior Solutions to Mogens Smed about “a significant opportunity with a company called Mohave Narrows.”⁵³ There is no information about what the “opportunity” is. Wilcox tells Smed “we may be able to help Falkbuilt with the Mojave Narrows opportunity until you get your Utah group set up.”
- 7/17/2019 email from Henderson to Barrie Loberg at Falkbuilt, stating that Henderson recently put in his notice with DIRTT, that he is in Calgary, that he has a company set up with logistics in process, that “4 projects looking good after we launch” and that he “[c]ouldn’t be more excited about what you and Mogens have put together!”⁵⁴
- 7/23/19 email chain between Henderson and a Falkbuilt employee describing Henderson’s efforts on various business startup logistics like insurance, phone, expenses, accounting, software, healthcare, etc.⁵⁵

For purposes of this motion only, the court finds that the foregoing eleven emails selected by Plaintiffs from the Utah Defendants show or suggest the following. In the first half of 2019, Smed and Henderson are discussing and planning on Henderson starting a Falkbuilt affiliate in Utah. These discussions occur during a 5–6-month period before Henderson leaves DIRTT. Henderson has many business ideas which he shares with Smed during this period. Smed also shares an idea or strategy with Henderson and others in a group email. Smed likely came to Utah at least once, and Henderson went to Calgary at least twice. Henderson and others wanted Falkbuilt to manufacture in Utah, but the emails do not show that Smed accepted that suggestion or that Falkbuilt manufacturing occurred. By May 20, 2019, no Falkbuilt-related enterprise had

⁵² Exhibit I, ECF No. 201-8.

⁵³ Exhibit L, ECF No. 201-11.

⁵⁴ Exhibit K, ECF No. 201-10.

⁵⁵ Exhibit C, ECF No. 201-2.

been established (third-party offer to Smed to handle business opportunity “until you get your Utah group set up”). By July 17, 2019, a Falkbuilt entity had been “set up” by Henderson, though it appears he still was a DIRTT employee at the time (“put my notice in last Friday”). It does not appear to have yet started actual client work, but the groundwork was being prepared (“4 projects looking good after we launch”).

C. Plaintiffs’ Interpretation of the Emails

Early in their motion, Plaintiffs highlight three snippets from the court’s ruling which they allege the recently produced documents show “were not accurate”⁵⁶:

- “Any theft or misappropriation of DIRTT’s confidential information initially occurred in Canada. So this factor favors applying Canadian law.” (Dkt. 166 at 70:14-17);
- The focal point for this litigation is Mr. Smed, who resides in Canada and has strong ties to Canada. (*Id.* at 71:18-24); and
- “The parties’ relationship *originated* and *ended up* . . . in Canada, and Mr. Smed resides there.” (*Id.* at 72:1-4 (emphasis added)).⁵⁷

Plaintiffs do not explain how the eleven emails show that those statements “were not accurate.” The first statement—the initial misappropriation of DIRTT, Ltd.’s confidential information by Smed—is not addressed by the emails at all. To the limited extent that the emails touch upon the second and third statements, they support them. In short, the eleven emails that are the subject of this motion do nothing to undercut any of those statements. None of the emails

⁵⁶ Rule 60(b) Motion at 4.

⁵⁷ The ellipses in Plaintiffs’ quote alter the meaning of the full quote. The ruling actually states that “the parties’ relationship originated and ended up, both Falkbuilt, Ltd, and DIRTT, Ltd, have their headquarters in Canada, and Mr. Smed resides there.” Transcript at 72:1-4, ECF No. 166. Elsewhere in the ruling, the court repeatedly notes that while the parties’ relationship began in and is centered in Canada, and the initial alleged misconduct occurred there, the United States was involved as well. *See, e.g.*, Transcript at 67:21-22 (“The first amended complaint alleged or implies economic injury and market confusion in the US and in Canada”); *id.* at 69:9–10 (“The alleged injury occurred across borders.”); *id.* at 70:12–14 (“Canada has the stronger claim to being the place where the conduct causing the injury occurred, even though that conduct crosses the border.”).

address Smed’s alleged initial theft of DIRTT’s confidential information. None of the emails suggest that Smed does not reside in Canada, does not have strong ties there, and is not key to the parties’ overarching litigation. And none of the emails suggest that the relationship between the DIRTT and Falkbuilt parties did not originate in Canada, or that DIRTT, Ltd. and Falkbuilt, Ltd. do not have their headquarters in Canada.

Plaintiffs’ first discussion of any specific email, as opposed to general statements about the meaning of the emails generally and collectively, occurs in their argument regarding three of the Rule 60(b)(2) factors about (1) the evidence being newly discovered, (2) that Plaintiffs were diligent in seeking it, and (3) that the evidence was not cumulative or impeaching.⁵⁸ As noted earlier, the court assumes, without deciding, that these factors are met.⁵⁹

Plaintiffs then turn to “factors four through six” arguing “the newly discovered evidence is not cumulative because it directly contradicts the Falkbuilt Defendants’ assertion that “[o]ther than Mr. Henderson there’s really no connection to Utah in this lawsuit.”⁶⁰ The court notes that there is no factor six—the test has five factors.⁶¹ Also, factors four and five are not, as Plaintiffs initially suggest, about “cumulative” evidence—factor three addresses whether the evidence is merely cumulative. Instead, the fourth and fifth factors are about materiality and whether the newly discovered material evidence would probably produce a different result.⁶²

⁵⁸ Rule 60(b) Motion at 8–12.

⁵⁹ Plaintiffs argue in this section that the emails show “Falkbuilt’s formation and operational presence in Utah since January 2019 . . . months before Henderson’s theft of trade secrets.” Rule 60(b) Motion at 9. As discussed *supra* at 6–8, the emails do not show that Falkbuilt was formed and operating in Utah in January 2019, but they do show that Henderson and Smed were preparing for that to occur and that a company was formed in or around July 2019. Henderson’s alleged theft of DIRTT’s trade secrets is a subject of the still pending case before this court and also is not discussed in the emails in question.

⁶⁰ Rule 60(b) Motion at 12.

⁶¹ See *Zurich N. Am.*, 426 F.3d at 1290 (listing five factors).

⁶² *Id.*

On the substance, Plaintiffs’ focus on Falkbuilt’s statement that “[o]ther than Mr. Henderson there’s really no connection to Utah in this lawsuit” misses the mark.⁶³ That the prevailing party said it does not mean the court adopted it. Instead, the court found as follows:

DIRTT has alleged market confusion and injury which transcend any single place. While Utah has some connection to this claim and certainly has connection to the claims against the Hendersons and Falk Mountain States, [by] contrast, Albertans are more connected to both sides for the many reasons previously stated. Moreover, DIRTT will still be able to proceed with its claims against the Henderson and Falk Mountain States, which are more directly tied to Utah.⁶⁴

Next, after providing their summary of most of the emails,⁶⁵ Plaintiffs explain what they think they show. Plaintiffs claim that the emails show that “the parties’ relationship was not localized within Canada as Falkbuilt originally represented, but included business strategy, finances and product testing in Utah, and that as part of the TTIMIT group national rollout, Utah was central to Falkbuilt’s creation.”⁶⁶

Unpacking these claims, once again, the court notes that just because the prevailing party asserted something⁶⁷ does not mean that the court based its ruling on it. The court did not find that the parties’ relationship was limited or “localized” within Canada. Instead, in evaluating the fourth Restatement Section 145 factor—the center of the parties’ relationship—the court found that Canada had the better claim because the two parent companies are headquartered there,

⁶³ The broader argument in which counsel’s quote appears is about what a Utah jury would think about why they were being called to decide a case where the two parent corporations are Canadian, whereas Albertans would understand why they were being called upon to decide the larger case. *See* Transcript at 15:19-25–16:1-13.

⁶⁴ Transcript at 75:18–25.

⁶⁵ Rule 60(b) Motion at 12–16.

⁶⁶ *Id.* at 16.

⁶⁷ Plaintiffs provide no cite to the record for this statement. The court will not address other examples of Plaintiffs asserting the court’s adoption of Defendants’ statements, other than to note that it happens multiple times in Plaintiffs’ briefing. *See, e.g.*, Plaintiffs’ Reply Brief in Support of Motion for Relief from Judgment Pursuant to Fed. R. Civ. Proc. 60(b) at 10 (“The Falkbuilt Defendants’ counsel said it was much ‘much ado about nothing,’ and the Court agreed.”). Plaintiffs’ counsel is cautioned to use care that rhetorical flourish does not further undermine accuracy.

Smed, the former founder and CEO of one Canadian company and the founder and current CEO of the other, is a Canadian resident, and Smed also is alleged to have stolen alleged trade secrets owned by the Canadian company.⁶⁸

Regarding “business strategy, finances[,] and product testing in Utah,”⁶⁹ the emails show the following. Henderson had lots of ideas he wanted to share with Smed. Smed offered brief replies to those emails. Smed also shared his own idea or strategy with an email group which included Henderson. Henderson, in support of one of Henderson’s ideas, performed some kind of “beta test” he wanted Smed to know about. The email does not suggest that Smed asked for it; to the contrary, Henderson tells Smed “PLEASE read this idea” and “This is a good idea – Consider it!”, strongly suggesting that both the idea and the test previously were unknown to Smed.⁷⁰ Plaintiffs’ “finances” statement is an apparent reference to a pitch email from Tony Howells at Everlast Capital Partners. As noted earlier, Howells’ email indicates that Smed showed “little interest” in Salt Lake City a week earlier, states that Smed may be “more receptive” now, but that Smed should let Howells know if “this is still a non-starter.”⁷¹ The fairest reading is that Howells is pitching Smed, not the other way around, and that Smed apparently is not much interested.

As noted earlier, the emails, taken together, certainly show that Henderson and Smed are anticipating that Henderson would join Falkbuilt at some point, all while Henderson was working for DIRTT, Inc. Both sides are sharing ideas and getting ready for the endeavor. This certainly will be relevant in the case still before the court involving the Hendersons and Falk Mountain States. But these emails do not establish that Falkbuilt and Smed are requesting or

⁶⁸ Transcript at 71–72, ECF No. 166.

⁶⁹ Rule 60(b) Motion at 16.

⁷⁰ ECF No. 201-4.

⁷¹ ECF No. 201-3.

directing product testing in Utah, seeking financing, or executing any actual business operations at the time of the emails.

Regarding the claim that the emails show that “Utah was central to Falkbuilt’s creation,”⁷² the emails do not even reference Falkbuilt’s “creation,” much less contain any information showing that Utah was “central” to it. Additionally, Plaintiffs’ filing in the Calgary court show that Falkbuilt’s creation predates all of the emails in question.⁷³

Plaintiffs then contend that the emails show that the “subsequent disclosure and use of DIRTT trade secrets—clearly commenced with Falkbuilt’s plans of establishing a Utah presence and culminated with Falkbuilt’s unlawful competition with DIRTT there, including Smed’s personal presence there.”⁷⁴ The emails do not do that. The emails say nothing about the taking or use of DIRTT’s trade secrets, much less link any DIRTT trade secrets with establishing a Utah presence.

Plaintiffs also note that the emails show “Falkbuilt’s and Smed’s activities extended beyond Canada, involving Utah and other U.S. markets from the beginning of the Falkbuilt enterprise.”⁷⁵ As already discussed, the *forum non conveniens* analysis recognized that the case was transnational, starting in Canada with Canadian parent companies and a common Canadian founder and then spilling over into the United States,⁷⁶ so that is not new. The claim that Utah was involved “from the beginning of the Falkbuilt enterprise” is not supported by the emails, which postdate Falkbuilt’s founding.

⁷² Rule 60(b) Motion at 16.

⁷³ Falkbuilt Ltd. was incorporated on October 26, 2018. Canadian Statement of Claim at ¶ 3, ECF No. 134-1; *see also* Canadian Amended Amended Amended Statement of Claim at ¶ 6, ECF NO. 207-3. The earliest email at issue here is three months later.

⁷⁴ *Id.* at 17 (footnote omitted).

⁷⁵ *Id.*

⁷⁶ *See supra* at 9 n.57; *infra* at 20.

Finally, Plaintiffs note that Henderson stated in an email that he has “4 projects looking good after we launch.”⁷⁷ Once again, this is fair game in the action that still is pending before this court against Hendersons and Falk Mountain States.⁷⁸

D. The *Forum Non Conveniens* Analysis

To analyze whether these emails would probably produce a different result, it is helpful to provide a summary of the court’s analysis and reasoning in granting the dismissal based on *forum non conveniens*.⁷⁹

“The doctrine of *forum non conveniens* permits a court to dismiss a case when an adequate alternative forum exists in a different judicial system and there is no mechanism by which the case may be transferred.”⁸⁰ And “*forum non conveniens* is proper when an adequate alternative forum is available and public- and private-interest factors weigh in favor of dismissal.”⁸¹ The Supreme Court has stated that “the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, [and] a foreign plaintiff’s choice deserves less deference.”⁸²

Dismissal under *forum non conveniens* must meet two threshold requirements.⁸³ “First there must be an ‘adequate alternative forum where the defendant is amenable to process.’ Second, ‘the court must confirm that foreign law is applicable,’ because *forum non conveniens* is improper if foreign law is not applicable and domestic law controls.”⁸⁴ And if both requirements

⁷⁷ Exhibit K, ECF No. 201-10.

⁷⁸ Plaintiffs make a number of other factual assertions, characterizations, and interpretations of the emails and facts in their briefing without citing any specific email or record evidence. Because those claims are made with no reference to any email or specific part of the record, they are not discussed further here.

⁷⁹ The entire opinion is located at ECF No. 166, 58–80 and ECF No. 164.

⁸⁰ *Kelvion, Inc. v. PetroChina Canada Ltd.*, 918 F.3d 1088, 1091 (10th Cir. 2019).

⁸¹ *Kelvion*, 918 F.3d at 1091 (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981)).

⁸² *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981).

⁸³ *Archangel Diamond Corp. Liquidating Trust v. Lukoil*, 812 F.3d 799, 804 (10th Cir. 2016).

⁸⁴ *Archangel Diamond*, 812 F.3d at 804 (internal citations omitted).

are met, then “the court weighs the private and public interests to determine whether to dismiss.”⁸⁵

As to the first requirement, the court noted the similarities between the Canadian and United States actions.⁸⁶ Plaintiffs’ pleadings in both actions “indicate that both courts may address the same alleged wrongful conduct and ultimately may grant substantive relief.”⁸⁷ The court concluded that “[t]he Canadian court in which DIRT, Ltd., has already filed a related lawsuit is an available and adequate forum for the claims against defendants Falkbuilt, Ltd.; Falkbuilt, Inc.; and Mr. Smed.”⁸⁸

As to the second threshold requirement, the court found that foreign law is applicable and domestic law does not control the claims against those three defendants.⁸⁹ Part of this analysis required the court to apply Utah’s choice of law rules and the most significant relationship test from Section 145 of the Restatement Second of Conflict of Laws.⁹⁰ This test involves four factors: (1) “the place where the injury occurred;” (2) “the place where the conduct causing the injury occurred;” (3) “the domicile, residence, nationality, place of incorporation and place of business of the parties;” and (4) “the place where the relationship, if any, between the parties is centered.”⁹¹

First as to the place of injury, the court discussed that Plaintiffs allege that the Falkbuilt Defendants stole confidential information from a Canadian company, and the First Amended Complaint “does not explicitly limit the injury or damages sought to the United States and

⁸⁵ *Archangel Diamond*, 812 F.3d at 804.

⁸⁶ Transcript at 60–62, ECF No. 166.

⁸⁷ *Id.* at 62:17–19.

⁸⁸ *Id.* at 66:12–15.

⁸⁹ *Id.* at 66–72.

⁹⁰ *Id.* at 67.

⁹¹ Restatement (Second) of Conflicts of Law: The General Principle § 145 (1971); *see also* Transcript at 67–72.

contains numerous statements that are broad regarding the damages and the injury.”⁹² The court also noted the confusion in the Amended Complaint referring to DIRTT, Ltd. and DIRTT, Inc. collectively.⁹³ Plaintiffs argued these entities are “totally separate” and “are operating on other sides of the border”⁹⁴ and yet they are continually referred to collectively.⁹⁵ Ultimately the court did not weigh the first factor in favor of applying Canadian law or domestic law as the injuries were “not limited to those two in those areas.”⁹⁶

Next, regarding the place where the conduct causing injury occurred, the court noted what was presented to the court, while involving the United States, “primarily point[ed] to Canada.”⁹⁷ While additional conduct extended beyond Canada, Canada had the “stronger claim” because “any theft or misappropriation of DIRTT’s confidential information initially occurred in Canada” and this favored applying Canadian law.⁹⁸ As to the third factor, the court looked at the domicile, residence, nationality, place of incorporation, and place of business of the parties.⁹⁹ Both businesses conduct business internationally. Both Falkbuilt, Ltd. and DIRTT, Ltd. are incorporated in Calgary, Alberta and have their headquarters and principal places of business in Calgary.¹⁰⁰

In its analysis, the court further noted that if the case against the Falkbuilt Defendants moved to Canada, the case here could still proceed with the “narrow Utah focus” against the Hendersons and Falk Mountain States Defendants.¹⁰¹ Furthermore, Smed is a citizen and resident

⁹² Transcript at 67:13–15.

⁹³ *Id.* at 68.

⁹⁴ The issue of Plaintiffs’ varying representations about DIRTT, Inc. is discussed *infra* at 21–25.

⁹⁵ Transcript at 68–69.

⁹⁶ *Id.* at 69:11–14.

⁹⁷ *Id.* at 69:24–25.

⁹⁸ *Id.* at 70:10–17.

⁹⁹ *Id.* at 70–71.

¹⁰⁰ *Id.* at 70–71.

¹⁰¹ *Id.* at 71:14–17.

of Canada and is at the center of Plaintiffs’ claims, “solidifying this factor in favor of applying Canadian law.”¹⁰² As to the fourth factor, the court analyzed the place where the relationship between the parties is centered.¹⁰³ The relationship between the two parent companies, DIRTT, Ltd. and Falkbuilt, Ltd., as well as their common founder and leader, Mogens Smed, originated in and continues in Canada.¹⁰⁴ Both DIRTT, Ltd. and Falkbuilt, Ltd. are Canadian companies, and the fourth factor “supports the applicability of Canadian law.”¹⁰⁵

The court then addressed the relevant private interest factors:

(1) the relative ease of access to sources of proof; (2) the availability of compulsory process for compelling attendance of witnesses; (3) cost of obtaining attendance of willing non-party witnesses; (4) possibility of a view of the premises, if appropriate; and (5) all other practical problems that make trial of the case easy, expeditious, and inexpensive.¹⁰⁶

Applying these factors, the court noted that both Falkbuilt, Ltd. and DIRTT, Ltd. have their principal places of business in Calgary.¹⁰⁷ Additionally, Plaintiffs have alleged that over 50 employees have joined Falkbuilt and Smed.¹⁰⁸ Witnesses will be needed from the parties’ principal places of business in Canada.¹⁰⁹ Discovery can more easily be obtained in Canada as to the Canadian defendants and any nonparty employees in the United States can be compelled to produce documents or testify in Canada.¹¹⁰ A review of the premises would also be better suited in a Canadian forum.¹¹¹ And lastly, the practical problems weighed in favor of dismissal because of “the parties’ business

¹⁰² *Id.* at 71:18–20.

¹⁰³ *Id.* at 71–72.

¹⁰⁴ *Id.* at 72.

¹⁰⁵ *Id.* at 72:11–13.

¹⁰⁶ *Archangel Diamond*, 812 F.3d at 806 (citation omitted).

¹⁰⁷ Transcript at 73:12–15.

¹⁰⁸ *Id.* at 73:16–18 (citing First Amended Complaint at ¶ 39).

¹⁰⁹ *Id.* at 73.

¹¹⁰ *Id.* at 74.

¹¹¹ *Id.* at 74.

presence in Canada, their history there and misappropriation of confidential information in Canada, all of that certainly started there allegedly.”¹¹² Most notably, the alleged wrongful conduct began in Canada and spread from there.¹¹³ In all, the private interests firmly weighed in favor of dismissal.¹¹⁴

The court also considered the relevant public interest factors:

(1) administrative difficulties of the courts with congested dockets which can be caused by cases not being filed at their place of origin; (2) the burden of jury duty on members of a community with no connection to the litigation; (3) the local interest in having localized controversies decided at home; and (4) the appropriateness of having diversity cases tried in a forum that is familiar with the governing law.¹¹⁵

The court noted the first factor “really doesn’t play any role because there is insufficient information about comparative court congestion.”¹¹⁶ The second factor “somewhat” favored dismissal.¹¹⁷ The court noted that Utah has a connection to the claims against the Hendersons and Falk Mountain States Defendants, but Albertans “are more connected to both sides [DIRTT, Ltd. and Falkbuilt, Ltd.] for the many reasons previously stated.”¹¹⁸ The claims against the Hendersons and Falk Mountain States were more directly tied to Utah, so that case would be able to proceed before the court.¹¹⁹ As to the third factor, the court discussed that both companies conduct business internationally and “the interest in deciding the controversy is not entirely localized.”¹²⁰

¹¹² *Id.* at 74:20–23.

¹¹³ *Id.* at 75.

¹¹⁴ *Id.* at 75.

¹¹⁵ *Archangel Diamond*, 812 F.3d at 808 (citation omitted).

¹¹⁶ Transcript at 75:13–14. However, it must be noted that when DIRTT, Inc. was seeking a *forum non conveniens* dismissal of the Falkbuilt Defendants’ counterclaim, it argued that U.S. federal courts are more congested than their Albertan counterparts. *See* ECF No. 63 at 13 n.1.

¹¹⁷ *Id.* at 75:17.

¹¹⁸ *Id.* at 75:19–23.

¹¹⁹ *Id.* at 75.

¹²⁰ *Id.* at 76:4–5.

However, the court determined that Plaintiffs’ allegations “primarily center around confidential information and trade secrets owned by a Canadian company,” specifically DIRTT, Ltd.¹²¹ While Plaintiffs allege dissemination of the confidential information, Alberta “has a much stronger local interest in the broad dispute between DIRTT and Falkbuilt.”¹²² Lastly, the fourth factor weighed most heavily in favor of dismissal.¹²³ The court determined that the alleged wrongdoing and relief between the Utah and Canadian actions is “substantially similar.”¹²⁴ The trade secrets at issue are trade secrets owned by a Canadian company.¹²⁵ The Canadian action was initiated first, the Canadian court is “already familiar with the parent companies,” and Canadian law is applicable to the claims alleged in the First Amended Complaint.¹²⁶

The court summarized its conclusions:

[T]his dispute primarily involves Canadian actors together with others and their alleged actions in Canada with additional actions and effects outside of Canada, including the United States and perhaps elsewhere. Mr. Smed is at the very center of this action. He is a Canadian citizen; he’s a former executive of DIRTT, Ltd, the head executive in fact, which is DIRTT, Inc.’s parent company in Canada and is the founder of Falkbuilt in Canada. He gained information about DIRTT operations while employed in Canada. He left DIRTT and started Falkbuilt, Ltd, in Canada. DIRTT claims that Mr. Smed masterminded this theft of DIRTT’s confidential information and engaged in other wrongdoing, such as luring away Canadian DIRTT employees and utilizing DIRTT’s information to unfairly compete against DIRTT. While DIRTT and Falkbuilt have expanded their operations across the border into the US, the dispute originated in Canada when Mr. Smed left DIRTT, Ltd., in Canada.¹²⁷

¹²¹ *Id.* at 76; *see also id.* at 67 (noting that DIRTT, Ltd, is the owner of the trade secret information at issue and licenses to subsidiary or related company DIRTT, Inc.); Amended Complaint at ¶ 2 (“DIRTT Ltd. is the licensor of the trade secrets at issue in this case.”).

¹²² Transcript at 76:10–13.

¹²³ *Id.* at 76:17–18.

¹²⁴ *Id.* at 76:22–23.

¹²⁵ *Id.* at 76:24–25.

¹²⁶ *Id.* at 77:1–8.

¹²⁷ *Id.* at 77:16–78:7.

In contrast to interpreting the eleven emails in question, Plaintiffs spend very little time in their briefing analyzing the *forum non conveniens* factors. Plaintiffs assert that the “New Correspondence swings the first through the fourth Section 145 factors decidedly in DIRTT’s favor.”¹²⁸ This is not followed by any significant analysis of those factors and how they would probably have changed the court’s Section 145 analysis.¹²⁹

Plaintiffs then argue that the emails “materially impact[] the extent of local interest for a Utah court and potential jury” because Henderson had “at least four local projects ready for ‘launch’,” “Henderson reached out to at least 60 contacts,” and the case involves “business wrongs in Utah resulting in injury and harm to a Utah business, and Utah played a significant role in a company’s national rollout.”¹³⁰

Local interest and the burden of jury duty are two of the five public interest factors. Henderson and Falk Mountain States’ alleged misconduct will be front and center in the case still pending before this court, including at trial. The claim that Henderson reached out to at least 60 contacts is not addressed by the eleven emails here. The argument that the case involves “harm to a Utah business” is not addressed by the emails or supported by the record: DIRTT, Ltd. was formed in Canada and has its principal place of business in Canada; DIRTT, Inc. was formed in Colorado and either has its principal place of business in Canada or in Georgia and Arizona, depending on which of Plaintiffs’ filings are credited.¹³¹ The contention that “Utah played a significant role in a

¹²⁸ Rule 60(b) Motion at 18.

¹²⁹ *Id.* at 18–19. It is preceded by Plaintiffs’ argument about “physical acts of ‘misappropriation’” and “subsequent disclosure and use of DIRTT trade secrets” but, as noted previously, the emails do not discuss Smed’s or Henderson’s alleged taking of DIRTT trade secrets or show how they used them.

¹³⁰ *Id.* at 18.

¹³¹ *See infra* at 21–25.

company’s national rollout”¹³² is not demonstrated by the emails. Smed, a Canadian, and Falkbuilt, Ltd., a Canadian company, apparently are operating in various states, including Utah, through a network of affiliates (much like DIRTT, Ltd.), but that does not put Utah at the center of the dispute.

E. The Mysterious Case of DIRTT, Inc.

Throughout the litigation between DIRTT and Falkbuilt, Plaintiffs have made various different representations about DIRTT, Inc.’s headquarters, principal place of business, and operations. Some of these statements conflict with each other.

On December 11, 2019, DIRTT, Inc., the only original plaintiff in this case, filed a Verified Complaint.¹³³ The Complaint alleged that DIRTT, Inc. is “a Colorado company, with its headquarters and principal place of business in Calgary, Alberta, Canada.”¹³⁴ It further alleged that it “operates in Canada, the United States, and other jurisdictions around the world.”¹³⁵ Nowhere in the Complaint is there any acknowledgement that DIRTT, Inc. has a parent company in Calgary, that the parent company is the owner of the trade secrets at issue, or that the parent company had previously filed related, ongoing litigation in Canada.

Attached to the Complaint was Defendant Henderson’s employment offer with “DIRTT Environmental Solutions” with an address in Calgary, Alberta, Canada.¹³⁶ The letter is signed by Jason Robinson for “DIRTT Environmental Solutions, Inc.”¹³⁷ Also attached as an exhibit to the

¹³² *Id.*

¹³³ Verified Complaint, ECF No. 2.

¹³⁴ *Id.* at ¶ 1.

¹³⁵ *Id.* at ¶ 2.

¹³⁶ 05/21/2009 Letter at 1, ECF No. 2-1.

¹³⁷ *Id.* at 2.

Complaint was DIRTT, Inc.’s Regional Partner Agreement.¹³⁸ The address for DIRTT, Inc. is listed as Calgary, Alberta, Canada and is the same address as the offer of employment.¹³⁹

On April 1, 2020, DIRTT, Inc., still the only plaintiff at the time, filed a motion to dismiss Falkbuilt’s First Amended Counterclaim on the grounds of *forum non conveniens*.¹⁴⁰ In its motion, DIRTT, Inc. made numerous statements that it was located in Canada, conducts business in Canada, and had employees in Canada. For example, on the first page of the motion, DIRTT, Inc. argued that “both DIRTT and Falkbuilt are located in Canada.”¹⁴¹ Later, DIRTT, Inc. argued, “That alternate forum is Calgary, Alberta, Canada, where DIRTT is amenable to service of process.”¹⁴² On the same page, DIRTT, Inc. noted that “the likely sources of proof are located in Canada, as both DIRTT and Falkbuilt are headquartered and do business there, with critical witnesses and documents located in Canada.”¹⁴³ On the next page, DIRTT, Inc. argued that “[d]ocuments relevant to the parties’ arguments will be located on the companies’ servers in those Canadian locations, and any physical documents or other evidence will also most likely be found in Canada...A number of Falkbuilt employees could foreseeably be called as witnesses, in addition to the Company’s founder, Mogens Smed. DIRTT employees could also likely be called. All of these individuals reside and work in Canada.”¹⁴⁴ The court granted Plaintiff’s motion to dismiss so that the claim could be heard in Canada.¹⁴⁵

¹³⁸ DIRTT Regional Partner Agreement, ECF No. 2-4.

¹³⁹ *Id.* at 1.

¹⁴⁰ DIRTT, Inc.’s Motion to Dismiss (DIRTT Motion to Dismiss), ECF No. 63, filed April 1, 2020.

¹⁴¹ *Id.* at 1

¹⁴² *Id.* at 11.

¹⁴³ *Id.* at 11.

¹⁴⁴ *Id.* at 12.

¹⁴⁵ *See* ECF Nos. 156, 157.

On October 20, 2020, DIRTT, Inc. filed a First Amended Complaint, adding DIRTT, Ltd. as a plaintiff.¹⁴⁶ There, Plaintiffs renewed their representation from their original Complaint that “DIRTT, Inc. is a Colorado company,” but dropped the original Complaint’s averment that DIRTT, Inc. had its “headquarters and principal place of business in Calgary, Alberta, Canada,”¹⁴⁷ alleging now instead that it had “principal places of business in Savannah, Georgia and Phoenix, Arizona.”¹⁴⁸ On November 19, 2020, the Falkbuilt Defendants moved to dismiss the First Amended Complaint.¹⁴⁹

On December 17, 2020, Plaintiffs opposed the Falkbuilt Defendants’ motion to dismiss.¹⁵⁰ In that pleading, Plaintiffs argued that DIRTT, Inc. is a “Colorado company operating in the U.S.”¹⁵¹ It also alleged that “DIRTT, Inc. is a U.S. plaintiff.”¹⁵² And, Plaintiffs argued that “DIRTT, Inc. only operates in the U.S. and has no factory in Canada.”¹⁵³

On May 19, 2021, the court held a hearing on the Falkbuilt Defendants’ motion to dismiss.¹⁵⁴ At the hearing, Plaintiffs’ counsel made various statements regarding DIRTT, Inc.’s status. He stated that “DIRTT, Inc. is only operating in the US. It has no employees outside of the US. It has no sales outside of the US. It has a US incorporation.”¹⁵⁵ He stated there was “no overlap” between DIRTT, Inc. and DIRTT, Ltd.,¹⁵⁶ DIRTT, Inc. is a “US only company” and

¹⁴⁶ First Amended Complaint, ECF No. 117, filed October 20, 2020.

¹⁴⁷ Verified Complaint at ¶ 1.

¹⁴⁸ First Amended Complaint at ¶ 1.

¹⁴⁹ Motion to Dismiss, ECF No. 134.

¹⁵⁰ Plaintiffs’ Opposition to Motion to Dismiss First Amended Complaint as to Falkbuilt, Ltd., Falkbuilt, Inc., and Mogens Smed (Plaintiffs’ Opposition), EF No. 139, filed December 17, 2020.

¹⁵¹ Plaintiffs’ Opposition at 5.

¹⁵² Plaintiffs’ Opposition at 17.

¹⁵³ *Id.* at 22.

¹⁵⁴ *See* Transcript of Motion to Dismiss Hearing, ECF No. 166.

¹⁵⁵ *Id.* at 17:22–24.

¹⁵⁶ *Id.* at 18:2–3.

does not operate in Canada.¹⁵⁷ Later, counsel again reaffirmed that DIRTT, Inc. is a “US company that operates only in the US.”¹⁵⁸ Plaintiffs’ counsel also represented that DIRTT, Ltd. does not “operate at all in the US” and “there are no allegations of DIRTT, Ltd. doing anything in the United States.”¹⁵⁹ Lastly, counsel made clear that “DIRTT, Inc. does no business in Canada. That’s done for tax reasons. It’s a very strict line. There’s no blending between the two.”¹⁶⁰

On September 30, 2021, the Falkbuilt Defendants filed an opposition to Plaintiffs’ Rule 60(b) motion.¹⁶¹ Attached to the opposition was a Consent Order from the Canadian action, permitting the plaintiff in that action, DIRTT, Ltd., to file an Amended Amended Amended Statement of Claim.¹⁶² The Amended Amended Amended Statement of Claim added DIRTT, Inc. as a plaintiff in the Canadian action.¹⁶³ DIRTT, Inc. is listed as “an affiliate of DIRTT, Ltd. incorporated under the laws of the States of Colorado, with its principal offices located in Calgary, Alberta,”¹⁶⁴ not Georgia or Arizona.

In summary, Plaintiffs have made varying representations over the course of this litigation about DIRTT, Inc. Originally, DIRTT, Inc. told the court that its headquarters and principal place of business were in Calgary. DIRTT, Inc. also said that operates in Canada, the United States, and other jurisdictions around the world. Similarly, in support

¹⁵⁷ *Id.* at 18:4–8.

¹⁵⁸ *Id.* at 29:11–12; *see also id.* at 30:3–4 (“[T]he only way we can protect those trade secrets which are in the US where the company only operates.”); *id.* at 30:16 (“We’ve alleged very clearly that there are third parties in the US that are critical to this dispute and that we need injunctive relief to protect our US-only business.”).

¹⁵⁹ *Id.* at 34:13–14, 17–18.

¹⁶⁰ *Id.* at 38:2–4.

¹⁶¹ Opposition to Motion for Relief from Judgment Pursuant to Fed. R. Civ. Proc. 60(b), ECF No. 207, filed September 30, 2021.

¹⁶² 08/31/21 Consent Order, ECF No. 207-3.

¹⁶³ *Id.* at 1; Amended Amended Amended Statement of Claim at ¶ 2.

¹⁶⁴ Amended Amended Amended Statement of Claim at ¶ 2.

of its effort to dismiss a counterclaim against it, DIRTT, Inc. made numerous statements about how it and Falkbuilt do business in Canada, are “located” and “headquartered” there, and about the critical witnesses and documents that would be found there. Several months after DIRTT, Inc.’s *forum non conveniens* motion was fully briefed, Plaintiffs filed an Amended Complaint changing DIRTT, Inc.’s principal place of business from Calgary to Arizona and Georgia. At the hearing on the Falkbuilt Defendants’ *forum non conveniens* motion, Plaintiffs’ counsel said that there is “no overlap” and “no blending” between DIRTT, Ltd. and DIRTT, Inc. “for tax purposes.” Counsel also said that DIRTT, Inc. is a “US only company.” Yet despite all this, the most recent filing in the Calgary court states DIRTT, Inc. has “its principal offices located in Calgary, Alberta.”

Whatever the reality actually is, and however Plaintiffs have chosen to organize themselves for tax or other purposes, Plaintiffs’ filings and representations regarding DIRTT, Inc. have been many and varied. And some of them seem to have varied based on whether DIRTT is seeking a *forum non conveniens* order or defending against one.

....

Based on all of the foregoing, Plaintiffs have failed to meet the Rule 60(b)(2) standard. The emails they cite add little to the court’s previous analysis that the relevant factors weigh in favor of the Falkbuilt Defendants being dismissed in favor of the first-filed case in Calgary. To prevail on its 60(b)(2) motion, Plaintiffs needed to show that the newly discovered emails would probably have changed the *forum non conveniens* result. These eleven emails would not have produced a different result. Also, the numerous conflicting representations Plaintiffs have made about DIRTT, Inc., while not key to the

court’s analysis, are not helpful. Accordingly, Plaintiffs have not met their burden under Rule 60(b)(2).

II. Plaintiffs Have Not Satisfied the Rule 60(b)(6) Standard.

Rule 60(b)(6) relief is “available only in ‘extraordinary circumstances’”¹⁶⁵ and “only when necessary to accomplish justice.”¹⁶⁶ “In determining whether extraordinary circumstances are present, a court may consider a wide range of factors. These may include, in an appropriate case, ‘the risk of injustice to the parties’ and ‘the risk of undermining the public’s confidence in the judicial process.’”¹⁶⁷

Plaintiffs first argue the “plain inequity of forcing a U.S. company to seek redress for misconduct and harm that demonstrably occurred within this forum against a local competitor in a foreign, inconvenient forum.”¹⁶⁸ This is not the case. Plaintiffs still have a suit before this court against the “local competitors” (Falk Mountain States and the Hendersons) for the local injury. The court’s *forum non conveniens* order simply has sent the broader suit back to Calgary—the place where the overlapping case was first filed; the place where both parent companies are incorporated and have their headquarters and principal places of business; the place where their common founder and leader resides; and the place where this cross-border dispute has its origins. That one of the Plaintiffs, the subsidiary, was legally incorporated in a neighboring state and does business here certainly is relevant to the *forum non conveniens* analysis, but it is not dispositive, especially when it has made numerous conflicting representations to this court and the Calgary court about its presence in and ties to Canada. Plaintiffs can hardly claim that

¹⁶⁵ *Buck v. Davis*, --- U.S. ---, 137 S.Ct. 759, 777 (2017) (quoting *Gonzalez v. Crosby*, 545 U.S. 524 (2005)).

¹⁶⁶ *United States v. Elwood*, 757 Fed. App’x 731, 734 (10th Cir. 2018) (quoting *Cashner v. Freedom Stores*, 98 F.3d 572, 579 (10th Cir. 1996)).

¹⁶⁷ *Id.* at 778 (citation omitted).

¹⁶⁸ Rule 60(b)Motion at 19, ECF No. 201.

Calgary is truly foreign or inconvenient for them. There is no equitable argument on this point that justifies relief under Rule 60(b)(6).

Plaintiffs also argue that because the Falkbuilt Defendants have “blocked enforcement” of the Canadian injunction in the United States this court should grant relief under Rule 60(b)(6).¹⁶⁹ The injunction referenced is one which the Plaintiffs and Defendants jointly prepared. Plaintiffs state that the Falkbuilt Defendants have “refused to consent to enforcement of such an order” in a recently-filed Texas action.¹⁷⁰ Plaintiffs’ complaint seems to be that the Falkbuilt Defendants did not voluntarily enter the injunction in Texas even though the Falkbuilt Defendants aver that they are bound by and operating under the terms of the injunction in the Canadian action.¹⁷¹ And Plaintiffs have not made any allegations, much less provided any evidence, that the Falkbuilt Defendants have violated the injunction either in Canada or in the United States. Plaintiffs provide no case law suggesting that their desire to have the stipulated protective order entered in another court warrants relief under Rule 60(b)(6). On the facts of this case, it does not.

In sum, none of these issues support the “extraordinary circumstances” required under Rule 60(b)(6). As the court detailed in its ruling on the *forum non conveniens* dismissal, Plaintiffs have an adequate remedy against the Falkbuilt Defendants in the Canadian action. While this case has an unusual posture and some of its handling has been curious, this does not amount to grounds to undo the dismissal of the overarching case in favor of Canada.

CONCLUSION

¹⁶⁹ *Id.* at 20.

¹⁷⁰ *Id.* at 21.

¹⁷¹ Opposition at 12–13; *see also* Exhibits 5, 6, 8, ECF Nos. 207-5, 207-6, 207-8.

This case was destined to have some complexity in its handling. When the founder and CEO of one company leaves and founds a competitor company, questions regarding the taking and use of trade secrets or other confidential information often arise. The stakes are high for both sides. In this case, Mogens Smed, a Calgary resident, was a founder and longtime CEO of one Calgary company, which he left in favor of founding his own Calgary company. His former Calgary company accused him of taking with him and using its trade secrets, pilfering employees, and unfairly competing against his former company. It filed suit over it and related conduct in Calgary. The alleged misconduct and injury did not stop at the Canadian border, since these two Calgary companies both have subsidiaries or affiliates through which they operate in the United States and other countries. Seven months after filing in Calgary, DIRT decided to open a second front in their litigation by filing a case in Utah against Smed and his companies, as well as two Utah residents and their Falkbuilt-affiliated company. DIRT then filed a successful *forum non conveniens* motion against the Falkbuilt Defendants' counterclaim, sending it back to Canada, where all of this began. And so, the *forum non conveniens* seeds were sown and sprouted.

In a *forum non conveniens* analysis, the court is tasked with deciding where trial would be most convenient, whether there is an adequate alternative forum, whether foreign law is applicable, and what the private and public interest factors suggest. Because this case involved both Canada and the United States, it is understandable why the issue was hotly disputed. But, at bottom, the beginnings of this case are in Calgary, the parent companies are Canadian, and so is the parent companies' common founder and leader. And the trade secrets at the core of this case are owned by the Canadian Plaintiff. So, while there are various other important actors, conduct, and injury involving the United States, Canada has the better claim to the larger dispute.

The DIRTT entities obviously feel very strongly about litigating their claims against the Falkbuilt entities in multiple courts at the same time. This has been demonstrated both in the number and tenor of their multiple filings and in their aggressive characterizations and statements. But, on the facts of this case, covering much of the same underlying conduct in two or three different courts will serve primarily to greatly increase litigation expenses. However, while Plaintiffs' 60(b) motion does not have merit and must be denied, the court recognizes that if the Calgary court unexpectedly and categorically denies discovery into Smed and Falkbuilt's Utah activities, then such discovery in the still pending suit before this court would be warranted. And if any such discovery were to reveal grounds for liability for which Canadian law and the Calgary court could offer no relief, the question of whether Falkbuilt, Ltd. and Inc., as well as Mogens Smed, need to be added back to the case pending before this court then would be live. But that future contingency has not arisen. This court has every confidence that the Calgary court is fully capable of handling the bulk of this cross-border dispute in the first-filed case before it. Should assistance be needed in enforcing the Calgary court's orders or judgments, this court stands ready to assist.

ORDER

For the reasons stated in this Memorandum Decision and Order, Plaintiffs' motion for Rule 60(b) relief is DENIED.

Signed December 14, 2021.

BY THE COURT



David Barlow
United States District Judge

CHAD E. NYDEGGER (USB 9962)
cnydegger@wnlaw.com
WORKMAN NYDEGGER
60 East South Temple, Tenth Floor
Salt Lake City, Utah 84111
Telephone: (801) 533-9800

JEFFREY J. MAYER (admitted *pro hac vice*)
Jeffrey.Mayer@akerman.com
CATHERINE A. MILLER (admitted *pro hac vice*)
Catherine.Miller@akerman.com
AKERMAN LLP
71 S. Wacker Drive, 47th Floor
Chicago, Illinois 60606
Telephone: 312-634-5700

Attorneys for Plaintiffs, DIRT Environmental Solutions, Inc. and DIRT Environmental Solutions Ltd.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, NORTHERN DIVISION**

DIRTT ENVIRONMENTAL
SOLUTIONS, INC. and DIRTT
ENVIRONMENTAL SYSTEMS
LTD.,

Plaintiffs,

v.

LANCE HENDERSON, KRISTY
HENDERSON, and FALK
MOUNTAIN STATES, LLC,

Defendants.

Case No: 1:19-cv-00144-DBB-
DBP

NOTICE OF APPEAL

Honorable David B. Barlow
Magistrate Judge Dustin B. Pead

Plaintiffs DIRTT Environmental Systems, Ltd. and DIRTT Environmental Systems, Inc., pursuant to 28 U.S.C. § 1291¹, hereby give notice that they are appealing to the Tenth Circuit Court of Appeals the Memorandum Decision and Order denying Motion for Relief from Judgment Pursuant to Fed. R. Civ. Proc. 60(b) [Dkt. 214], which was entered in this case on December 14, 2021 (attached hereto as “Exhibit A”).

A Docketing Statement will be filed within 14 days requesting the Clerk of Courts to prepare and assemble the documents constituting the record on appeal.

December 21, 2021

Respectfully Submitted,

WORKMAN NYDEGGER:

By: /s/ Chad E. Nydegger
Chad E. Nydegger

AKERMAN LLP:

By: /s/ Jeffrey J. Mayer
Jeffrey J. Mayer

Attorneys for Plaintiffs

¹ This is an appeal of an order denying a motion seeking relief pursuant to Fed. R. Civ. Proc. 60(b) from an order certified pursuant to Fed. R. Civ. Proc. 54(b). That final order [Dkt. 164] is currently on appeal in Tenth Circuit Court of Appeals Case No. 21-4078, which has been held in abeyance pending the resolution of the motion disposed of by the order at issue in this appeal. Once this appeal is docketed in the Tenth Circuit Court of Appeals, the undersigned will file a motion to consolidate the two appeals.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December 2021, a true and correct copy of the foregoing **NOTICE OF APPEAL** was served through the court's efilng system which caused notice of filing to be sent to all counsel of record.

/s/ Chad E. Nydegger _____

Case Nos. 21-4078 (L), 21-4153

In the
United States Court of Appeals
for the
Tenth Circuit

DIRTT ENVIRONMENTAL SOLUTIONS, INC. and
DIRTT ENVIRONMENTAL SOLUTIONS, LTD.,
Plaintiffs-Appellants,

v.

FALKBUILT LTD., FALKBUILT, INC. and MOGENS SMED,
Defendants-Appellees,

LANCE HENDERSON, KRISTY HENDERSON and
FALK MOUNTAIN STATES, LLC,
Defendants.

*Appeal from a Decision of the United States District Court
for the District of Utah - Salt Lake City
Case No. 1:19-CV-00144-DBB-DBP · Honorable David Barlow, U.S. District Judge*

APPELLEES' SUPPLEMENTAL APPENDIX
VOLUME I OF II - Pages 1 to 226

ARTEMIS D. VAMIANAKIS, ESQ.
TANNER J. BEAN, ESQ.
FABIAN VANCOTT
215 South State Street, Suite 1200
Salt Lake City, Utah 84111
(801) 531-8900 Telephone
(801) 596-2814 Facsimile
avamianakis@fabianvancott.com
tbean@fabianvancott.com

*Counsel for Appellees Falkbuilt Ltd.,
Falkbuilt, Inc. and Mogens Smed*



COUNSEL PRESS · (213) 680-2300

PRINTED ON RECYCLED PAPER



TABLE OF CONTENTS

Docket Entry	Description	Page
VOLUME I OF II – Pages 1 to 226		
—	Civil Docket, United States District Court for the District of Utah, Case No. 1:19-cv-00144-DBB-DBP	5
46	Falkbuilt, Ltd.’s Response to Plaintiff’s Motion for a Preservation Order and, Following Expedited Discovery, a Limited Preliminary Injunction to Preserve the Status Quo, Filed February 11, 2020	30
52	Defendants Lance Henderson, Kristy Henderson, and Falk Mountain States, LLC’s Opposition to Plaintiff’s Motion for a Preservation Order and, Following Expedited Discovery, a Limited Preliminary Injunction to Preserve the Status Quo, Filed February 12, 2020	42
55	Plaintiff’s Motion to Dismiss Counterclaim, Filed February 26, 2020	53
61	Order: • Granting In Part [5] Motion for Preliminary Injunction to Preserve the Status Quo; and • Finding as Moot [6] Motion to Expedite Discovery, Filed March 13, 2020	75
63	Plaintiff’s Motion to Dismiss First Amended Counterclaim, Filed April 1, 2020	79
68	Notice of Electronic Filing re: Order Finding as Moot Motion to Dismiss, Filed May 1, 2020	111
70	Plaintiff’s Reply in Support of Motion to Dismiss First Amended Counterclaim, Filed May 13, 2020	113
105	Plaintiff’s Motion for Leave to File First Amended Complaint [Selected Excerpts], Filed September 4, 2020	126
	Exhibit B: Redlined First Amended Complaint	134

VOLUME II OF II – Pages 227 to 416

156	Order Granting [63] Plaintiff’s Motion to Dismiss First Amended Counterclaim, Filed March 30, 2021	231
160	Citation of Supplemental Authority in Support of Motion to Dismiss First Amended Complaint as to Falkbuilt Ltd., Falkbuilt, Inc., and Mogens Smed, Filed May 18, 2021	233
	Exhibit 1: Letter from Duncan Marsden to James D. Murphy, Dated May 14, 2021	237
	Exhibit 2: Application to Amend Falkbuilt’s Counterclaim	296
171	Notice of Appeal [DIRTT Environmental Solutions, Inc. and DIRTT Environmental Solutions, Ltd.], Filed June 16, 2021	328
	Exhibit A: Memorandum Decision and Order Granting [134] Motion to Dismiss First Amended Complaint as to Defendants Falkbuilt Ltd., Falkbuilt Inc. and Mogens Smed and Denying Plaintiffs’ Oral Motion to Amend	331
179	Defendants Lance Henderson, Kristy Henderson, and Falk Mountain States, LLC’s Motion to Stay, Filed July 8, 2021	336
180	Notice of Appeal Pursuant To Rule 54(B) Certification [DIRTT Environmental Solutions, Inc. and DIRTT Environmental Solutions, Ltd.], Filed July 16, 2021	346
	Exhibit A: Memorandum Decision and Order Granting [134] Motion to Dismiss First Amended Complaint as to Defendants Falkbuilt Ltd., Falkbuilt Inc. and Mogens Smed and Denying Plaintiffs’ Oral Motion to Amend	350
	Exhibit B: Memorandum Decision and Order Granting [168] Motion for Rule 54(B) Certification of Docket No. 164	355
183	Order from the Tenth Circuit Court of Appeals re: Notice of Appeal, Filed July 19, 2021	358

185 Amended Notice of Appeal Pursuant To Rule 54(B) Certification 359
[DIRTT Environmental Solutions, Inc. and DIRTT Environmental
Solutions, Ltd.],
Filed July 16, 2021

Exhibit A: Memorandum Decision and Order Granting 363
[134] Motion to Dismiss First Amended
Complaint as to Defendants Falkbuilt Ltd.,
Falkbuilt Inc. and Mogens Smed and Denying
Plaintiffs' Oral Motion to Amend

Exhibit B: Memorandum Decision and Order Granting 368
[168] Motion for Rule 54(B) Certification of
Docket No. 164

195 Memorandum Decision and Order Granting Motion to Stay, 371
Filed August 23, 2021

REPORTER'S TRANSCRIPT

157 Reporter's Transcript, United States District Court for the District of 376
Utah, Before the Honorable David Barlow,
Date of Proceedings: March 30, 2021 [Filed On: April 8, 2021]

P. Bruce Badger (A4791)
bbadger@fabianvancott.com
Jason W. Hardin (A8793)
jhardin@fabianvancott.com
FABIAN VANCOTT
215 South State Street, Suite 1200
Salt Lake City, UT 84111-2323
Telephone: (801) 531-8900

Attorneys for Defendant and Counterclaimant Falkbuilt Ltd.

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, NORTHERN DIVISION**

DIRTT ENVIRONMENTAL
SOLUTIONS, INC.,

Plaintiff,

vs.

LANCE HENDERSON, KRISTY
HENDERSON, FALKBUILT LTD.,
AND FALK MOUNTAIN STATES,
LLC,

Defendants.

FALKBUILT LTD.,

Counterclaimant,

vs.

DIRTT ENVIRONMENTAL
SOLUTIONS, INC.,

Counterclaim Defendant.

Case No. 1:19CV00144-DBB-DBP

**FALKBUILT, LTD.’S RESPONSE
TO PLAINTIFF’S MOTION FOR A
PRESERVATION ORDER AND,
FOLLOWING EXPEDITED
DISCOVERY, A LIMITED
PRELIMINARY INJUNCTION TO
PRESERVE THE STATUS QUO**

Honorable David B. Barlow
Magistrate Judge Dustin B. Pead

Defendant Falkbuilt Ltd. (“Falkbuilt”) submits this Response to Plaintiff’s Motion for a Preservation Order and, Following Expedited Discovery, a Limited Preliminary Injunction to Preserve the Status Quo, (Dkt. 5), (the “Motion”).

FACTUAL BACKGROUND AND INTRODUCTION

This lawsuit is part of a larger dispute (initiated in Canadian court) between DIRT Environmental Solutions Ltd., the Canadian parent entity of Plaintiff DIRT Environmental Solutions, Inc. (“DIRT”), and Mogens Smed, the founder of DIRT and its former CEO.¹ In this particular lawsuit, DIRT erroneously claims that Falkbuilt is competing with DIRT in the United States and has stolen and is using DIRT’s confidential business information and trade secrets.² Falkbuilt vehemently denies these claims as well as the vast majority of the allegations in the Motion and in the Verified Complaint.³ Nevertheless, because Falkbuilt has no desire—and has had no intention—to steal or use any of DIRT’s confidential or secret information (as more fully detailed below), **Falkbuilt consents to entry of a preliminary injunction and preservation order**, with only slight, reasonable modifications to what DIRT has proposed.

¹ (Ver. Compl., (Dkt. 2), ¶ 19; Mot. at 3-4.)

² DIRT also erroneously claims, but has failed to set forth any evidence whatsoever showing, that Falkbuilt has used DIRT confidential or secret information or that DIRT has suffered any actual damages, let alone irreparable harm. (*See generally* Ver. Compl., (Dkt. 2).)

³ (*See generally* Falkbuilt’s Answer to Ver. Compl. and Counterclaim, (Dkt. 42).)

ARGUMENT

I. DIRTT’S FILINGS INDICATE A DESIRE TO SHORT-CIRCUIT DISCOVERY AND GAIN AN UNFAIR ADVANTAGE.

Obviously, DIRTT did not intend for this Motion to be addressed so soon. Instead, DIRTT’s hoped-for strategy was to first schedule briefing on its Motion for Expedited Discovery, (Dkt. 6), (the “Dkt. 6 Motion”), to thereafter inundate Falkbuilt with broad written discovery requests with short response deadlines (*of just “ten days”*), to then return to court and call up this Motion, and to present its entire case with no less than three broad “categories” of witnesses—“forensic witnesses ...; business witnesses ...; [and] DIRTT partners and third-party witnesses”—in a preliminary injunction hearing that would rush all defendants to defend themselves on a greatly tilted, uneven playing field.⁴

Moreover, as of December 11, 2019, DIRTT already had gathered, organized and forensically analyzed the computers and electronic storage devices of numerous yet-to-be-identified, former employees.⁵ DIRTT’s forensic expert at Kroll Associates, Inc. stated that, as of that time, it already had evaluated a massive amount of information: “a) Emails for over 25 employees; b) Company issued computers, iPhones or other company-issued devices; and c) Instant Messages,

⁴ (Mot. at 1; Dkt. 6 Mot. at 3, 8, and Ex. A thereto, (Dkt. 6-1).)

⁵ (Ver. Compl. Ex. O, (Dkt. 2-15), ¶¶ 6, 7.)

phone records and web activity logs.”⁶ And Kroll’s litigation database contained images of “over 50 devices consisting of laptops, iPhones and other computing devices” and “549,000 documents across 275,000 emails.”⁷ The short-circuited, expedited discovery sought by DIRTТ obviously would disadvantage defendants by giving them too little time to conduct adequate discovery of the massive amount of materials that DIRTТ concededly has been gathering and analyzing for many months with its forensic experts.

DIRTT’s plan to obtain burdensome expedited discovery in a short time frame in order to support a later preliminary injunction hearing is no longer viable since the Court scheduled the filing of defendants’ opposition memorandums for both the Dkt. 5 and Dkt. 6 Motions on the same date (i.e., February 12, 2020).⁸ But there is no need for DIRTТ’s gamesmanship. There is no need to burden the parties or to disadvantage defendants with potentially massive amounts of discovery on an expedited basis with shortened response times. And there is no need to burden the Court with a lengthy, unnecessary preliminary injunction hearing. Falkbuilt has a much better, simpler idea.

⁶ (*Id.* ¶ 7.)

⁷ (*Id.*)

⁸ (Order Granting in Part Motion to Expedite Status Conference and Set Briefing Schedule, (Dkt. 36).)

II. FALKBUILT AGREES TO A PRELIMINARY INJUNCTION AND PRESERVATION ORDER BECAUSE IT IS NOT USING AND DOES NOT WANT TO USE ANY OF DIRTT'S INFORMATION.

Although Falkbuilt denies that it has misappropriated any confidential information or trade secrets from DIRTT, Falkbuilt consents to entry of a Preservation Order in the form filed concurrently herewith as Exhibit “1” (the “Preservation Order”) and to a Preliminary Injunction to Preserve the Status Quo in the form filed concurrently herewith as Exhibit “2” (the “Preliminary Injunction”). As a result, there is no need for discovery on an expedited basis or with abnormally short deadlines, and there is no need for a preliminary injunction hearing.⁹ Falkbuilt makes this offer because, again, Falkbuilt has no desire—and has had no intention—to steal or use any of DIRTT’s confidential or secret information.¹⁰ Falkbuilt maintains that any acquisition and retention of DIRTT confidential or secret information was inadvertent and has caused no damage to DIRTT.

⁹ Defendants Lance Henderson, Kristy Henderson and Falk Mountain States, LLC have indicated their willingness to be bound by Falkbuilt’s proposed Preservation Order and Preliminary Injunction. Therefore, the proposed Preservation Order and Preliminary Injunction reflect their anticipated consent and are hereinafter referred to as “Defendants’ proposed” orders.

¹⁰ For the record, Falkbuilt *does* oppose DIRTT’s Motion for several reasons, chief among them that DIRTT has failed to set forth any evidence whatsoever showing that Falkbuilt has used DIRTT confidential or secret information or that DIRTT has suffered any actual damages, let alone the irreparable harm required to justify imposition of a preliminary injunction under Rule 65. (*See generally* Ver. Compl., (Dkt. 2).) But because Falkbuilt is consenting to entry of the Preliminary Injunction, lengthy briefing and a hearing on these matters is unnecessary.

Defendants’ proposed Preservation Order is very close to the preservation order that DIRTT already has proposed to the Court,¹¹ except that Defendants’ proposed Preservation Order more appropriately specifies exactly what needs to be preserved by reciting the particular list of items *that DIRTT previously identified* in its definition of “Confidential Business Information” in DIRTT’s proposed Rule 34 Requests for Production of Documents to All Defendants,¹² as opposed to DIRTT’s vague, overly broad reference in its proposed form of preservation order to “*all documents and information . . . related to issues set forth in the Verified Complaint . . .*” If the language in Defendants’ proposed Preservation Order needs to be further tailored, Falkbuilt is certainly amenable to addressing this with the Court and DIRTT’s counsel.

Defendants’ proposed Preliminary Injunction likewise accomplishes the same objectives as the proposed order DIRTT submitted along with its Motion¹³— it preserves the status quo, uses the same list of DIRTT’s previously identified,

¹¹ (DIRTT’s proposed Order Granting Motion for Preservation Order, (Dkt. 5-2).)

¹² (Plaintiff’s First Requests for Production of Documents to All Defendants, DIRTT’s Mot. Expedited Disc., Ex. A, (Dkt. 6-1).)

¹³ (DIRTT’s proposed Order Granting Motion for Preliminary Injunction. (Dkt. 5-1).)

allegedly confidential items noted above, and assures that, during the pendency of this action, there will be no use, disclosure or deletion of any such information.¹⁴

There is one significant difference between DIRTT’s proposed order and Defendants’ proposed Preliminary Injunction. DIRTT’s proposed order also would require Defendants to “make a full accounting under oath of all information removed from DIRTT, whether in existence or not today,” and to “immediately return any and all confidential information, trade secrets, and property belonging to DIRTT in Defendants’ possession, custody, or control.” Falkbuilt has omitted these requirements in its proposed Preliminary Injunction because making a full accounting of anything at this early stage goes well beyond maintaining the status quo¹⁵ and is more properly the subject of discovery, including answers to Rule 33

¹⁴ This will not be a problem for Falkbuilt because, despite DIRTT’s unsupported allegations to the contrary, Falkbuilt is not using anything that DIRTT alleges was taken without its consent. (See also Mot. at 5 (“The requested preliminary injunction will prevent Defendants from using the DIRTT Confidential Business Information for a competitive advantage against DIRTT.”).)

¹⁵ See, e.g., *US Airline Pilots Ass’n v. Velez*, 2015 WL5258725, at *6 (W.D.N.C. Aug. 27, 2015):

A preliminary injunction serves to maintain the status quo pending a final determination on the merits of a case and to preserve the object of the litigation so that ultimate relief is not rendered ineffectual. In this case, **a demand for an accounting is not necessary to preserve the status quo** Injunctive relief is not intended to serve as an independent discovery tool used as a bludgeon against an enjoined party.

(Emphasis added.)

interrogatories made under oath or answers to questions during depositions.¹⁶ Furthermore, there is nothing to be gained by ordering anything to be returned immediately, assuming there is anything to return, without first determining what exists and whether a return even makes sense (or if agreed-upon permanent deletion is the better alternative). Again, this goes well beyond maintaining the status quo. For the time being, if one or more of Falkbuilt’s employees took something belonging to DIRTT without DIRTT’s consent (which Falkbuilt denies, unless done so inadvertently), whatever was taken will be locked down under the terms of the Preservation Order and Preliminary Injunction, and the Court or the parties can easily address its return or deletion at a later date.¹⁷

III. THE COURT SHOULD ORDER NOTHING MORE THAN AN AGREED UPON PRESERVATION ORDER AND PRELIMINARY INJUNCTION FOLLOWED BY NORMAL DISCOVERY.

Discovery in this case is going to take time, and trying to short circuit the Federal Rules of Civil Procedure would be unfair to Defendants. As noted above, DIRTT already has hired Kroll Associates, Inc. to create and analyze a massive database of electronic files, and DIRTT already has identified three “categories of

¹⁶ See, e.g., Fed. R. Civ. P. 33(b)(3) (“Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.”).

¹⁷ Defendants’ proposed Preliminary Injunction also does not contain a preservation requirement like that in DIRTT’s proposed order because preservation will be covered in a separate order of the Court. As a result, this is not a significant difference between the two proposals.

witnesses” it believes have relevant evidence. Defendants have a right to discovery regarding these large amounts of files and witnesses, and DIRTT obviously has considerable affirmative discovery it wants to pursue. There is simply no need to force this discovery upon Defendants in an expedited, unusual fashion given that Defendants are agreeable to entry of a Preservation Order and Preliminary Injunction, which will preserve the status quo, alleviate the unfair hurried scramble, and allow the case to proceed normally under the Federal Rules.

Finally, although DIRTT feigns to be in a hurry to stop the purported misappropriation of its alleged trade secrets, the filing of its Verified Complaint (*two months ago*) suggests otherwise because it was filed under highly suspect circumstances. As Falkbuilt’s Counterclaim details, DIRTT’s Verified Complaint appears to have been timed to scuttle a multi-million dollar deal for capital funding that Falkbuilt was on the verge of closing—and *it worked*.¹⁸ DIRTT’s Canadian parent entity and Falkbuilt had been battling each other since May 2019 in related litigation filed in the Court of Queen’s Bench of Alberta.¹⁹ DIRTT appears to have had no legitimate pressing reason to file its Verified Complaint when it did on December 11, 2019. Falkbuilt believes DIRTT somehow learned that Falkbuilt

¹⁸ (*See generally* Falkbuilt’s Answer to Ver. Compl. and Counterclaim, (Dkt. 42).)

¹⁹ (Ver. Compl., (Dkt. 2), ¶ 19; Mot. at 3.)

was set to close on a tranche of new capital funding on December 12, 2019, and that DIRTT thereafter timed the initiation of this action to negatively impact that deal.²⁰

More specifically, almost immediately after filing its Verified Complaint on December 11, 2019, someone on DIRTT's behalf uploaded the Verified Complaint to a recently created website, DIRTT included the link to the uploaded complaint in a press release, and then DIRTT widely circulated that press release (and thus the Verified Complaint) to multiple business-related news organizations that same day.²¹ Word of the lawsuit and its defamatory, scandalous allegations spread quickly, causing at least one substantial investment banker to back out of the previously discussed deal—*specifically citing DIRTT's new lawsuit and its allegations as the cause*.²² Falkbuilt maintains that DIRTT's affirmative uploading and publication of its Verified Complaint and its widespread, obviously intentional dissemination of the press release and linked complaint on the internet waived any privilege that might otherwise have attached to this court filing.²³ Thus, Falkbuilt

²⁰ (Falkbuilt's Answer to Ver. Compl. and Counterclaim, (Dkt. 42), ¶¶ 6, 7.)

²¹ (*Id.* ¶¶ 8-17.)

²² (*Id.* ¶¶ 20-31.)

²³ (*Id.* ¶¶ 38); *see also Pratt v. Nelson*, 2007 UT 41, ¶¶33-48 (applying excessive publication rule in reversing and remanding summary judgment that had dismissed defamation claims based on press conference and statements in disseminated complaint).

is entitled to discovery regarding the facts underlying its Counterclaim, and the expedited, shortened discovery in the context of unnecessary preliminary injunction proceedings requested by DIRTT could easily prejudice Falkbuilt in that regard.

CONCLUSION

For the reasons set forth above, the Court should enter Defendants' proposed Preservation Order and Preliminary Injunction to Preserve the Status Quo, and otherwise deny Plaintiff's Motion for a Preservation Order and, Following Expedited Discovery, a Limited Preliminary Injunction to Preserve the Status Quo.

Dated this 11th day of February, 2020.

/s/ Jason W. Hardin _____

P. Bruce Badger

Jason W. Hardin

FABIAN VANCOTT

Attorneys for Defendant Falkbuilt Ltd.

MANNING CURTIS BRADSHAW
& BEDNAR PLLC
Alan C. Bradshaw (4801)
Chad R. Derum (9452)
Jack T. Nelson (13819)
136 E. South Temple, Suite 1300
Salt Lake City, UT 84111
Telephone: (801) 363-5678
Facsimile: (801) 364-5678

*Attorneys for Defendants Lance Mr. Henderson,
Mrs. Henderson and Falk Mountain States, LLC*

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, NORTHERN DIVISION**

DIRTT ENVIRONMENTAL SOLUTIONS,
INC.,

Plaintiff,

v.

LANCE HENDERSON, KRISTY
HENDERSON, FALKBUILT, LLC,
FALKBUILT LTD., AND FALK
MOUNTAIN STATES, LLC,

Defendants.

DEFENDANTS

**LANCE HENDERSON, KRISTY
HENDERSON, AND FALK MOUNTAIN
STATES, LLC’S OPPOSITION TO
PLAINTIFF’S MOTION FOR A
PRESERVATION ORDER AND,
FOLLOWING EXPEDITED
DISCOVERY, A LIMITED
PRELIMINARY INJUNCTION TO
PRESERVE THE STATUS QUO**

Case No. 1:19CV00144-DBB-DBP

Hon. David B. Barlow
Magistrate Judge Dustin B. Pead

Defendants Lance Henderson, Kristy Henderson, and Falk Mountain States, LLC (“Henderson Defendants”), through counsel, submit the following Opposition to Plaintiff’s Motion for a Preservation Order and, Following Expedited Discovery, a Limited Preliminary Injunction to Preserve the Status Quo (“Injunction Motion”).

{01988315.DOCX / 5}

INTRODUCTION AND BACKGROUND¹

Having already filed two cases in Canada, this is the third lawsuit Plaintiff DIRT Environmental Solutions, Inc. (“DIRT”) has brought to stifle the efforts of its former founder Mogens Smed and his new business, Falkbuilt, Ltd. (“Falkbuilt”). DIRT has significant problems in the Canadian litigation, where it faces a multimillion-dollar counterclaim for misappropriating Falkbuilt’s proprietary information. Nevertheless, DIRT has now expanded its litigation into this country—and more specifically this Court. The motive for bringing this case in Utah appears to have less to do with the merits of DIRT’s legal claims, than to use the filing and public announcement of the Complaint to scuttle Falkbuilt’s recent capital raising efforts.²

The problem with DIRT’s current lawsuit, which adds the Henderson Defendants as parties, is that it lacks substantive support demonstrating any inappropriate conduct that would justify any of the relief DIRT seeks. DIRT claims to be seeking protection of its confidential business information. However, while DIRT went out of its way to include irrelevant and inadmissible allegations regarding Mr. Henderson in its Complaint,³ its allegations are devoid of substantive allegations of misuse of DIRT’s confidential business information or any genuine harm. The lack of substantive evidence is particularly striking since the events underlying DIRT’s complaint have been long-known. Indeed, DIRT admits that Mr. Smed left its employ nearly a year and a half ago⁴ and that it was aware of Mr. Henderson’s non-nefarious

¹ The Henderson Defendants have also separately filed an opposition to Plaintiff’s Motion for Expedited Discovery (“Discovery Motion”).

² See Dkt. 42

³ See *e.g.* Dkt. 43, 6-7 (addressing scandalous allegations objectionable under Rule 12(f))

⁴ See Dkt. 42

uploading of DIRT information⁵ more than six months before DIRT filed its Complaint.⁶ In all events, DIRT lacks any basis to establish any irreparable harm because DIRT lacks evidence that Defendants have used, or intend to use, any DIRT confidential information. If they had, there is little question that DIRT's supposedly extensive pre-litigation discovery efforts would have yielded enough information for DIRT to plead actual or threatened misuse or harm, which it must do to prevail on its preliminary injunctive motion.⁷

Like its co-Defendant Falkbuilt, the Henderson Defendants have no interest in using DIRT's information. Thus, while Mr. Henderson disputes DIRT is entitled to any relief (let alone the expedited, preliminary relief it seeks) the Henderson Defendants are willing to stipulate to the preliminary injunction and preservation order Falkbuilt proposed to save the Court and the parties the expense and inconvenience associated with expedited litigation.⁸ Importantly, this approach does not admit to any of the alleged wrongdoing in DIRT's Complaint. To the contrary, the Henderson Defendants are willing to stipulate to an injunction because it is consistent with what they are already doing, i.e., *not* using DIRT's confidential information. Given Defendants' willingness to agree to largely all the substantive relief DIRT seeks in its opening motions, the need for an expedited hearing or a one-sided presentation of evidence from DIRT to support its allegations is unnecessary.

⁵ DIRT admits that Mr. Henderson denied any improper motive with respect to this upload and allowed DIRT's IT staff to remove any offending files. See Dkt. 2, ¶ 48.

⁶ Dkt. 42, ¶ 46. It is also worth noting that while DIRT's Complaint (and the motions relying on it) claimed to be verified, it was not at the time of filing. Not until almost two and half weeks later was a verification filed with the Court, providing another example of actions inconsistent with a pressing need for resolution of allegedly irreparable harm. See Dkt. 20-1.

⁷ *Advisors Excel, LLC v. Zagula Kaye Consulting, LLC*, No. 15-4010-DDC-KGS, 2015 WL 736344, at *3 (D. Kan. Feb. 20, 2015) (harm must be "certain, great, actual and not theoretical.") (quotations omitted)

⁸ See Falkbuilt's Response to DIRT's Injunction Motion and Exhibits thereto.

Accordingly, the Court should grant in part DIRTT's Injunction Motion and enter Falkbuilt's proposed preservation order and preliminary injunction and allow this case to proceed consistent with Fed. R. Civ. P. 26's standard deadlines.⁹

ARGUMENT

I. THE COURT SHOULD NOT ALLOW DIRTT TO PREEMPT STANDARD DISCOVERY WITH AN UNNECESSARY AND UNSUPPORTED PRELIMINARY INJUNCTION REQUEST.

As DIRTT recognizes in its Injunction Motion, a party seeking a preliminary injunction “must demonstrate (1) that it has a substantial likelihood of prevailing on the merits; (2) that it will suffer irreparable harm unless the preliminary injunction is issued; (3) that the threatened injury outweighs the harm the preliminary injunction might cause the opposing party; and (4) that the preliminary injunction if issued will not adversely affect the public interest.”¹⁰ Additionally, the “requesting party's right to relief must be clear and unequivocal” because a preliminary injunction is such an “extraordinary remedy.”¹¹ With respect to the second element, “an injury must be certain, great, actual ‘and not theoretical.’”¹² It is not enough for the alleged harm to be “merely serious or substantial.”¹³

⁹ DIRTT's request for expedited discovery should be further denied for the reasons set forth in Defendants' Oppositions to Plaintiff's Discovery Motion.

¹⁰ *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001). The Henderson Defendants do not concede DIRTT has met any of these factors but focus argument here on the first two elements because they are the most readily dispositive. Plainly, without the ability to show irreparable harm, DIRTT cannot show that its alleged “injury” is greater than what Defendants would suffer if the injunction does not issue. Furthermore, the public has no interest in the entry of a forced injunction to preclude activity that is not unlawful and does not risk irreparable harm.

¹¹ *Id.*

¹² *Advisors Excel*, 2015 WL 736344, at *3.

¹³ *Id.*

A. DIRTТ Does not Have a Substantial Likelihood of Prevailing on the Merits.

DIRTT’s motion fails to meet this exceptionally high standard for a preliminary injunction because it cannot demonstrate a likelihood of prevailing on the merits. Indeed, DIRTT’s motion admits that DIRTT never intended to support its injunction motion on the current record. Rather, DIRTT’s objective has been to hold a preliminary injunction hearing only *after* obtaining onerous, expedited discovery from Defendants.¹⁴ This is why DIRTT’s motion speaks in such high-level terms about alleged misappropriation. It is because DIRTT knew it could not prove unlawful misappropriation when it filed its motion. Rather, DIRTT tries to assure the Court that it will *later* support its motion with testimony from DIRTT’s “employees and the employees of one of its partners” to demonstrate the value of the alleged confidential information DIRTT claims has been misappropriated.¹⁵ But no such evidence exists before the Court today, and the Henderson Defendants cannot be expected to oppose DIRTT’s motion by arguing against evidence DIRTT intentionally chose not to disclose in its Motion. It would be improper and unfair to issue a preliminary injunction based on a record DIRTT admits is insufficient to support its Injunction Motion.

¹⁴ See Dkt. 5 (“Plaintiff has developed, and expects to further develop (in connection with the concurrently-filed motion for expedited discovery), substantial evidence, including electronic forensic evidence, that goes beyond what may be presented in this motion, to demonstrate Defendants’ theft of DIRTT’s trade secrets in support of its motion for a preliminary injunction.”)

¹⁵ Dkt. 5 at 15.

B. DIRTT will Not Suffer Irreparable Harm if an Injunction Does not Issue.

Despite months to develop its case, DIRTT's Complaint is devoid of allegation of any concrete or particularized harm.¹⁶ The Supreme Court has held that "[i]ssuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."¹⁷

DIRTT has long been aware the information it claims Mr. Henderson has taken, having known of Mr. Henderson's efforts to back up his computer on the cloud (something done to save personal information) months ago. DIRTT lacks any evidence that backing up Mr. Henderson's computer resulted in the misuse of its confidential information—which is essential to demonstrate irreparable harm. Lacking such evidence, DIRTT resorts to conflating the alleged possession of information with its unlawful use.¹⁸ Not only does DIRTT lack evidence that such information has been used, DIRTT lacks evidence that any of the Henderson Defendants have threatened to use DIRTT's confidential information. Accordingly, DIRTT cannot demonstrate irreparable harm.

Importantly, DIRTT also admits, consistent with Mr. Henderson's non-use of DIRTT's information, that Mr. Henderson complied with DIRTT's request to remove any DIRTT

¹⁶ *See gen. Dkt. 2, Compl.* (failing to identify a single lost job or client caused by the Henderson Defendants' action or the actual use of material they allegedly misappropriated).

¹⁷ *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

¹⁸ *See Dkt. 5 at 16* ("There is no possible legitimate use of the information taken by these former DIRTT employees, who began working for or on behalf of Falkbuilt. Thus, DIRTT reasonably believes that evidence obtained in expedited discovery will show that Defendants are presently using DIRTT Confidential Business information to benefit Falkbuilt and compete with DIRTT.")

information it believed existed.¹⁹ Yet DIRTT has not demonstrated any concrete or threatened harm suffered as a result of this alleged activity. DIRTT's Injunction Motion does little to change this, making only vague allegations of what it will present at a hearing, but making clear that it only "anticipates" that discovery will reveal actual harm.²⁰ This omission is telling, given that DIRTT has had months to develop evidence, including its own gathering of hundreds of thousands of pages of information.

Ultimately, DIRTT's concern for the actual or threatened use of its confidential information is misplaced. However, to offset any concern of such use, Mr. Henderson has now preserved all electronic devices that were potentially used during his time with DIRTT with a third-party forensic vendor. This data has been imaged or remains in the vendor's possession. Further, while Mr. Henderson did not access or use any of this information for purposes of his work with FMS, in an abundance of caution, he has transitioned to entirely new electronic devices (including new user accounts), avoiding any possibility of cross-contamination of data or potential use of DIRTT information going forward. Any allegedly protected data has been quarantined with a third-party vendor and Mr. Henderson no longer has access to this information (and has not accessed it since his departure). These efforts further undercut the contention that DIRTT will suffer irreparable harm at the hand of the Henderson Defendants if an injunction does not issue.

While DIRTT's pleading failures, in combination with the Henderson Defendants' preservation efforts, are enough for the Court to deny DIRTT's Injunction Motion altogether, it need not even go that far. The Henderson Defendants, like Falkbuilt, have no desire to use

¹⁹ See Dkt. 2, ¶¶ 46-48.

²⁰ Dkt. 5, 17.

DIRTT's information. Thus, the Henderson Defendants are willing to agree to the entry of the preliminary injunction Falkbuilt has proposed. Doing so will limit the burden on the parties and the Court to rush through an unnecessary preliminary injunction procedure that will result, at best, in substantially the same relief as Defendants are willing to have entered voluntarily. This approach provides DIRTT with more relief than it would be entitled to otherwise and will allow the parties to simply address the merits of their claims in normal discovery rather than through a one-sided presentation of DIRTT's insufficient evidence to the Court. Accordingly, the Court should enter the Defendants' proposed preliminary injunction and otherwise deny DIRTT's Injunction Motion as moot.

II. THE HENDERSON DEFENDANTS DO NOT OBJECT TO AN APPROPRIATE PRESERVATION ORDER, BUT EXISTING PRESERVATION EFFORTS MAKE IT UNNECESSARY.

As the case law DIRTT cites recognizes, “[a] motion to preserve evidence is an injunctive remedy and should issue only upon an adequate showing that equitable relief is warranted.²¹ And, where a plaintiff “do[es] not allege, much less prove, that defendants will flaunt their obligation under the federal rules without a preservation order,” such an order is unnecessary.²² For the Court to have to “supplement every complaint with an order requiring compliance with the Rules of Civil Procedure would be a superfluous and wasteful task, and would likely create no more incentive upon the parties than already exists.”²³

Here, DIRTT's request for a preservation order fails for the same reasons as its preliminary injunction motion. Furthermore, DIRTT requests the very type of supplemental

²¹ *Madden v. Wyeth*, No. 3-03-CV-0167-R, 2003 WL 21443404, at *1 (N.D. Tex. Apr. 16, 2003).

²² *Id.*

²³ *Id.*

order courts regularly reject. DIRTT has not provided the Court with any evidence that any of the Defendants will flaunt their preservation obligations. To the contrary, DIRTT recognized in its opening motion that “[o]nce counsel for Defendants appear” it believed “appropriate preservation protocols could be negotiated.”²⁴ The Henderson Defendants²⁵ have already undertaken significant efforts to meet this obligation without such an order, including extensive efforts to identify, image, and otherwise gather any potential electronic storage media that could be relevant to this matter. Further, although the Court would be well within its discretion to deny DIRTT’s motion like the *Madden* court, the Henderson Defendants have not used any DIRTT information and have no desire to do so, and are thus willing to stipulate to the preservation order Falkbuilt has proposed.²⁶ With this stipulation, and the preservation efforts already undertaken by all parties, any alleged need to expedite discovery no longer exists. The case should proceed under a normal schedule, avoiding prejudice to any party by allowing bi-lateral discovery of all parties and claims involved.

CONCLUSION

Based on the foregoing, the Henderson Defendants request the Court enter Defendants’ proposed preliminary injunction and preservation order, otherwise deny DIRTT’s Motions, and allow this matter to proceed as it typically would under the Federal Rules of Civil Procedure.

²⁴ Dkt. 5, Motion, 10

²⁵ It is the Henderson Defendants’ understanding that Falkbuilt has taken similar steps and they are confident Falkbuilt, like the Henderson Defendants, will honor its preservation obligations.

²⁶ The Henderson Defendants similarly incorporate by reference the arguments set forth in Falkbuilt’s Response to DIRTT’s Injunction Motion and Discovery Motion.

DATED the 12th day of February 2020.

MANNING CURTIS BRADSHAW
& BEDNAR PLLC

/s/ Jack T. Nelson

Alan C. Bradshaw
Chad R. Derum
Jack T. Nelson
*Attorneys for Defendants Lance Henderson,
Kristy Henderson and
Falk Mountain States, LLC*

Chad E. Nydegger (USB 9962)
cnydegger@wnlaw.com
Workman Nydegger
60 East South Temple, Suite 1000
Salt Lake City, Utah 84111
Telephone: (801) 533-9800
~~Faeximile: (801) 328-1707~~

Jeffrey J. Mayer (~~admitted~~ *pro hac vice-to-be-filed*)
Jeffrey.Mayer@akerman.com
Catherine A. Miller (~~admitted~~ *pro hac vice-to-be-filed*)Catherine.Miller@akerman.com
~~Timothy K. Sendek (pro hac vice-to-be-filed)~~
~~Tim.Sendek@akerman.com~~Catherine.Miller@akerman.com
Akerman LLP
71 S. Wacker Drive, 47th Floor
Chicago, Illinois 60606
Telephone: (312) 634-5700
~~Faeximile: (312) 424-1934~~
Attorneys for Plaintiff, DIRT Environmental Solutions, Inc.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, NORTHERN DIVISION**

DIRTT ENVIRONMENTAL
SOLUTIONS, INC.; DIRT
ENVIRONMENTAL SOLUTIONS
LIMITED

~~Plaintiff~~
Plaintiffs,

v.

LANCE HENDERSON, KRISTY
HENDERSON, FALKBUILT,
~~LLC~~INC., FALKBUILT LTD.,
MOGENS SMED, and FALK
MOUNTAIN STATES, LLC

Case No: 1:19CV00144-DBB-DPP

~~VERIFIED~~ FIRST AMENDED
COMPLAINT

~~Distriet~~

The Hon. David B. Barlow

Magistrate Judge Dustin B. Pead

JURY DEMANDED

~~51000139;553682906;25~~

Defendants.

DIRTT Environmental Solutions, Inc. (“DIRTT Inc.”) and DIRTT Environmental Solutions, Ltd. (“DIRTT, Ltd.”) (collectively “DIRTT”), by ~~its~~their undersigned counsel, ~~file~~file this First Amended Complaint against Defendants Falkbuilt, ~~LLC, Inc. and~~ Falkbuilt Ltd. ~~and Falk Mountain States LLC~~ (collectively “Falkbuilt”), Falk Mountain States, LLC, Mogens Smed, Lance Henderson and Kristy Henderson. ~~As explained in further detail below, former~~Former employees of ~~Plaintiff~~Plaintiffs have taken and used DIRTT confidential information in an attempt to steal customers, opportunities, and business intelligence, with the aim of setting up a competing national business.

Among other ~~things~~matters: (1) Defendant Lance Henderson uploaded over 35 gigabytes of DIRTT data, which included confidential and proprietary information, to a personal cloud-based data storage location; (2) multiple former DIRTT employees, who are now working for or on behalf of Falkbuilt, all set up personal Dropbox accounts within a couple of weeks, or even a few days, prior to leaving DIRTT’s employ; (3) Kristy Henderson, Lance Henderson’s wife and an

employee of a former DIRT T partner, incorporated Defendant Falk Mountain States one month before Mr. Henderson left DIRT T's employ; ~~and~~ (4) immediately after her departure from DIRT T, Amanda Buczynski, also a former DIRT T employee, ~~immediately after her departure from DIRT T~~ reached out to DIRT T customers on behalf of Falkbuilt in an effort to compete on ongoing projects and undercut DIRT T's bids by utilizing DIRT T confidential information; (5) Falkbuilt, Inc. and Falkbuilt Ltd. misleadingly market their products as having identical or superior characteristics to DIRT T products even though the products are in significant part not similar or identical and are inferior for the purposes of the market; (6) Falkbuilt, Inc. and Falkbuilt Ltd. continue to trade on an alleged connection with DIRT T products and technology, while privately and publicly degrading DIRT T's brand and reputation; and (7) Mogens Smed masterminded and encouraged all of these activities, personally acting within the United States market. In support of ~~its~~ ~~Verified~~ their First Amended Complaint, ~~DIRTT states~~ Plaintiffs state as follows:

BACKGROUND OF THE PARTIES

1. Plaintiff DIRT T Inc. is a Colorado company, with its principal places of business in Savannah, Georgia and Phoenix, Arizona. DIRT T Inc. is the licensee of the trade secrets at issue in this case.

2. Plaintiff DIRT T Ltd. is a Canadian company, incorporated in the Province of Alberta and with its headquarters and principal place of business in Calgary, Alberta, Canada. DIRTT Ltd. is DIRT T Inc.’s parent company. DIRT T Ltd. is the licensor of the trade secrets at issue in this case.

3. ~~2-~~DIRTT is an innovative, technology-driven company that operates in Canada, the United States and other jurisdictions around the world. DIRT T’s sales offices in Salt Lake City, Phoenix, New York, Chicago, Calgary, and Toronto are supported by its factories and distribution centers across the United States and Canada.

4. ~~3-DIRT T offers~~Plaintiffs offer products and services for the digital design of component, prefabricated construction to build out interior spaces in buildings (referred to as “interior construction”). Among many other services, ~~DIRTT offers~~Plaintiffs offer clients the ability to utilize virtual-reality to design office, healthcare, and other interior spaces using modular components which can be rapidly and affordably assembled in ~~DIRTT~~Plaintiffs’s factories and on-site.

5. ~~4-DIRT T is an innovator~~Plaintiffs are innovators and ~~leader~~leaders in the prefabricated, interior design and construction market space and ~~has~~have been granted over 300 U.S. and foreign patents for the technology in both ~~its~~their

building products themselves and the technology to design and fabricate those products.

6. ~~5. DIRTT is an inventive manufacturing company featuring~~ Plaintiffs use a proprietary software and virtual-reality visualization platform coupled with vertically integrated manufacturing that designs, configures and manufactures prefabricated interior construction solutions used primarily in commercial spaces across a wide range of industries and businesses. ~~DIRTT combines~~ Plaintiffs combine innovative product design with ~~its~~ their industry-leading, proprietary ICE Software (“ICE Software” or “ICE”); and technology-driven, lean manufacturing practices and sustainable materials to provide an end-to-end solution for the traditionally inefficient and fragmented interior construction industry. DIRTT creates customized interiors with the aesthetics of conventional construction, but with greater cost and schedule certainty, shorter lead times, greater future flexibility, and better environmental sustainability than conventional construction.

7. ~~6. DIRTT offers~~ Plaintiffs offer interior construction solutions throughout the United States and Canada, as well as in select international markets, through a network of independent ~~distribution~~ regional partners (“~~Distribution~~ Regional Partners”) and an internal sales team. The

~~Distribution~~Regional Partners use the ICE Software to work with end users to envision and design their spaces. Orders are electronically transmitted through ICE to DIRTT Ltd.'s manufacturing facilities for production, packing and shipping. DIRTT's ~~Distribution~~Regional Partners then coordinate the receipt and ~~installations~~installation of DIRTT's interior construction solutions at the end users' locations.

8. ~~7.~~ ICE generates valuable proprietary information, including cost and margin information, the components of the bill of materials for individual companies, detailed plans and specifications for projects, and customer requirements.

9. ~~8.~~ Apart from ICE, ~~DIRTT's~~Plaintiffs' internal restricted information and communications network contains other sources of valuable information, including prospective and current customer databases that include information on potential projects, as well as the status of all pending projects, and a restricted site for individuallyly-approved users to access called "MyDIRTT", which contains confidential technical information such as diagrams and other technical know-how.

~~9. ——— When logging into ICE, the authorized user is directed to a statement regarding the~~

10. Plaintiff's Regional Partners execute confidentiality agreements and have access to confidential ~~and proprietary nature of the ICE~~ information, including ~~specifically identifying the confidential nature of any "compilation" of information regarding a project or customer~~ pricing and prospective customers.

11. ~~10.~~ In addition to sales and marketing, ~~Distribution~~ Regional Partners provide value throughout the planning, design and installation/construction process. At the pre-construction stage, ~~Distribution~~ Regional Partners provide design assistance services to architects, designers and end clients. Through the installation/construction process, ~~Distribution~~ Regional Partners act as specialty subcontractors to the general contractors and provide installation and other construction services. Post move-in, ~~Distribution~~ Regional Partners provide warranty work, ongoing maintenance and repurposing support. The ~~Distribution~~ Regional Partners operate under ~~Distribution~~ Regional Partner agreements with DIRTT, which outline sales goals and marketing territories and provide the terms and conditions upon which the ~~Distribution~~ Regional Partners market and sell DIRTT products. Regional partners agree in writing to keep information generated through this process confidential.

12. ~~11. DIRTTP~~Plaintiffs also ~~operates~~operate several “DIRTT Experience Centers” (“DXCs”) (previously referred to as “Green Learning Centers”), which are display areas used to showcase DIRTT’s products and services. ~~DIRTT~~Plaintiffs generally ~~requires its Distribution~~require their Regional Partners to construct and maintain a DXC in their local markets. There are currently over 80 DXCs showcasing DIRTT’s products and services across North America, the Middle East and India.

13. ~~12. DIRTT’s principal place of business is located in Calgary, Alberta, Canada. DIRTT also~~ conducts ~~aspects of~~ its North American business in ~~other~~a number of cities, including Salt Lake City, Utah, Chicago, Illinois, New York, New York, and Phoenix, Arizona. ~~DIRTT~~ operates manufacturing facilities in Calgary, Alberta, Phoenix, Arizona and Savannah, Georgia. ~~DIRTT~~ currently has a manufacturing facility under construction near Charlotte, ~~South~~North Carolina.

14. DIRTT Ltd. is the owner of the trade secret information at issue in this case and licenses the information directly to DIRTT Inc. DIRTT Ltd. does not sell products directly in the United States, but directly benefits from every DIRTT Inc. sale in the United States.

15. ~~+3.~~ Mr. Henderson is an individual and a resident of Davis County, Utah.

16. ~~+4.~~ Mr. Henderson was a DIRT employee responsible for sales and marketing from at least May 2009 to August 2, 2019, when he departed from DIRT of his own initiative.

17. ~~+5.~~ Kristy Henderson is an individual and a resident of Davis County, Utah.

18. ~~+6.~~ Falk Mountain States, LLC is a Utah Limited Liability Company incorporated in July 2019 by Kristy Henderson, with an address and registered agent in Logan, Utah.

19. ~~+7.~~ Falkbuilt, LLC Inc. is a ~~Texas Limited Liability Company incorporated in July 2019~~ Delaware corporation. Falkbuilt, Inc. was established to emulate DIRT's business model by departed DIRT employees, including Mr. Henderson and Mogens Smed.

20. ~~+8.~~ Falkbuilt Ltd. is a Canadian company with offices in Calgary, Alberta, Canada.

~~+9.~~ ~~Until January 2018, Mr. Smed was the Calgary based CEO of DIRT. He subsequently left DIRT in September 2018. Pursuant to his obligations as a DIRT employee, including fiduciary obligations, and the executive employment agreement signed by him, Mr.~~

~~Smed agreed to, among other things, refrain from competing with DIRTT and refrain from soliciting DIRTT employees for a period of two years. Nevertheless, Mr. Smed has done, and continues to do, exactly what he is not permitted to do, namely, establishing a competing business, and soliciting DIRTT employees to leave DIRTT and join his competing business, Falkbuilt. As can be seen from Falkbuilt's website, (www.falkbuilt.com) (advertising interior component construction for healthcare, commercial and office, and education) Falk competes in the same general market as DIRTT (www.dirtt.com) (advertising projects in education, healthcare, office space, residential, government, and hospitality). Additionally, Falkbuilt's webpages and designs also mimic DIRTT's appearance. To date, over 50 DIRTT employees have joined Falkbuilt. The breach of Mr. Smed's common law employment obligations and express contractual obligations to DIRTT is the subject of ongoing litigation in Alberta, Canada and will be adjudicated by the Canadian courts. This particular action concerns the theft and improper use of DIRTT's confidential information in the United States~~

21. Mr. Smed is an individual and a resident of Calgary, Alberta, Canada. Until January 2018, Mr. Smed was the Calgary-based CEO, directly or indirectly controlling DIRTT Inc. and DIRTT Ltd. He left DIRTT in September 2018.

22. Additionally, Falkbuilt has created a network of captive and independent representatives, comprised largely of former DIRTT employees and representatives, that it refers to as "Falk Branches".

23. This action concerns the theft of DIRTT’s confidential information (both in the United States and Canada and any other location as revealed), as well as the improper use of that information in connection with the United States market. Additionally, this action addresses false and misleading statements by Falkbuilt representatives creating confusion in the marketplace and causing Plaintiffs to suffer financial injuries measured under both federal and state law.

JURISDICTION AND VENUE

24. ~~20.~~ This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331, as this action arises under the following federal statutes: 18 U.S.C. § 1836, 18 U.S.C. § 1030 and 18 U.S.C. § 2701. This Court has jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367, as they are so related to the claims within the Court’s original jurisdiction that they form part of the same case or controversy. The Court also has jurisdiction over the state law claims pursuant to 28 U.S.C. §1332, as there is complete diversity and the amount in controversy exceeds the statutory minimum.

25. ~~21.~~ This Court has personal jurisdiction over Mr. Henderson and Mrs. Henderson because they are residents of Davis County, Utah.

26. This court has personal jurisdiction over Mr. Smed because he directed the wrongful actions of the other defendants that took place in the State of Utah, including but not limited to, directing Mr. Henderson to undertake a conspiracy to misappropriate DIRTT's confidential and trade secret information. Mr. Smed also regularly directs business to the State of Utah through Falkbuilt Ltd., Falkbuilt, Inc. and Falk Mountain States, LLC. Mr. Smed has also availed himself of the protections of this State by directing the filing of Falkbuilt Ltd.'s Counterclaim against DIRTT in this forum. Based on Mr. Smed's direction of the Utah-based, wrongful activity complained of in this Complaint, Mr. Smed should have reasonably anticipated being haled into a Utah court over claims based on that wrongful activity.

27. ~~22.~~ This Court has personal jurisdiction over Falk Mountain States, LLC because it is incorporated in Utah.

28. ~~23.~~ This Court has personal jurisdiction over Falkbuilt, ~~LLC~~Inc. because Falkbuilt, ~~LLC~~Inc. regularly conducts business in the State of Utah, specifically with Falk Mountain States, Mr. Henderson works for Falkbuilt, ~~LLC~~Inc. or on its behalf in the State of Utah, and Falkbuilt, ~~LLC~~Inc. should have reasonably anticipated being ~~hailed~~haled into a Utah court over claims based on

the DIRTT confidential information it obtained from Mr. Henderson, a Utah resident.

29. ~~24.~~ This Court has personal jurisdiction over Falkbuilt Ltd. because Falkbuilt Ltd. regularly conducts business in the State of Utah, specifically with Falk Mountain States, Mr. Henderson works for Falkbuilt Ltd. or on its behalf in the State of Utah, and Falkbuilt Ltd. should have reasonably anticipated being ~~hailed~~haled into a Utah court over claims based on the DIRTT confidential information it obtained from Mr. Henderson, a Utah resident.

30. Falkbuilt Ltd. also has multiple agents in the United States that hold themselves out as employees and agents of Falkbuilt Ltd., independently establishing jurisdiction over Falkbuilt Ltd.

31. Falkbuilt Inc.'s and Falkbuilt's agents and employees are directed by Mr. Smed.

32. ~~25.~~ Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(2) as a substantial portion of the events giving rise to this action occurred in this district, and pursuant to §1391(b)(1) as the Hendersons and Falk Mountain States reside in this district.

FACTUAL BACKGROUND

33. ~~26.~~ Since his difficult departure from DIRTT in September 2018, Mr. Smed and those acting in concert with him, including the newly-formed ~~Falk~~Falkbuilt entities, have engaged in an ongoing attempt to replicate DIRTT's business, ~~products~~steal DIRTT's clients, and co-opt DIRTT's product characteristics and business ~~model~~reputation as Falkbuilt's own, through improper means, including but not limited to ~~utilizing~~using DIRTT confidential information and trade secrets to identify and approach customers and potential customers, utilizing pricing and margin information to undercut DIRTT's quotes, and ~~utilizing~~sowing confusion in the market by drawing false equivalencies between Falkbuilt's and DIRTT's patented products and trade secret technology to gain an unfair advantage in product offerings. —services. These approaches have been made both directly and indirectly through current and former DIRTT Regional Partners.

34. ~~27.~~ Despite public statements to the contrary by Mr. Smed that Falkbuilt is not a competitor of DIRTT, DIRTT ~~recently~~ determined, based on a forensic study of electronic information, that Falkbuilt was built upon, and is dependent on, both information and employees obtained from DIRTT. (Exhibit O at ¶¶ 6, 9). In fact, Falkbuilt would likely not be operating today but for the customer contact information, pricing, estimates and other DIRTT confidential

information and trade secrets taken by former DIRTT employees, including Mr. Henderson, for use at their new ~~business~~Falkbuilt businesses started by Mr. Smed. Based on information obtained by DIRTT, as well as publicly available information, Falkbuilt is directly competing with DIRTT.

35. In order to build a competing company, Mr. Smed recruited DIRTT employees to work for Falkbuilt and, based on available forensic information, encouraged the employees to assist in planning Falkbuilt: (1) while still working for DIRTT; and (2) in reliance upon DIRTT confidential information. Mr. Smed knew, as the former DIRTT CEO, that each of these employees had contractual, statutory, and common law obligations to maintain the confidentiality of DIRTT confidential information.

36. Falkbuilt has directly bid against DIRTT on projects using DIRTT Confidential Information.

37. Further, while not independently wrongful, Falkbuilt has built its distribution system for Falkbuilt products in the United States around current and former DIRTT distributors. Those partners target the same customers and markets as DIRTT.

38. ~~28.~~ Upon information and belief, Mr. Smed not only actively recruited DIRTТ employees to join Falkbuilt, including meeting with certain DIRTТ employees in advance of their leaving DIRTТ's employ, but also encouraged them to solicit other DIRTТ employees to work for or on behalf of Falkbuilt. Additionally, on information and belief, Mr. Smed emboldened those same individuals to take with them DIRTТ information that they utilized while in DIRTТ's employ, and to misappropriate DIRTТ's ~~designs and know-how in order~~ confidential, competitive information to assist Falkbuilt in quickly getting up-to-speed and operational, and to undercut DIRTТ's bids and estimates, with the end goal of ultimately taking DIRTТ's customers and projects. It is no coincidence that Falkbuilt is bidding on the same projects as DIRTТ and contacting DIRTТ's customers and prospective customers. ~~This conduct also entirely undercuts Mr. Smed's public statements that,~~ as well as preventing DIRTТ from even learning of potential projects by using confidential information to divert business to Falkbuilt through current and former DIRTТ Regional Partners.

39. As can be seen from Falkbuilt's website, www.falkbuilt.com (advertising interior component construction for healthcare, commercial and office, and education), Falkbuilt ~~is not competing with~~ competes in the same market

as DIRT, www.dirtt.com (advertising projects in education, healthcare, office space, residential, government, and hospitality). Additionally, Falkbuilt's webpages and designs mimic DIRT's appearance. To date, over 50 DIRT employees have joined Falkbuilt, either working for it or on its behalf. The breach of Mr. Smed's common law employment obligations and express contractual obligations to DIRT is the subject of ongoing litigation in Alberta, Canada and will be adjudicated by the Canadian courts.

A. Falkbuilt's Campaign of Misinformation

1. Ms. Buczynski's Misattributions

40. Amanda Buczynski was a DIRT employee from October 17, 2016 to September 17, 2019. She was responsible for DIRT sales in a territory that included Western Pennsylvania and West Virginia. She maintained an office on site at a DIRT Regional Partner's facility in Pittsburgh, Pennsylvania.

41. Immediately after her departure from DIRT, Ms. Buczynski began working for Falkbuilt, where she is Director of Design and Construction.

42. On behalf of Falkbuilt, Ms. Buczynski walked at least one potential customer through the showroom of one of DIRT's Regional Partners in Ohio,

and misrepresented to this potential customer that the DIRTТ installations in the showroom were created by Falkbuilt, not DIRTТ. The DIRTТ installations in the showroom consisted of ready-for-market examples of DIRTТ’s products, used to allow DIRTТ’s customers to place custom orders.

43. Ms. Buczynski has also referred to Falkbuilt as “the new DIRTТ” or “DIRTТ 2.0”, in communications with potential customers, further clouding the issue of which entity originated DIRTТ’s products and services, and contradicting Falkbuilt’s public representations that Falkbuilt is not competing with DIRTТ or building upon DIRTТ technology and information.

44. Ms. Buczynski knew that these statements were false when she made them, and she made them with the intent to deceive potential DIRTТ customers into believing that DIRTТ’s products are actually those of Falkbuilt for the purpose of steering those customers away from DIRTТ to Falkbuilt.

2. Falkbuilt’s Misdesignation and Misdescription of the Origin of Its Products and Services

45. Falkbuilt’s products and services are demonstrably not equivalent to DIRTТ’s, yet Falkbuilt continues to intentionally sow confusion in the market to leverage DIRTТ’s products, services, and reputation as its own.

46. Falkbuilt is also mimicking DIRTT’s designs and diagrams in its promotional materials, misdesignating the origin in its techsheets and brochures as Falkbuilt. DIRTT’s designs and diagrams are essential to DIRTT’s business in that they allow DIRTT’s customers to place custom orders. Falkbuilt issues “techsheets” describing the technical features and performance capabilities of the various components that it purports to offer. (See Ex. Q). Falkbuilt also issues illustrated brochures depicting the various installations that it claims to be able to construct and deliver. (See Ex. R). The diagrams and products in these techsheets and brochures are so similar to those offered by DIRTT as to be virtually indistinguishable.

47. It took DIRTT years to develop its proprietary products and their components. Falkbuilt, on the other hand, has purportedly developed its “digital construction” process and its components seemingly overnight. Upon information and belief, Falkbuilt does not actually currently possess the capabilities it is advertising, necessitating the mimicking of DIRTT’s designs and diagrams, and the misdesignating of the origin of Falkbuilt’s techsheets and brochures as Falkbuilt. As alleged herein, several former DIRTT employees took DIRTT’s

confidential and proprietary information with them to Falkbuilt, which has inevitably aided Falkbuilt's ramp-up efforts.

48. The similarity of Falkbuilt's promotional material to that of DIRT is no coincidence. Falkbuilt's use of advertising and promotional materials that are indistinguishably different from DIRT's, including the language and images used, the narrative history of Falkbuilt, and the value proposition, is a key part of its overall effort to knowingly deceive potential customers into believing that Falkbuilt's work is actually that of DIRT.

49. However, Falkbuilt's products do not have the same capabilities and characteristics as DIRT products. By way of example, to DIRT's knowledge, Falkbuilt does not offer tamper-evident tile functionality. Falkbuilt does not offer a foldable wall system with the same functionality as the rest of the product line, instead offering a third-party stacking wall only. Falkbuilt does not possess a system to permit mitered tiles to meet at a corner with no end cap. Falkbuilt's tiles mount only at the verticals, and must end at a vertical post, or the tile must be extended unsupported past the vertical. If Falkbuilt wants a shelf, cabinet or work surface to extend from the tiles, the location must be predetermined and holes must be cut in the tiles. The shelf or cabinet cannot be relocated horizontally

without having new tiles cut and internal mounting componentry moved by a technician. DIRTT, though, possesses a horizontal mounting channel that permits any hanging component to be moved on a horizontal axis at will. In fact, the technology underlying Falkbuilt's solutions is not advanced as compared to the technology underlying DIRTT's solutions.

50. Additionally, unlike DIRTT, which uses actual wood veneer, matching the tile veneer perfectly, Falkbuilt uses vinyl-wrap "Falkskin" on its metal components to emulate woodgrain. Falkbuilt's sit-stand solutions also have visible actuator housings, while DIRTT's actuator housings are concealed under the work surface with the drive mechanisms hidden inside the wall.

51. From a functionality standpoint, Falkbuilt fails to offer the re-configurability of DIRTT's products. For example, DIRTT's sliding door supports allow a door to easily be moved from one point to another or changed out for another door simply by moving the support, which mounts into a horizontal mounting channel, to another location. No screw holes or other marks are left behind. Additionally, should a section of a wall require reconfiguration, such as a glass wall replacing a solid wall, that single section can be removed and replaced without disturbing adjacent wall sections. Falkbuilt's walls, which are

built sequentially, would require each section to be disassembled, beginning at the end of the wall until the section to be replaced was reached. Finally, DIRTT's capabilities allow it to place walls at virtually any angle, with no ramifications when reconfigured to another angle. No drilling or damaging tile at the intersection of the walls is required. In other words, to be the functional equivalent of DIRTT, Falkbuilt would have to offer an easily reconfigurable wall system including infinite horizontal positioning (and re-positioning) of hanging components, without compromising aesthetics. Falkbuilt's system offers none of these things.

52. Moreover, DIRTT and Falkbuilt use different materials in their systems, which renders Falkbuilt unable to provide DIRTT's advantages. DIRTT uses aluminum in its solutions, which allows for much more flexible functionality. The aluminum extrusions used in DIRTT's solutions can be formed in virtually any shape necessary, meaning DIRTT can design any shape needed to accomplish the solution's intended functionality. Falkbuilt, on the other hand, uses steel, which is much more rigid and offers far less flexibility in shaping. Because Falkbuilt relies on steel, it cannot achieve the flexibility of design and reconfigurability that DIRTT offers in its solutions. For this reason, it is not just

Falkbuilt's false claims of equivalency to DIRTT that are misleading to customers, but also its own promotional material, which touts that Falkbuilt's solutions are "easily reconfigured" and have "endless design options."

53. Similarly, Falkbuilt does not at present possess in-house design capabilities, which is an aspect of DIRTT's solution that greatly increases the customizability of its solutions for DIRTT customers. Rather, Falkbuilt relies on external designers to create its solutions, making it much more difficult, if not impossible in some instances, to achieve the customizability necessary to achieve the customers' desired functionality.

54. As such, Falkbuilt's attempts to equate the characteristics of its solutions with those of DIRTT constitute a blatant effort to confuse customers and capitalize on the superior characteristics of DIRTT's solutions as compared to Falkbuilt's for the same purposes, and suggest that DIRTT and Falkbuilt are the same, or that Falkbuilt's solutions are an equivalent alternative. The fact is, Falkbuilt and DIRTT are simply not equivalents.

55. Falkbuilt further misrepresents the size and capabilities of its United States operations, as its allegedly independent representatives claim to be Falkbuilt employees.

56. Despite Falkbuilt’s contention that it does not compete with DIRTT, these efforts are intended to damage, and have damaged, DIRTT by luring potential customers away from DIRTT to Falkbuilt. For example, a number of existing DIRTT projects have been converted to Falkbuilt projects due to Falkbuilt’s interference. Similarly, DIRTT has lost competitive bids on projects to Falkbuilt as a result of Falkbuilt’s false claims of equivalency with DIRTT. In one instance, DIRTT lost the bid for phase 2 of a project for which DIRTT had done a full solution installation for phase 1 in 2018-2019. Falkbuilt was a competitor on this bid, and would not have won the bid but for its false claims of equivalency and use of DIRTT’s competitive information. In another example, bid documents from the architects for a particular project DIRTT and Falkbuilt were both competing for had to be amended to clarify that the basis of the design was Falkbuilt, not DIRTT, but noted that DIRTT was an acceptable equivalent manufacturer. This amendment came after a DIRTT representative had a detailed conversation with the architectural firm issuing the bid documents, and explained exactly what Falkbuilt is vis-à-vis DIRTT – i.e. a competitor, wholly separate from DIRTT, and not the “new DIRTT”.

57. Falkbuilt further trades on DIRTT’s technology, heritage, and reputation. One of the clearest examples is that Mr. Smed continues to identify himself as a “DIRTTbag,” a phrase used by DIRTT employees to describe themselves and to express pride in adhering to DIRTT’s philosophy. A collection of representative Tweets from Mr. Smed is attached as Exhibit S. Falkbuilt has created a false impression that it is doing what DIRTT has done in the industry for the last several years, and intentionally attempts to market itself as associated with, or even part of, DIRTT in order to capitalize on DIRTT’s reputation, historical performance, and customer base despite Falkbuilt’s inferior products. Falkbuilt uses the same language, same images, and the same value proposition as DIRTT to further this effort and to confuse customers in the marketplace.

58. As further evidence of Falkbuilt’s positioning of itself as the same as DIRTT, upon information and belief, Mr. Smed has approached clients of DIRTT to be references for Falkbuilt, based only on their past experience with DIRTT, not Falkbuilt.

59. Mr. Smed has further denigrated DIRTT publicly, and to customers and parties, indicating falsely that Falkbuilt is a successor to DIRTT’s technological heritage.

60. As a result, the marketplace is highly convoluted and confused. Customers who have a history with DIRTT are now being approached by a company with many of the same people, a purportedly similar product, and a nearly identical value proposition and origin story. In other words, due to Falkbuilt’s tactics of passing itself off as “DIRTT 2.0”, many customers view Falkbuilt as having some positive association with DIRTT. Some customers have even misunderstood Falkbuilt as either a new division of DIRTT or the same company, but with a new name.

B. The Hendersons’ Utah Conspiracy

61. ~~29.~~ DIRTT Inc. hired Mr. Henderson as a sales representative. In that capacity, he was entrusted with a variety of significant confidential and proprietary information and trade secrets pertaining to DIRTT’s business (“DIRTT Confidential Business Information”) and owed DIRTT a fiduciary duty with respect to such DIRTT Confidential Business Information. At the time he was hired, Mr. Henderson agreed in writing to maintain the confidentiality of DIRTT’s trade secrets and confidential information.

62. ~~30.~~ In a May 21, 2009 agreement, Mr. Henderson agreed to DIRTT’s terms and conditions regarding his employment, including that he “would not . . .

divulge to any other person whosoever and will use [his] best endeavors to prevent unauthorized publication or disclosure of any trade secret, manufacturing process or confidential information concerning the Company and related companies or the finances of the Company and related companies or any of their respective dealings, transactions or affairs which may come to [his] knowledge during or in the course of [his] employment.” (Exhibit A).

63. ~~31.~~—On June 25, 2019, Mr. Henderson acknowledged DIRTT’s Computer/Data Security Policy (Exhibit B), which states in relevant part that:

This document is not intended to displace any non-disclosure obligations, but rather to ensure proper data security. Please read the following provisions carefully and thoroughly before signing.

POLICIES / PROCEDURES

1. Personnel are prohibited from accessing any computer or network location for which they have not previously received proper authorization, and from altering any data or database other than that which is specifically authorized as required in the performance of his or her job functions.
2. Sensitive or confidential data/information may not be stored or referenced via systems or communication channels not controlled by DIRTT. For example, the use of external e-mail systems or data storage systems not hosted by or approved by DIRTT, is not allowed.
3. Secure passwords are to be used on all systems as per the DIRTT password policy. These credentials must be unique and must not be used on other external systems or services. Passwords or

security codes are not to be disclosed to anyone else; do not allow others to use your IDs and/or passwords. Password(s) must be changed whenever the need exists; such as someone else learning your password, or the password becoming known during problem resolution or day-to-day functions, or when requested by DIRTT I.T.

4. DIRTT I.T. is to be notified immediately in the event that a company device is lost. (mobile phones, laptops etc.).

5. In the event that a system or process is suspected as not being compliant with this policy, immediately notify your supervisor and/or DIRTT I.T. so they can take appropriate action.

6. Personnel assigned the ability to work remotely must take extra precautions to ensure that data is appropriately handled.

64. ~~32.~~ Mr. Henderson's responsibilities included interfacing with customers, understanding and promoting DIRTT's products, services, and technology, and identifying new potential customers and partners for DIRTT in the southwestern United States. In connection with his job, Mr. Henderson was provided with extensive access to DIRTT Confidential Business Information concerning those markets.

65. ~~33.~~ Mr. Henderson was also issued a company laptop with access to DIRTT computer resources, including other networked computers, shared file resources, and other repositories of electronically stored information.

66. ~~34.~~ Mr. Henderson was not authorized to access, store, or retrieve DIRT Confidential Business Information other than using DIRT computers and resources, and then only for bona fide business purposes for the benefit of DIRT.

67. ~~35.~~ In May 2019, DIRT's Human Resources department received an administrative garnishment order from the State of Utah for \$11.3 million, which DIRT learned was related to Mr. Henderson's 2003 felony securities fraud convictions. (Exhibit C). Until receipt of the garnishment order, DIRT's then current management team was unaware of Mr. Henderson's felony convictions.

68. ~~36.~~ Mr. Henderson's crimes were quite serious. According to press accounts of his sentencing, he pled guilty to a number of felony counts involving his stealing between \$6 million and \$8 million from investors in fraudulent business ventures, ultimately serving time in prison based on his convictions. *See* "Swindler Sentenced," KSL.com, 6/21/03 (available at <https://www.ksl.com/article/90261/swindler-sentenced>, last retrieved ~~9/25/19~~4/9/20).

69. ~~37.~~ Press reports of Mr. Henderson's sentencing hearing note that over 64 known victims, many of them senior citizens, lost their life savings and

retirement pensions to Mr. Henderson's fraudulent scheme. Mr. Henderson was ordered to repay those funds.

70. ~~38.~~ While Mr. Smed was aware of these convictions while acting as DIRT's CEO, he nonetheless regularly supported Mr. Henderson in his role at DIRT. In fact, when the local ~~Distribution~~Regional Partner in Salt Lake City expressed a desire not to work with Mr. Henderson, Mr. Smed arranged for another ~~Distribution~~Regional Partner in Salt Lake City, Interior Solutions, to work specifically with Mr. Henderson. Importantly, Mr. Henderson's wife, Defendant Kristy Henderson, was, and is, the branch manager of Interior Solutions' Salt Lake City office.

71. ~~39.~~ The receipt of the wage garnishment order by DIRT, of which Mr. Henderson quickly became aware, touched off a series of events for Mr. Henderson and DIRT.

72. ~~40.~~ In 2019, after Mr. Smed's departure from DIRT but before receipt of the wage garnishment order, DIRT's senior management were considering Mr. Henderson for a promotion.

73. ~~41.~~ Upon learning about Mr. Henderson's prior criminal convictions, current DIRT management provided Mr. Henderson a number of opportunities

to explain his actions and provide his version of events. During that process, his anticipated promotion was placed on hold.

74. ~~42.~~ Mr. Henderson apparently determined at that point in time to leave DIRTT and return ~~working~~to work for his prior supporter, Mr. Smed, at Falkbuilt and to take valuable DIRTT Confidential Business Information with him.

75. ~~43.~~ After DIRTT received the garnishment order and placed Mr. Henderson's promotion on hold, Mr. Henderson commenced or continued a scheme to misappropriate DIRTT's confidential and propriety information and trade secrets by uploading DIRTT Confidential Business Information onto a personal, cloud-based data storage location. There was no legitimate business purpose for this activity.

76. ~~44.~~ On information and belief, in or around this same time period, Mr. Henderson either made contact or accelerated plans with Mr. Smed and Falkbuilt to assist them in launching a business in Utah to compete with DIRTT, utilizing DIRTT Confidential Business Information to do so.

77. ~~45.~~ The departure of his primary benefactor at DIRTT, Mr. Smed, coupled with the forthcoming garnishment (which would far exceed Mr.

Henderson’s DIRTТ salary for over 100 years), likely accelerated Mr. Henderson’s plans to misappropriate information from DIRTТ for Mr. Smed’s new venture.

78. ~~46.~~—Starting on Sunday, June 3, 2019, Mr. Henderson began uploading what would ultimately amount to over 35 gigabytes of data¹ from his DIRTТ-issued laptop and account to Google “Google Drive” and/or Apple “iCloud” cloud computing servers.

79. ~~47.~~—DIRTТ IT staff became aware of the unauthorized access to and exfiltration of information from DIRTТ’s systems on June 10, 2019.

80. ~~48.~~—When DIRTТ confronted ~~by DIRTТ,~~ Mr. Henderson about uploading this information, he admitted to uploading the data but denied any improper motive, and purported to allow his cloud account to be removed of such data by DIRTТ.

81. ~~49.~~—Further investigation has revealed that, in addition to uploading DIRTТ Confidential Business Information to a cloud server, Mr. Henderson had also likely mirrored DIRTТ Confidential Business Information to a personal external hard disk drive, which was not authorized by DIRTТ.

¹ On average, one gigabyte contains 4400 documents, depending on the file type.

82. ~~50.~~ To date, the unauthorized hard disk drive remains ~~unaccounted for in~~
Mr. Henderson's possession. DIRT T reasonably believes that ~~Mr. Henderson is in~~
~~possession of and has access to~~ the unauthorized hard disk drive ~~containing~~contains
DIRTT Confidential Business Information.

83. ~~51.~~ The files wrongfully taken by Mr. Henderson included materials
which he would not have a need or reason to access in his day-to-day employment
at DIRT T, including design and pricing information and proprietary ICE design
files and Standard Factory Net (SFN) price lists for projects which had no
connection to his employment at DIRT T.

84. ~~52.~~ The files obtained by Mr. Henderson ~~also included~~appear to include
hundreds of design, layout, pricing, and other files regarding projects, regions,
and customers far outside of Mr. Henderson's responsibilities at DIRT T.

~~53.—The files represent a laundry list of files that would prove extremely helpful in
setting up a competing operation at what would become Falkbuilt, LLC, Falkbuilt Ltd. and Falk
Mountain States.~~

85. ~~54.~~ Examples of the files misappropriated by Mr. Henderson include:
(a) specific budget proposals for projects; and (b) ICE files and SFN summaries,
which could be used against DIRT T in bidding for projects because they contain
pricing information, among other valuable data.

86. ~~55.~~ In the weeks leading up to his departure, Mr. Henderson began separately, affirmatively seeking out information from other DIRTT employees regarding internal company processes, particularly pricing, testing, and structural ~~calculations~~calculation processes under the guise of improving his knowledge of DIRTT company practices for DIRTT's benefit. Mr. Henderson did so despite the fact that he already knew at the time that he would be leaving DIRTT and assisting Falkbuilt in creating a competing business in Utah, Falk Mountain States, LLC.

87. ~~56.~~ Shortly after DIRTT's receipt of the garnishment order, Mr. Henderson indicated that DIRTT should terminate its relationship with Interior Solutions, the company where his wife works. DIRTT then terminated the relationship in a negotiated exit based on Mr. Henderson's recommendations.

88. ~~57.~~ In her role at Interior Solutions, Kristy Henderson had access to DIRTT Confidential Business Information.

89. ~~58.~~ In entering into a Regional Partner Agreement with DIRTT, Interior Solutions agreed in March 2018 that it would not "copy, use, disclose or transfer" any DIRTT confidential information. (Exhibit D). The confidential information included ICE files, SFN pricing, ICE quotes, and final approved

~~ICE~~ICE files. Interior Solutions also agreed to adhere to the proprietary license with respect to its use of ICE software.

90. ~~59.~~—On July 8, 2019, Kristy Henderson, Mr. Henderson’s wife, incorporated Falk Mountain States, LLC. Kristy Henderson, through her work at Interior Solutions as a DIRTT Regional Partner, possessed significant knowledge about DIRTT’s operations.

91. ~~60.~~—On information and belief, Falk Mountain States, LLC was intended to be, and is, an affiliate of Falkbuilt, a direct competitor of DIRTT set up by former DIRTT employees. Falk Mountain States’ filings with the State of Utah indicate that Falk Mountain States is doing business as “Falkbuilt, Salt Lake City” and “Falkbuilt, St. George”.

92. ~~61.~~—Mr. Henderson resigned from DIRTT effective August 2, 2019 on several weeks’ notice.

93. ~~62.~~—Although Kristy Henderson had already formed Falk Mountain States, LLC at the time of his resignation, Mr. Henderson told DIRTT that he was leaving to launch a construction company with his wife, Kristy Henderson, and to develop some commercial property that had “been in the works” for 15 years. Mr. Henderson never informed anyone at DIRTT that he was actually going to work

for Mr. Smed at Falkbuilt, but instead intentionally misled DIRTТ regarding his plan to begin working for a direct competitor.

94. ~~63.~~—On August 8, 2019, Mr. Henderson contacted at least one prospective customer of DIRTТ “announcing” his and other former DIRTТ employees’ ~~departure~~departures to launch a new competitor to DIRTТ. Mr. Henderson’s email asked the prospective customer to allow the new entity to bid on an existing project with which he was familiar based on his employment with DIRTТ.

95. ~~64.~~—While still employed by DIRTТ, in direct violation of his fiduciary duties owed to DIRTТ, Mr. Henderson conspired with Kristy Henderson and Falk Mountain States to obtain and misappropriate DIRTТ Confidential Business Information, including trade secrets, to benefit himself, Kristy Henderson, Falkbuilt and Falk Mountain States.

96. Mr. Smed directed and encouraged these efforts by Mr. and Mrs. Henderson to obtain and misappropriate DIRTТ Confidential Business Information.

B. Other Efforts to Misappropriate DIRTТ Confidential Business Information

97. ~~65.~~ The Hendersons are not the only individuals engaged by Mr. Smed and Falkbuilt to gain access to DIRTT Confidential Business Information.

~~66.~~ Amanda Buczynski was a DIRTT employee from October 17, 2016 to September 17, 2019. Ms. Buczynski was responsible for DIRTT sales in a territory that included Western Pennsylvania and West Virginia. She maintained an office on site at a DIRTT partner's facility in Pittsburgh, Pennsylvania.

98. ~~67.~~ As part of her job responsibilities with DIRTT, Ms. Buczynski had access to proprietary databases of customer relationships, pricing, costing, and forecasts accessible only to herself, the CEO, and the COO of DIRTT's regional partner.

99. ~~68.~~ Ms. Buczynski, as part of her employment with DIRTT, agreed to a confidentiality agreement which provided, among other things, that she would not "without the prior written consent of DIRTT, either during the period of [her] employment or at any time thereafter, disclose or cause to be disclosed any of the Confidential Information in any manner ..." (Exhibit E).

100. ~~69.~~ Ms. Buczynski also agreed to confidentiality provisions in the DIRTT offer letter she executed on September 30, 2016.

101. ~~70.~~ Ms. Buczynski resigned from DIRTT effective September 17, 2019, as with Mr. Henderson, falsely stating to her colleagues that she was not leaving to work for Falkbuilt.

102. ~~71.~~ On Ms. Buczynski's last day, she plugged a USB device with a serial number that included 4A3BCF57-0 into her DIRTT-provided laptop. She also accessed a number of files and folders on her work computer's hard drive related to ongoing DIRTT projects. Ms. Buczynski did not possess authorization to undertake any of these acts. (Exhibit F; Exhibit O at ¶ 9).

103. ~~72.~~ On August 30, 2019, prior to her departure from DIRTT, Ms. Buczynski copied over 40 files, including one identified as "PPT 'Large Clients'" to a Dropbox directory/folder. (Exhibit G).

104. ~~73.~~ In fact, as noted above, Ms. Buczynski started working on behalf of Falkbuilt immediately following her departure from DIRTT.

105. ~~74.~~ Immediately after ~~her departure from~~ leaving DIRTT's employ, Ms. Buczynski reached out to one or more DIRTT customers on behalf of Falkbuilt in an effort to compete on ongoing projects and to underbid DIRTT by utilizing DIRTT's Confidential Business Information and information obtained from DIRTT's partner. (Exhibit H).

106. ~~75.~~ On information and belief, Ms. Buczynski also worked to advance Falkbuilt's interests to the detriment of DIRTT by either hiding or sitting on leads that she received in the time leading up to her departure, including inquiries from potential partners interested in working with DIRTT.

~~76.— Ms. Buczynski has referred to Falkbuilt as the “new DIRTT” in communications with potential customers, contradicting Falkbuilt’s public representations that Falkbuilt is not competing with DIRTT or building upon DIRTT technology and information.~~

107. ~~77.~~ After submitting her resignation to DIRTT, Ms. Buczynski also emailed to her personal email account DIRTT customer contact information, and DIRTT pricing and estimates. (Exhibit I).

108. ~~78.~~ Ms. Buczynski's and Mr. Henderson's conduct is part of a pattern of a larger number of former DIRTT employees solicited by Falkbuilt (*see* Exhibit O at ¶ 9):

(a) On December 28, 2018, Christina Engelbert, while a DIRTT employee, received an email from Dropbox instructing her to “Complete your Dropbox setup.” The email indicated that Ms. Engelbert had created a Dropbox account. Ms. Engelbert left DIRTT on December 31, 2018 and subsequently went to work for or on behalf of Falkbuilt. (Exhibit J).

(b) On December 29, 2018, Clayton Smed, while a DIRTT employee, received an email from Dropbox instructing him to “Complete your Dropbox setup.” The email indicated that Mr. Smed had created a Dropbox account. Clayton Smed changed the email associated with his Dropbox account from his DIRTT email to his personal email on January 14, 2019. Clayton Smed left DIRTT on January 31, 2019 and subsequently went to work for or on behalf of Falkbuilt. (Exhibit K).

(c) On January 12, 2019 Laura Shadow, while a DIRTT employee, received an email from Dropbox instructing her to “Complete your Dropbox setup.” The email indicated Ms. Shadow had created a Dropbox account. Ms. Shadow left DIRTT’s employ on January 31, 2019 and subsequently went to work for or on behalf of Falkbuilt. (Exhibit L).

109. ~~79.~~ On September 19, 2018, David Weeks sent Mogens Smed a sensitive, confidential DIRTT document titled “Typical Headwall Cost Breakdown”. This information constitutes DIRTT Confidential Business Information. Mr. Weeks left DIRTT on Feb. 28, 2019 and went to work for Mr. Smed at Falkbuilt. (Exhibit M). Mr. Weeks forwarded similar pricing information to his personal email account in November 2018.

110. ~~80.~~—Ingrid Schoning (who left DIRTT on September 15, 2019) forwarded a DIRTT confidential document to her Gmail account. This information constitutes DIRTT Confidential Business Information. Ms. Schoning now works for or on behalf of Falkbuilt. Ms. Schoning also changed a Dropbox account to associate it with her personal email address on July 23, 2019. (Exhibit N).

111. Jordan Smed (who left DIRTT on January 31, 2019) accessed CAD design files at an abnormally high rate just prior to his departure from DIRTT. Mr. J. Smed accessed CAD files a total of 281 times over a period of nearly *six years* from 2012 to October 2018. In the three months prior to his departure from DIRTT, he accessed the CAD files 714 times, with 449 of those times being in the month of his departure. Mr. J. Smed also sent DIRTT pricing information, as well as shipping and forecast reports, to his personal email in the two weeks prior to his departure, including on his very last day of employment with DIRTT.

112. ~~81.~~—Defendants are using and have misappropriated DIRTT Confidential Business Information, and DIRTT has reason to believe that Defendants' actions are ongoing and widespread and directed by Falkbuilt.

113. Plaintiffs have reason to believe, based upon direct knowledge of information actually taken, the facial similarity of DIRTT and Falkbuilt products, and the direct approach of Falkbuilt to DIRTT customers and partners with the purportedly similar products, that the theft was far more widespread than currently known.

114. ~~82.~~ DIRTT seeks all relief available at law and in equity including, but not limited to, preliminary and permanent injunctive relief to restrain Defendants from using or disclosing DIRTT Confidential Business Information. DIRTT requests injunctive relief to protect itself from irreparable injuries caused by Defendants' conduct and to prevent further harm. DIRTT also seeks an award of compensatory damages, exemplary damages, and attorney's fees.

~~83.—DIRTT also seeks expedited discovery. Mr. Henderson and Ms. Buczynski made affirmative efforts to conceal the extent of their actions and DIRTT requires court process to determine the full scope of their wrongdoing, and of misappropriation and use of DIRTT Confidential Business Information by other former DIRTT employees currently employed by or working on behalf of Falkbuilt. Falkbuilt has made public and misleading statements about the nature of its business and attempted to impede the investigation into its activities. DIRTT's investigation into misappropriated information is ongoing and incomplete, and has been~~

~~necessarily frustrated by misrepresentations made by Mr. Henderson, Ms. Buczynski, and Falkbuilt as to the nature, scope and use of misappropriated material.~~

C. DIRT Confidential Business Information Constitutes Trade Secrets

115. ~~84.~~ DIRT's manufacturing approach is built on a foundation of technology, the center of which is the proprietary ICE Software. DIRT uses ICE Software to design, visualize, configure, price, communicate, engineer, specify, order and manage projects. The ICE Software was developed in or around 2005 as a custom interior design and construction software solution to integrate into DIRT's offerings. The ICE Software makes manufactured, fully custom interiors both feasible and profitable while addressing challenges associated with traditional construction, including cost overruns, inconsistent quality, delays, and significant material waste. The ICE Software is used throughout the sales process, ensuring consistency across DIRT's services and products received by all of DIRT's clients.

116. ~~85.~~ DIRT begins manufacturing custom DIRT products once a file (an "ICE File") is generated and a purchase order is received. The ICE Software allows an entire project to be tracked and managed across the entire production cycle through design, sales, production, delivery and installation. The ICE File (containing a project's engineering and manufacturing data) generated during the

design and specification process can be used for optimizing future reconfigurations, renovations, technology integration initiatives and changes to a client's space.

117. ~~86.~~—The ICE Software is licensed to unrelated companies and ~~Distribution~~Regional Partners of DIRTT, but only for certain limited information and only if the parties agree to be bound by a confidentiality agreement.

118. ~~87.~~—DIRTT's proprietary ICE Software is among a body of DIRTT's valuable intellectual property. The ICE Software is subject to a number of patents in Canada, the United States, Europe and Singapore. DIRTT also has a number of trademark and copyright protections related to the ICE Software.

119. ~~88.~~—ICE files generated by ICE ~~software~~Software contain proprietary costing information that would be of substantial benefit to a competitor seeking to undercut DIRTT on price. Costing is a closely-guarded secret at DIRTT for this reason, and because of the substantial efforts utilized to generate it.

120. ~~89.~~—In addition to the ICE Software, during their employment with DIRTT, Mr. Henderson ~~and~~, Ms. Buczynski, and other former DIRTT employees had access to DIRTT Confidential Business Information, including but not limited to:

- (a) DIRTT's job costing;
- (b) DIRTT's customer, and supplier ~~and—Distribution—Partner contacts~~lists, and a list of prospects and projects;
- (c) DIRTT's sales figures and projections;
- (d) DIRTT's pre-use customer presentations and marketing materials;
- (e) DIRTT's marketing and sales strategies;
- (f) DIRTT's customer, supplier and ~~Distribution~~Regional Partner order histories, needs, and preferences;
- (g) DIRTT's customer proposals, service agreements, contracts and purchase orders;
- (h) DIRTT's plans to expand and target new clients and markets;
- (i) design specifications and drawings of DIRTT products;
- (j) specialized methods and processes used to create custom prefabricated modular interior wall partitions, other ocular interior components and other DIRTT products;
- (k) research and development of new DIRTT products;
- (l) trade secrets and intellectual property strategy, including strategy regarding the ICE Software and ancillary programs;
- (m) strategic plans and business plans; and
- (n) ~~such further and other confidential and proprietary information as may be proven at trial~~library of prior projects and customer needs, impossible to replicate without access to DIRTT's confidential system.

This information comprises DIRT Confidential Business Information.

121. DIRT Confidential Business Information is comprised of thousands of different files and documents. And while DIRT is aware that some of the files constituting DIRT's Confidential Business Information were taken (or retained) without authorization, due to the volume of information that individuals such as Mr. Henderson, Mr. Jordan Smed, and Ms. Buczynski had access to, it is nearly impossible for DIRT to identify every individual stolen file at this time, until or unless Defendants comply with their discovery obligations.

122. Further, given Mr. Smed's close personal relationship with many of the departing DIRT employees, DIRT has reasonably concluded that such information was widely shared within Falkbuilt Inc. and Falkbuilt Ltd. and directed by Mr. Smed. Additionally, considering that Falkbuilt's regional branches are investors in Falkbuilt, are personally close to Mr. Smed, and that Falkbuilt issues email addresses to the branches, maintains the servers for them and stores emails for the branches, DIRT believes the information is shared with Falkbuilt partners.

123. 90.—DIRT devotes significant resources to developing DIRT Confidential Business Information.

124. ~~91.~~—DIRTT Confidential Business Information constitutes trade secrets of DIRTT. It is vital to DIRTT’s business success and enables it to compete effectively in an extremely competitive marketplace. DIRTT takes reasonable measures to protect and maintain the confidentiality of DIRTT Confidential Business Information, including the measures described above.

125. ~~92.~~—DIRTT derives substantial economic value from maintaining the secrecy of its DIRTT Confidential Business Information, including, among other things, its pricing, its customer, prospect, and supplier information, its sales figures and projections, its marketing and sales strategies, its technical-know-how, its design specifications, and its strategic and business plans. Any of this information would be immensely valuable to a competitor, and a global theft of the information would allow a competitor ~~to bid~~ an unfair advantage in bidding against DIRTT on projects. DIRTT has incurred significant costs and expenses in developing its DIRTT Confidential Business Information.

126. ~~93.~~—DIRTT Confidential Business Information, including, among other things, pricing, its customer, prospect and supplier information, its sales figures and projections, its marketing and sales strategies, its design specifications, and strategic and business plans, is neither generally known, nor is

it readily ascertainable, to the general public, to DIRTT's competitors, or to any other person or entity that could obtain value from such information.

127. ~~94.~~ DIRTT takes reasonable measures to protect and maintain the secrecy of its DIRTT Confidential Business Information, including, among other things, its pricing, its customer, prospect, and supplier information, its sales figures and projections, its marketing and sales strategies, its design specifications, and its strategic and business plans.

128. ~~95.~~ DIRTT limits access to DIRTT Confidential Business Information, and requires network passwords to access DIRTT Confidential Business Information on DIRTT's computers, confidential agreements, warranty on ICE Software, and partner confidentiality agreements. DIRTT also has policies and procedures in place governing the access to and use of DIRTT Confidential Business Information, including efforts described above to identify attempts to improperly transfer DIRTT Confidential Business Information.

D. Falkbuilt directly and unlawfully competes with DIRTT, Inc.

129. Despite Falkbuilt's claims to the contrary, since its formation, Falkbuilt has attempted to compete in the same market as DIRTT, Inc. Not only is Falkbuilt attempting to compete in exactly the same market as Plaintiffs, but it is

also attempting to steal DIRTT, Inc.'s customers and convert existing DIRTT, Inc. projects into Falkbuilt projects through unlawful means, including through its controlled regional representatives and partners. The regional branches are largely investors in Falkbuilt, and many hold themselves out as employees or principals of Falkbuilt, Ltd. The email servers for these purported independent businesses are controlled and maintained by Falkbuilt, Ltd.

130. By way of example, in June 2020, Mr. Smed, on behalf of Falkbuilt, met with representatives from a DIRTT client. During this meeting, Mr. Smed discussed the DIRTT project, and made accusations regarding DIRTT with the intent of sowing suspicion and doubt about DIRTT's ability to complete the project.

131. Similarly, one of DIRTT's Regional Partners in New York has already begun transitioning from selling DIRTT products to also selling Falkbuilt products. In addition to selling Falkbuilt products in the same market as DIRTT products, this partner has converted existing DIRTT projects into Falkbuilt projects. Such a transition of DIRTT projects to Falkbuilt projects will directly result in a loss of business and revenue for DIRTT.

132. One of DIRTT's partners in Cleveland has similarly used its dual relationship with DIRTT and Falkbuilt to Falkbuilt's advantage. Specifically, DIRTT lost the bid for the second phase of a project for which DIRTT had done a full solution installation for the first phase in 2018 to 2019. DIRTT had informed its Regional Partner of the opportunity to bid on the second phase, which the partner then wrongfully disclosed to Falkbuilt. Despite DIRTT's involvement in the project and what it believed was a competitive bid, DIRTT lost the bid. In other words, Falkbuilt has demonstrated a pattern of using DIRTT's partner network in an effort to gain exposure to DIRTT's competitive information. While DIRTT does not suggest that Falkbuilt should refrain from recruiting certain partners, it is certainly improper to use DIRTT's partners to gain access to confidential information, such as bid pricing, in order to gain an unfair advantage in Falkbuilt's direct competition with DIRTT, or to promote a false equivalency with DIRTT products.

133. Falkbuilt and Mr. Smed have created confusion in the marketplace by:

(a) Presenting Falkbuilt services to customers, including DIRTT customers and prospects, and misrepresenting the characteristics of

such products and services by stating and representing that Falkbuilt products can replace DIRT products with the full range of customization and functionality. In fact, for one project, the customer was so misled by Falkbuilt's statements concerning the similarity between DIRT and Falkbuilt that the project documents had to be formally amended to clarify that the design was based on Falkbuilt's solution, and that DIRT was an acceptable alternative as a manufacturer. This change was only made after a DIRT representative had an in-depth conversation with the architect for the project, explaining the substantial difference between DIRT and Falkbuilt.

(b) Repeatedly and falsely claiming an affiliation with DIRT, as Mr. Smed refers to DIRTBAGS and DIRT through social media, wrongly suggesting an affiliation, and that Falkbuilt's technology is a lawful outgrowth of DIRT technological heritage.

(c) Degrading DIRT to DIRT customers and partners by falsely announcing departures of DIRT partners, falsely representing DIRT's ability to perform its obligations with its customers, and falsely referring to the destruction of the company by current management.

134. Falkbuilt’s own materials illustrate the extent to which Falkbuilt and its allegedly independent regional branches are intertwined. In one presentation, Falkbuilt claims that over 85% of Falkbuilt’s branches are investors in Falkbuilt, and over 66% of the total capital for Falkbuilt was raised directly from the branches. With the branches having so significant a financial stake in Falkbuilt, it is clear that they, too, have an incentive to use DIRTT information to leverage a competitive advantage for Falkbuilt.

135. DIRTT, Inc. and DIRTT Ltd. have both been injured by Falkbuilt’s actions. Plaintiffs both have an interest in the integrity of DIRTT Confidential Information. Both companies also have lost revenue and face the risk of further lost revenue.

COUNT I - VIOLATION OF UTAH UNIFORM TRADE SECRETS ACT (Utah. Code § 13-24-1 *et seq.*)(Against ~~All Defendants~~ Lance Henderson, Kristy Henderson, Falkbuilt Ltd., Falkbuilt, Inc. and Falk Mountain States, LLC)

136. ~~96.~~ The allegations contained in the preceding paragraphs set forth above are incorporated as if fully set forth herein.

137. ~~97.~~ The Utah Uniform Trade Secrets Act (“UTSA”) provides a private right of action for misappropriation of trade secrets.

138. ~~98.~~ A “trade secret” is defined as “information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” Utah Code § 13-24-2.

139. ~~99.~~ The term “misappropriation” includes “(a) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or (b) disclosure or use of a trade secret of another without express or implied consent by a person who: (i) used improper means to acquire knowledge of the trade secret; or (ii) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was: (A) derived from or through a person who had utilized improper means to acquire it; (B) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or (iii) before a material change of his position, knew or had reason to know that it was a trade

secret and that knowledge of it had been acquired by accident or mistake.” Utah.

Code § 13-24-2.

140. ~~100.~~—The term “improper means” includes “theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.” Utah. Code § 13-24-2.

141. ~~101.~~—While a DIRT T employee, Mr. Henderson had access to DIRT T’s trade secrets, including confidential customer and account information, such as marketing strategies and techniques, marketing and development plans for client contact information, price lists, specific contract pricing and payment histories. Such information gives DIRT T a commercial competitive advantage and derives economic value from not being generally known to and not readily ascertainable by the public or any person who can obtain economic value from its disclosure or use.

142. Upon information and belief, Defendants have conspired to misappropriate a large number of other DIRT T trade secrets. Plaintiffs are aware of, for example, DIRT T pricing information, design documents, client specific project documents, and other trade secrets that were misappropriated. However, due to the potentially thousands of individual trade secrets at issue (i.e. individual

design files, pricing documents, and client project information), DIRTТ cannot reasonably identify each trade secret at issue, as the information necessary for such identification is in the possession of Defendants and in the possession of those former DIRTТ employees who took part in Defendants' conspiracy.

143. ~~+02.~~—As a DIRTТ employee, Mr. Henderson was aware of the confidential nature of DIRTТ's trade secrets and agreed to ensure the continued confidentiality of such information as set forth above.

144. ~~+03.~~—As a DIRTТ employee, Mr. Henderson was also aware that DIRTТ placed confidence in him to maintain the confidentiality of DIRTТ's trade secrets, at least through the confidentiality agreement he signed.

145. ~~+04.~~—At all relevant times, DIRTТ made, and continues to make, reasonable efforts to maintain the secrecy of DIRTТ's trade secrets, by, among other things, requiring Mr. Henderson to sign a confidentiality agreement in connection with his employment.

146. ~~+05.~~—In violation of his duty to refrain from using or disclosing DIRTТ's trade secrets, Mr. Henderson, on his own and as part of a conspiracy with ~~all other Defendants~~ Falkbuilt Ltd., Falkbuilt, Inc., Kristy Henderson and Falk Mountain States, LLC, misappropriated DIRTТ's trade secrets, including but not

limited to, confidential and proprietary customer account information, marketing data and analysis, customer histories and payment histories, including marketing information and hundreds of DIRTT files and folders.

147. ~~106.~~ These Defendants' violations of the ~~Utah Uniform Trade Secrets Act~~ UTSA caused DIRTT substantial damage. Among other things, DIRTT was required to hire attorneys and computer forensic experts to investigate and attempt to mitigate Defendants' misappropriation of DIRTT's trade secrets.

148. ~~107.~~ DIRTT also suffered damage as a result of the loss or diminishment of value of DIRTT Confidential Business Information and other confidential and proprietary information, and diminishment of business value and competitive standing.

149. Falkbuilt competes directly with DIRTT, and Defendants continue to use the misappropriated DIRTT trade secrets to gain an unfair competitive advantage in the marketplace. Upon information and belief, it is at least in part due to Falkbuilt's illegal use of DIRTT's trade secrets that several DIRTT projects were stolen by Falkbuilt, and the reason why DIRTT lost bids to Falkbuilt on the same projects. A list of such projects currently known to DIRTT is attached as Exhibit P, and filed under seal.

150. At all times, Mr. Smed, as founder and CEO of Falkbuilt, was aware of and actively encouraged Mr. Henderson's and Kristy Henderson's improper acquisition of DIRTТ trade secret information.

151. ~~108. Falkbuilt, LLC~~ In addition to Mr. Henderson, Falkbuilt Ltd., Falkbuilt, Inc., Falk Mountain States, ~~and~~ LLC, Kristy Henderson, and Mogens Smed are directly liable for violations of the ~~Utah Uniform Trade Secrets Act~~ UTSA because they actively participated, through their conspiracy with each other and Mr. Henderson, in misappropriating DIRTТ's trade secrets.

152. ~~109. Falkbuilt, LLC~~ Inc., Falkbuilt Ltd., and Falk Mountain States, LLC are also directly liable for violations of the ~~Utah Uniform Trade Secrets Act~~ UTSA because they acquired DIRTТ trade secret information through ~~its~~ their agents, Mr. Henderson and Kristy Henderson, knowing that such information was obtained by improper means, including violations of Mr. Henderson's explicit and implied duties of confidentiality.

153. ~~110. Falkbuilt, LLC~~ Inc., Falkbuilt Ltd., Falk Mountain States, LLC, Mr. Henderson, and Kristy Henderson are each liable for violations of the ~~Utah Uniform Trade Secrets Act~~ UTSA because they used DIRTТ trade secrets (which include DIRTТ Confidential Business Information) without express or implied

permission from DIRTT and because Falkbuilt, ~~LLC~~Inc., Falkbuilt Ltd., Falk Mountain States, LLC and Kristy Henderson knew or had reason to know that Mr. Henderson had acquired ~~the~~DIRTT's trade secrets under circumstances giving rise to a duty to maintain their secrecy or limit their use₂, and had divulged DIRTT's trade secrets when he owed a duty to DIRTT to maintain their secrecy or limit their use.

154. ~~111.~~ DIRTT has been and continues to be injured irreparably by these Defendants' misappropriations of its trade secrets.

COUNT II – FEDERAL DEFEND TRADE SECRETS ACT (18 U.S.C. § 1836)

(Against ~~All Defendants~~ Lance Henderson, Kristy Henderson, Falkbuilt Ltd., Falkbuilt, Inc., and Falk Mountain States, LLC)

155. ~~112.~~ The allegations contained in the preceding paragraphs set forth above are incorporated as if fully set forth herein.

156. ~~113.~~ The Federal Defend Trade Secrets Act provides a private right of action for an “owner of a trade secret that is misappropriated . . . if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce.” 18 U.S.C. § 1836(b)(1).

157. ~~114.~~ A “trade secret” means:

all forms and types of financial, business, scientific, technical, economic or engineering information, including patterns, plans,

compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically or in writing if (A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

18 U.S.C. § 1836(3).

158. ~~+15.~~ The term “misappropriation” includes the “disclosure or use of a trade secret of another without express or implied consent by a person who . . . at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was . . . derived from or through a person who owed a duty to the person seeking relief to maintain the secrecy of the trade secret.” 18 U.S.C. § 1839(5)(B)(ii)(III).

159. ~~+16.~~ The term “improper” includes “breach of a duty to maintain secrecy . . .” 18 U.S.C. §1939(6).

160. ~~+17.~~ DIRT Confidential Business Information is a “trade secret” under the Federal Defend Trade Secrets Act because it comprises confidential and proprietary customer information, including marketing plans, strategies and data,

artwork, financial information, customer information, account histories and other information which DIRTТ takes reasonable measures to maintain secret.

161. ~~H8.~~ Such information derives independent economic value because it provides DIRTТ with a competitive commercial advantage from not being known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

162. Upon information and belief based upon available objective information, Defendants have conspired to misappropriate a large number of other DIRTТ trade secrets. Plaintiffs are aware of, for example, DIRTТ pricing information, design documents, client specific project documents, and other trade secrets that were misappropriated. However, due to the potentially thousands of individual trade secrets at issue (i.e. individual design files, pricing documents, and client project information), DIRTТ cannot reasonably identify each trade secret at issue in this Litigation until or unless Defendants respond in discovery, as the information necessary for such identification is in the possession of Defendants and in the possession of those former DIRTТ employees who took part in Defendants' conspiracy.

163. ~~+19.~~ The DIRTТ trade secrets misappropriated by ~~Defendants~~ Falkbuilt Ltd., Falkbuilt, Inc., Lance Henderson, Kristy Henderson and Falk Mountain States, LLC are used in interstate commerce to bid for, design, and construct projects throughout the United States.

164. ~~+20.~~ As a DIRTТ employee, Mr. Henderson had contractual and fiduciary duties to maintain the secrecy of DIRTТ's trade secrets and not misappropriate the information for his own use or for the use of DIRTТ's competitors.

165. ~~+21.~~ At all relevant times, Mr. Henderson was aware of the duty to maintain the secrecy of DIRTТ's trade secrets and not misappropriate such information for his own use.

166. ~~+22.~~ In violation of this duty, Mr. Henderson misappropriated DIRTТ's trade secrets, marketing data and analyses, customer histories and payment histories, by taking such information without DIRTТ's express or implied consent.

167. ~~+23.~~ These Defendants' violations of the Federal Defend Trade Secrets Act caused DIRTТ substantial damage. Among other things, DIRTТ was

required to hire attorneys and computer forensic experts to investigate and attempt to mitigate Defendants' misappropriation of DIRTT's trade secrets.

168. ~~+24.~~ DIRTT also suffered damage as a result of the loss or diminishment of value of DIRTT's trade secrets, and diminishment of business value and competitive standing.

169. Falkbuilt competes directly with DIRTT, and Defendants continue to use the misappropriated DIRTT trade secrets to gain an unfair competitive advantage in the marketplace. Upon information and belief, it is at least in part due to Falkbuilt's illegal use of DIRTT's trade secrets that several DIRTT projects were stolen by Falkbuilt, and the reason why DIRTT lost bids to Falkbuilt on the same projects. A list of such projects currently known to DIRTT is attached as Exhibit P, and filed under seal.

170. ~~+25.~~ In addition to Mr. Henderson, Falkbuilt, LLC Inc., Falkbuilt Ltd., Falk Mountain States, LLC and Kristy Henderson are directly liable for violations of the Defend Trade Secrets Act because they actively participated, through their conspiracy with other Defendants in misappropriating DIRTT's trade secrets.

171. ~~+26.~~ Falkbuilt, LLC Inc., Falkbuilt Ltd. and Falk Mountain States, LLC are also directly liable for violations of the Defend Trade Secrets Act because they

acquired DIRTT trade secret information through ~~its~~their agents, the Hendersons, knowing that such information was obtained by improper means, including violations of Mr. Henderson's explicit and implied duties of confidentiality.

172. ~~+27.~~ Falkbuilt, ~~LLC~~Inc., Falkbuilt Ltd., Falk Mountain States, LLC, Mr. Henderson, and Kristy Henderson are liable for violations of the Defend Trade Secrets Act because they used DIRTT trade secrets without express or implied permission from DIRTT and Falkbuilt, ~~LLC~~Inc., Falkbuilt Ltd., Falk Mountain States, LLC and Kristy Henderson knew or had reason to know that Mr. Henderson had acquired the DIRTT trade secrets under circumstances giving rise to a duty to maintain their secrecy or limit their use; and had divulged DIRTT trade secrets when he owed a duty to DIRTT to maintain their secrecy or limit their use.

COUNT III – BREACHES OF CONTRACTS (Against Mr. Henderson)

173. ~~+28.~~ The allegations contained in the preceding paragraphs set forth above are incorporated as if fully set forth herein.

174. ~~+29.~~ Mr. Henderson owed contractual duties to DIRTT based on his May 21, 2009 agreement to DIRTT's terms and conditions, and his June 25, 2019 execution of DIRTT's Computer/Data Security policy.

175. ~~130.~~—On information and belief, Mr. Henderson breached his obligations under the May 21, 2009 agreement by failing to prevent unauthorized publication and disclosure of (a) any trade secret, manufacturing process or confidential information concerning DIRTT, and (b) the finances of DIRTT and respective dealings, transactions or affairs of which Mr. Henderson was familiar during his employment.

176. ~~131.~~—For example, Mr. Henderson has used his knowledge of DIRTT dealings with customers and prospective customers for the benefit of Falkbuilt, Falkbuilt Mountain States, and himself.

177. ~~132.~~—On information and belief, Mr. Henderson has also ~~published~~damaged DIRTT by publishing and ~~disclosed~~disclosing to Falkbuilt and Falkbuilt Mountain States, DIRTT's competitor, DIRTT Confidential Business Information, including confidential electronic information, copied from DIRTT's computer systems before his departure.

178. ~~133.~~—On information and belief, Mr. Henderson breached his obligations under the June 25, 2019 DIRTT Computer/Data Security Policy by (a) storing information on systems and channels not controlled by DIRTT (e.g., cloud computing services and a personal hard drive), and (b) accessing DIRTT

computer or network locations and resources for which he was not previously authorized (e.g. projects outside of his market area, which on information and belief were accessed to benefit Falkbuilt).

COUNT IV – VIOLATION OF PENNSYLVANIA UNIFORM TRADE SECRETS ACT (12 P.S. § 5302) (Against Falkbuilt, LLC Inc. and Falkbuilt Ltd.)

179. ~~134.~~ The allegations contained in the preceding paragraphs set forth above are incorporated as if fully set forth herein.

180. ~~135.~~ The Pennsylvania Uniform Trade Secrets Act (“PUTSA”) provides a private right of action for misappropriation of trade secrets.

181. ~~136.~~ A “trade secret” is defined as “information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” 12 P.S. § 5302.

182. ~~137.~~ The term “misappropriation” includes “(a) acquisition of a trade secret of another by a person who knows or has reason to know that the trade

secret was acquired by improper means; or (b) disclosure or use of a trade secret of another without express or implied consent by a person who: (i) used improper means to acquire knowledge of the trade secret; or (ii) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was: (A) derived from or through a person who had utilized improper means to acquire it; (B) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or (iii) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.” 12 P.S. § 5302.

183. ~~138.~~—The term “improper means” includes “theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.” 12 P.S. § 5302.

184. ~~139.~~—While a DIRTT employee, Ms. Buczynski, working from Pennsylvania ~~at the time~~, had access to DIRTT’s trade secrets, including DIRTT Confidential Business Information, including confidential customer and account information, such as marketing strategies and techniques, marketing and

development plans for client contact information, price lists, specific contract pricing and payment histories. Such information derives economic value because it gives DIRTТ a commercial competitive advantage from not being generally known to and not readily ascertainable by the public or any person who can obtain economic value from its disclosure or use.

185. ~~+40.~~—As a DIRTТ employee, Ms. Buczynski was aware of the confidential nature of DIRTТ’s trade secrets and agreed to ensure the continued confidentiality of such information.

186. ~~+41.~~—As a DIRTТ employee, Ms. Buczynski was also aware that DIRTТ placed confidence in her to maintain the confidentiality of DIRTТ’s trade secrets.

187. ~~+42.~~—At all relevant times, DIRTТ made, and continues to make, reasonable efforts to maintain the secrecy of DIRTТ Confidential Business Information, by, among other things, requiring Ms. Buczynski to sign a confidentiality agreement.

188. Upon information and belief, Defendants have conspired to misappropriate a large number of other DIRTТ trade secrets. Plaintiffs are aware of, for example, DIRTТ pricing information, design documents, client specific

project documents, and other trade secrets that were misappropriated. However, due to the potentially thousands of individual trade secrets at issue (i.e. individual design files, pricing documents, and client project information), DIRTТ cannot reasonably identify each trade secret at issue, as the information necessary for such identification is in possession of Defendants and in the possession of those former DIRTТ employees who took part in Defendants' conspiracy.

189. ~~143.~~—In violation of her duty to refrain from using or disclosing DIRTТ's trade secrets, Ms. Buczynski, on her own and as part of a conspiracy with Falkbuilt, Inc. and Falkbuilt Ltd., misappropriated DIRTТ's trade secrets. Mr. Smed, as CEO and founder of Falkbuilt, was aware of and actively encouraged and induced these activities of Ms. Buczynski, which constitute a breach of her duty to maintain the secrecy of DIRTТ's trade secrets.

190. ~~144.~~—Falkbuilt, ~~LLC~~Inc.'s and Falkbuilt Ltd.'s violations of the ~~Pennsylvania Uniform Trade Secrets Act~~PUTSA caused DIRTТ substantial damage. Among other things, DIRTТ was required to hire attorneys and computer forensic experts to investigate and attempt to mitigate Falkbuilt's misappropriation of DIRTТ Confidential Business Information.

191. ~~145.~~ DIRT T also suffered damage as a result of the loss or diminishment of value of DIRT T Confidential Business Information and other confidential and proprietary information, and diminishment of business value and competitive standing.

192. Falkbuilt competes directly with DIRT T, and Defendants continue to use the misappropriated DIRT T trade secrets to gain a competitive advantage in the marketplace. Upon information and belief, several DIRT T projects were stolen by Falkbuilt, and DIRT T lost bids to Falkbuilt on the same projects, at least in part due to Falkbuilt's illegal use of DIRT T's trade secrets. A list of such projects currently known to DIRT T is attached as Exhibit P, and filed under seal.

193. DIRT T further believes that Falkbuilt is improperly using DIRT T's confidential information gained from its regional branches to gain a competitive edge on DIRT T in direct competition on projects. Falkbuilt has used, and continues to use, confidential information obtained from DIRT T to undercut DIRT T's pricing on project bids for which DIRT T and Falkbuilt are in competition. In many cases, DIRT T has lost bids to Falkbuilt by just hundreds of dollars. In one example, DIRT T lost the bid for the second phase of a project for which DIRT T had already bid, won, and completed the first phase in 2018 to

2019. DIRT T had informed its Regional Partner of the opportunity to bid on the second phase, which the partner then wrongfully disclosed to Falkbuilt.

194. ~~146.~~ Falkbuilt, ~~LLC~~Inc., and Falkbuilt Ltd. are directly liable for violations of the ~~Pennsylvania Uniform Trade Secrets Act~~PUTSA because they actively participated with Ms. Buczynski in misappropriating DIRT T's trade secrets.

195. ~~147.~~ Falkbuilt, ~~LLC~~Inc. and Falkbuilt Ltd. are also directly liable for violations of the ~~Pennsylvania Uniform Trade Secrets Act~~PUTSA because they acquired DIRT T trade secret information through ~~its~~their agent, Ms. Buczynski, knowing that such information was obtained by improper means, including violations of Ms. Buczynski's explicit and implied duties of confidentiality.

196. ~~148.~~ Falkbuilt, ~~LLC~~Inc. and Falkbuilt Ltd. are liable for violations of the ~~Pennsylvania Uniform Trade Secrets Act~~PUTSA because they used DIRT T trade secrets without express or implied permission from DIRT T, and Falkbuilt, ~~LLC~~Inc. and ~~Falkbuilt~~Falkbuilt Ltd. knew or had reason to know that Ms. Buczynski had acquired the DIRT T trade secrets under circumstances giving rise to a duty to maintain their secrecy or limit their use; and had divulged DIRT T's trade secrets when she owed a duty to DIRT T to maintain their secrecy or limit their use.

197. ~~149.~~ DIRT T has been and continues to be injured irreparably by Falkbuilt, ~~LLC~~Inc.'s and Falkbuilt Ltd.'s misappropriations of DIRT T's trade secrets.

COUNT V – VIOLATION OF LANHAM ACT (15 U.S.C. § 1501, et seq.)
(Against Falkbuilt, Inc., Falkbuilt Ltd. and Mogens Smed)

198. The allegations contained in the preceding paragraphs set forth above are incorporated as if fully set forth herein.

199. The Lanham Act provides a private cause of action for misidentification of the origin of goods and services.

200. Specifically, the Lanham Act provides:

§1125 FALSE DESIGNATIONS OF ORIGIN, FALSE DESCRIPTIONS, AND DILUTION FORBIDDEN

(a) Civil action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities.

201. In this case, Falkbuilt has presented itself in the marketplace as providing equivalent services to DIRTT. As explained above in Paragraphs 45-60, Falkbuilt's solutions are demonstrably not equivalent to those of DIRTT. Falkbuilt's solutions lack the flexibility or customizability of DIRTT's solutions, and rely on considerably older technology.

202. Falkbuilt, Inc., Falkbuilt Ltd. and Mr. Smed violated the prohibitions of the Lanham Act in four separate ways:

(a) Repeatedly misrepresenting the nature and character of Falkbuilt's goods and services by drawing false comparisons between DIRTT products and Falkbuilt products, which is likely to cause confusion among consumers, as explained in Paragraphs 45-60 above. Specifically,

Falkbuilt, Inc., Falkbuilt Ltd. and Mr. Smed have misrepresented the capability of Falkbuilt solutions. Similarly, Falkbuilt, Inc.'s, Falkbuilt Ltd.'s and Mr. Smed's false comparisons to DIRTT solutions misrepresent Falkbuilt's access to DIRTT's proprietary methods, which are protected by patents. Falkbuilt further misrepresents the cost of Falkbuilt products over the life of the products. Upon information and belief, such misrepresentations are not limited to individual instances, but are widespread and ongoing. At least one specific example, as explained in Paragraph 56 above, is presently known to DIRTT in which Falkbuilt's misrepresentations as to the equivalency between DIRTT and Falkbuilt were such that when the reality was discovered, project documents had to be formally amended.

(b) Repeatedly and falsely representing an association or affiliation with DIRTT through the use of social media, which is likely to cause confusion among consumers by, for example, creating an illusion that Mr. Smed and Falkbuilt have access to DIRTT's resources and clientele, and co-opting DIRTT's reputation. This is part of an ongoing effort to persuade consumers that Falkbuilt's products and services are equivalent to DIRTT's

products and services. Specifically, Mr. Smed has issued numerous Tweets that either (1) falsely create the illusion of his continued association with DIRT T or (2) detail false information about DIRT T and/or its customers. These Tweets were directed to the marketplace as a whole, and are attached hereto as Exhibit S.

(c) Ms. Buczynski, on behalf of Falkbuilt, passed off the ready-for-market products in DIRT T’s showroom as those of Falkbuilt and, when discussing Falkbuilt with consumers, referred to it as “the new DIRT T” or “DIRT T 2.0.” Upon information and belief, Falkbuilt partners and employees continue to make similar misrepresentations, which are directed at consumers and at the marketplace, generally.

(d) Falkbuilt, Inc., Falkbuilt Ltd. and Mr. Smed knowingly misdesignated the origin of Falkbuilt’s techsheets and brochures, and similar information included on Falkbuilt’s website, mimicking DIRT T’s diagrams and products in them even though, as explained in Paragraphs 45-60 above, there is no real equivalence between DIRT T’s and Falkbuilt’s interior construction solutions. Such information and promotional materials were

distributed, and continue to be distributed, widely in the marketplace to consumers.

203. There is a high likelihood of consumer confusion as to the origin of the goods and services caused by these Defendants' false designations of origin. DIRT is harmed by the false designation of DIRT products as those of Falkbuilt because such false attribution diverts existing and potential customers, in the health care sector and others, from DIRT to Falkbuilt, resulting in damages to DIRT.

204. Upon information and belief, it is due to Defendants' false descriptions that several DIRT projects were obtained by Falkbuilt, either by flipping projects that were DIRT projects, or winning bids on projects that would otherwise have gone to DIRT but for Falkbuilt's misrepresentations.

205. Pursuant to the Lanham Act, DIRT is entitled to damages in the amount of: (1) Falkbuilt's profits related to the violations; (2) damages sustained by DIRT; (3) DIRT's costs of the action; and (4) DIRT's attorneys' fees.

**COUNT VI – VIOLATION OF COLORADO CONSUMER PROTECTION
ACT (Colo. Rev. Stat. § 6-1-101, et seq.) (Against Falkbuilt, Inc., Falkbuilt
Ltd. and Mogens Smed)**

206. The allegations contained in the preceding paragraphs set forth above are incorporated as if fully set forth herein.

207. The Colorado Consumer Protection Act (“CCPA”) provides a private cause of action to citizens of Colorado, including businesses such as DIRT which are incorporated there.

208. Defendants Falkbuilt, Inc., Falkbuilt, Ltd. and Mr. Smed are liable for violating the CCPA because these Defendants engaged in unfair or deceptive trade practices by:

(a) Repeatedly misrepresenting the nature and character of Falkbuilt’s goods and services by drawing false comparisons between DIRT products and Falkbuilt products, which is likely to cause confusion among consumers, as explained in Paragraphs 45-60 above. Specifically, Falkbuilt, Inc., Falkbuilt Ltd. and Mr. Smed have misrepresented the capability of Falkbuilt’s interior construction solutions. Similarly, Falkbuilt, Inc.’s, Falkbuilt Ltd.’s and Mr. Smed’s false comparisons to DIRT solutions misrepresent Falkbuilt’s access to DIRT’s proprietary methods,

which are protected by patents. Falkbuilt further misrepresents the cost of Falkbuilt products over the life of the products. Upon information and belief, such misrepresentations are not limited to individual instances, but are widespread and ongoing. At least one specific example, as explained in Paragraph 56 above, is presently known to DIRTT in which Falkbuilt's misrepresentations as to the equivalency between DIRTT and Falkbuilt was such that when the reality was discovered, project documents had to be formally amended. And DIRTT believes that it lost the bid for that project in January 2020 due to Falkbuilt's misrepresentations.

(b) Repeatedly and falsely representing an association or affiliation with DIRTT through the use of social media, which is likely to cause confusion among consumers by, for example, creating an illusion that Mr. Smed and Falkbuilt have access to DIRTT's resources and clientele, and co-opting DIRTT's reputation. This is part of an ongoing effort to persuade consumers that Falkbuilt's products and services are equivalent to DIRTT's products and services. Specifically, Mr. Smed has issued numerous Tweets that either: (1) falsely create the illusion of his continued association with DIRTT; or (2) detail false information about DIRTT and/or its customers.

These Tweets were directed to the marketplace as a whole, and are attached hereto as Exhibit S.

(c) Ms. Buczynski, on behalf of Falkbuilt, passed off the ready-for-market products in DIRTT’s showroom as those of Falkbuilt and, when discussing Falkbuilt with consumers, referred to it as “the new DIRTT” or “DIRTT 2.0”. Upon information and belief, Falkbuilt branches and employees continue to make similar misrepresentations, which are directed at consumers and at the marketplace, generally. And in fact, Falkbuilt’s own promotional material touts the fact that it has no showrooms, which may explain why Falkbuilt branches and employees rely on DIRTT’s showrooms to be able to provide Falkbuilt customers with in-person demonstrations of its solutions.

(d) Falkbuilt, Inc., Falkbuilt Ltd. and Mr. Smed knowingly misdesignated the origin of Falkbuilt’s techsheets and brochures, and similar information included on Falkbuilt’s website, mimicking DIRTT’s diagrams and products in them even though, as explained in Paragraphs 45-60 above, there is no real equivalence between DIRTT’s and Falkbuilt’s interior construction solutions. Such information and promotional materials were

distributed, and continue to be distributed, widely in the marketplace to consumers.

209. All of these acts and false statements of facts occurred in the course of Falkbuilt's business, and these Defendants' efforts to create confusion are directed generally to the marketplace for DIRTT's goods and services.

210. These Defendants' acts and false statements of facts constitute an ongoing fraud on the consumer public.

211. These acts and false statements of facts significantly impact the public as actual or potential consumers of DIRTT's goods and services because they create a high likelihood of confusion among actual or potential consumers of those goods and services as to the origin of those goods and services.

212. The end users of DIRTT's goods and services, including hospitals and medical clinics, are not necessarily knowledgeable about the technological nuances of the process by which these units are constructed. Thus, these Defendants' efforts to misstate the origin of these goods and services have the capacity, and are highly likely, to deceive consumers. These consumers are likely to have to expend time and effort to determine the actual origin of the goods and services. Unless restrained and enjoined by this Court, these Defendants' actions

will continue to cause confusion in the marketplace as to the origin of DIRTT's goods and services.

213. The conduct of these Defendants has caused, and unless restrained and enjoined by this Court, will continue to cause, irreparable damage to DIRTT, a Colorado corporation, by confusing consumers as to the origin of its goods and services and by creating doubt about DIRTT's stability with respect to its partner network. These Defendants' deceptive conduct has directly and negatively impacted DIRTT's reputation, business value, and competitive standing. Upon information and belief, it is due to Defendants' false statements of fact that several DIRTT projects were stolen by Falkbuilt, and the reason why DIRTT lost bids to Falkbuilt on the same projects. A list of such projects currently known to DIRTT is attached as Exhibit P, and filed under seal.

214. Pursuant to Colo. Rev. Stat. § 6-1-113, DIRTT is entitled to recover an amount equal to three times its actual damages, and reasonable attorneys' fees.

COUNT VII – VIOLATION OF OHIO DECEPTIVE PRACTICES ACT
(Ohio Rev. Code Ann. § 4165.01, et seq.)
(Against Falkbuilt, Inc., Falkbuilt Ltd. and Mogens Smed)

215. The allegations contained in the preceding paragraphs set forth above are incorporated as if fully set forth herein.

216. The Ohio Deceptive Practices Act (“ODPA”) provides a private cause of action when, among other things, “in the course of [a] person’s business, vocation or occupation, the person causes likelihood of confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services.” Ohio Rev. Code Ann. § 4165.02(A)(2).

217. Falkbuilt, Inc., Falkbuilt Ltd. and Mr. Smed are liable for violation of the ODPA because they knowingly engaged in deceptive trade practices by falsely designating the source of goods and services originated by DIRTT by:

(a) Repeatedly misrepresenting the nature and character of the goods and services by drawing false comparisons between DIRTT products and Falkbuilt products, which is likely to cause confusion among consumers, as explained in Paragraphs 45-60 above. Specifically, Falkbuilt, Inc., Falkbuilt Ltd. and Mr. Smed have misrepresented the capability of Falkbuilt’s interior construction solutions. Similarly, Falkbuilt, Inc.’s,

Falkbuilt Ltd.'s and Mr. Smed's false comparisons to DIRTT solutions misrepresent Falkbuilt's access to DIRTT's proprietary methods, which are protected by patents. Falkbuilt further misrepresents the cost of Falkbuilt products over the life of the products. Upon information and belief, such misrepresentations are not limited to individual instances, but are widespread and ongoing. At least one specific example, as explained in Paragraph 56 above, is presently known to DIRTT in which Falkbuilt's misrepresentations as to the equivalency between DIRTT and Falkbuilt was such that when the reality was discovered, project documents had to be formally amended. And DIRTT believes that it lost the bid for that project in January 2020 due to Falkbuilt's misrepresentations.

(b) Repeatedly and falsely representing an association or affiliation with DIRTT through the use of social media, which is likely to cause confusion among consumers by, for example, creating an illusion that Mr. Smed and Falkbuilt have access to DIRTT's resources and clientele, and co-opting DIRTT's reputation. This is part of an ongoing effort to persuade consumers that Falkbuilt's products and services are equivalent to DIRTT's products and services. Specifically, Mr. Smed has issued numerous Tweets

that either: (1) falsely create the illusion of his continued association with DIRT T or; (2) detail false information about DIRT T and/or its customers. These Tweets were directed to the marketplace as a whole, and are attached hereto as Exhibit S.

(c) Ms. Buczynski, on behalf of Falkbuilt, passed off the ready-for-market products in DIRT T’s showroom as those of Falkbuilt and, when discussing Falkbuilt with consumers, referred to it as “the new DIRT T” or “DIRT T 2.0”. Upon information and belief, Falkbuilt branches and employees continue to make similar misrepresentations, which are directed at consumers and at the marketplace, generally. And, in fact, Falkbuilt’s own promotional material touts the fact that it has no showrooms, which may explain why Falkbuilt partners and employees rely on DIRT T’s showrooms to be able to provide Falkbuilt customers with in-person demonstrations of its solutions.

(d) Falkbuilt, Inc., Falkbuilt Ltd. and Mr. Smed knowingly misdesignated the origin of Falkbuilt’s techsheets and brochures, and similar information included on Falkbuilt’s website, mimicking DIRT T’s diagrams and products in them even though, as explained in Paragraphs 45-60 above,

there is no real equivalence between DIRTT's and Falkbuilt's interior construction solutions. Such information and promotional materials were distributed, and continue to be distributed, widely in the marketplace to consumers.

218. There is a high likelihood of confusion or misunderstanding on the part of the buying public as to the source of DIRTT's goods and services caused by these Defendants' false designations of origin. These Defendants knew that their actions were deceptive. DIRTT is harmed by the false designation of DIRTT products as those of Falkbuilt because such false attribution diverts existing and potential customers, in the health care sector and others, from DIRTT to Falkbuilt, resulting in monetary damages to DIRTT.

219. These Defendants' intentional efforts to misstate the origin of these goods and services have the capacity, and are highly likely, to deceive consumers. Unless restrained and enjoined by this Court, these Defendants' actions will continue to cause confusion in the marketplace as to the origin of DIRTT's goods and services.

220. These Defendants' deceptive conduct has directly and negatively impacted DIRT's reputation, business value, and competitive standing. The extent of this damage is not yet known, but will be proven at trial.

221. Pursuant to ODP, DIRT is entitled to an injunction enjoining Mr. Smed, Falkbuilt, Inc. and Falkbuilt Ltd. from violating the ODP and creating a likelihood of confusion among the buying public as to the source of DIRT's goods and services. DIRT is further entitled under the ODP to recover its actual damages and, due to Defendants' willful violations of the statute, DIRT is also entitled to recover its reasonable attorneys' fees.

PRAYER FOR RELIEF

WHEREFORE, DIRT respectfully requests the following relief against Defendants:

- a. Enter judgment for it and against ~~all Defendants~~ Lance Henderson, Kristy Henderson, Falkbuilt Ltd., Falkbuilt, Inc., and Falk Mountain States, LLC on Counts I and II, against Falkbuilt, Inc. and Falkbuilt Ltd. on Count IV, against Mr. Henderson on Count III, and against Falkbuilt, ~~LLC and Inc.~~, Falkbuilt Ltd. and Mr. Smed on ~~Count IV~~ Counts V, VI and VII;
- ~~b. Enter an preservation order preventing the destruction of documents, an order that is necessary in light of the repeated taking and secretive access;~~
- b. e. Continue the preliminary and permanent injunctions currently in place restraining and enjoining each Defendant, including Mr. Smed and Falkbuilt, Inc., and all persons and entities

in active concert with any of them, from disclosing, using or misappropriating any of DIRT T's trade secrets;

c. ~~d.~~ Enter a mandatory injunction requiring each Defendant, and all persons and entities in active concert with any of them, to return to DIRT T any and all written materials, including copies thereof, and/or flash drives, thumb drives, external hard drives, USB storage drives, computer disks, diskettes, databases and/or other retrievable data which reflect, refer, or relate to DIRT T Confidential Business Information, and any copies that are in Defendants' possession, custody, or control;

d. ~~e.~~ Order each Defendant, and all persons and entities in active concert with any of them, to provide a full accounting as to the whereabouts of all of DIRT T's trade secrets, DIRT T Confidential Business Information and other DIRT T property in their possession, custody, or control (including information on the personal cloud drives of Defendants' employees);

e. ~~f.~~ Enter judgment that ~~Defendants~~ Lance Henderson, Kristy Henderson, Falkbuilt Ltd., Falkbuilt, Inc., and Falk Mountain States, LLC are jointly and severally liable to DIRT T for its actual damages for losses resulting from these Defendants' misappropriation of DIRT T's trade secrets, including but not limited to lost profits proximately caused by Defendants' misappropriation, or in the alternative, a reasonable royalty for Defendants' misappropriation of DIRT T's trade secrets in violation of the Utah Uniform Trade Secrets Act and/or Federal Defend Trade Secrets Act;

f. ~~g.~~ Enter judgment that ~~Defendants~~ Lance Henderson, Kristy Henderson, Falkbuilt Ltd., Falkbuilt, Inc., and Falk Mountain States, LLC are jointly and severally liable to DIRT T for disgorgement of all compensation paid to Mr. Henderson by DIRT T during and after his breaches, and disgorgement of any and all profits Defendants earned as a result of the misappropriation of DIRT T's trade secrets in violation of the Utah Uniform Trade Secrets Act and/or Federal Defend Trade Secrets Act;

- g. ~~h.~~ Enter judgment that ~~Defendants~~ Lance Henderson, Kristy Henderson, Falkbuilt Ltd., Falkbuilt, Inc., and Falk Mountain States, LLC are jointly and severally liable to DIRT for exemplary damages for these Defendants' willful, wanton or reckless disregard of DIRT's rights under the Utah Uniform Trade Secrets Act and/or Federal Defend Trade Secrets Act;
- h. ~~i.~~ Enter judgment that ~~Defendants~~ Lance Henderson, Kristy Henderson, Falkbuilt Ltd., Falkbuilt, Inc., and Falk Mountain States, LLC are jointly and severally liable to DIRT for DIRT's attorneys' fees for these Defendants' willful, wanton or reckless disregard of DIRT's rights under the Utah Uniform Trade Secrets Act and/or Federal Defend Trade Secrets ~~Act~~;
- i. ~~j.~~ Enter judgment that Falkbuilt, LLC Inc. and Falkbuilt Ltd. are liable to DIRT for its actual damages for losses resulting from their misappropriation of DIRT's trade secrets, including lost profits proximately caused by Falkbuilt, LLC Inc.'s and Falkbuilt Ltd.'s misappropriation of DIRT's trade secrets, or, in the alternative, a reasonable royalty for their misappropriation of DIRT's trade secrets in violation of the Pennsylvania Uniform Trade Secrets Act;
- j. ~~k.~~ Enter judgment that Falkbuilt, LLC Inc. and Falkbuilt Ltd. are liable to DIRT for disgorgement of all compensation paid to Ms. Buczynski by DIRT during and after her breaches, and disgorgement of any and all profits Mr. Smed, Falkbuilt, LLC Inc. and Falkbuilt Ltd. earned as a result of the misappropriation of DIRT's trade secrets in violation of the Pennsylvania Uniform Trade Secrets Act;
- k. ~~l.~~ Enter judgment that Falkbuilt, LLC Inc. and Falkbuilt Ltd. are liable to DIRT for exemplary damages for their willful, wanton or reckless disregard of DIRT's rights under the Pennsylvania Uniform Trade Secrets Act;
- l. ~~m.~~ Enter judgment that Falkbuilt, LLC Inc. and Falkbuilt Ltd. are jointly and severally liable to DIRT for DIRT's attorneys' fees for

their willful, wanton or reckless disregard of DIRTT's rights under the Pennsylvania Uniform Trade Secrets Act;

- m. ~~n.~~ Enter judgment that Mr. Henderson is liable to DIRTT for its actual damages and losses resulting from Mr. Henderson's breaches of contracts;
- n. Enter judgment that Falkbuilt, Inc., Falkbuilt Ltd. and Mr. Smed are jointly and severally liable to DIRTT for their violation of the Lanham Act;
- o. Enter judgment that Falkbuilt, Inc., Falkbuilt Ltd. and Mr. Smed are jointly and severally liable to DIRTT for Falkbuilt's profits related to their violation of the Lanham Act; damages sustained by DIRTT; DIRTT's costs of the action; and DIRTT's attorney's fees for their violation of the Lanham Act;
- p. Enter judgment that Mr. Smed, Falkbuilt, Inc. and Falkbuilt Ltd. are jointly and severally liable to DIRTT for three times the amount of its actual damages for their willful, wanton or reckless disregard of DIRTT's rights under the Colorado Consumer Protection Act;
- q. Enter judgment that Mr. Smed, Falkbuilt, Inc. and Falkbuilt Ltd. are jointly and severally liable to DIRTT for DIRTT's attorneys' fees for Defendants' violation of the Colorado Consumer Protection Act;
- r. Enter judgment that Mr. Smed, Falkbuilt, Inc. and Falkbuilt Ltd. are jointly and severally liable to DIRTT for DIRTT's actual damages for their violation of the Ohio Deceptive Practices Act;
- s. Enter judgment that Mr. Smed, Falkbuilt, Inc. and Falkbuilt Ltd. are jointly and severally liable to DIRTT for DIRTT's attorneys' fees for their willful violation of the Ohio Deceptive Practices Act;
- t. Enter an injunction enjoining Mr. Smed, Falkbuilt, Inc. and Falkbuilt Ltd. from violating the Ohio Deceptive Practices Act and creating a likelihood of confusion among the buying public as to the source of DIRTT's goods and services; and

u. ~~e.~~ Award such other and further relief that this Court determines to be just and proper under the circumstances.

Dated: ~~December 11, 2019~~ September 4, 2020 DIRT ENVIRONMENTAL SOLUTIONS, INC. and DIRT ENVIRONMENTAL SOLUTIONS LTD.

Plaintiff,

By: /s/ Chad E. Nydegger
One of ~~its~~ Their Attorneys

Chad E. Nydegger
Workman Nydegger
60 East South Temple, Suite 1000
Salt Lake City, Utah 84111
cnydegger@wnlaw.com

Jeffrey J. Mayer
Catherine A. Miller
~~Timothy K. Sendek~~
Akerman LLP
71 S. Wacker Drive, 47th Floor
Chicago, Illinois 60606
Jeffrey.Mayer@akerman.com
Catherine.Miller@akerman.com
~~Tim.Sendek@akerman.com~~

Attorneys for Plaintiff

Case Nos. 21-4078 (L), 21-4153

In the
United States Court of Appeals
for the
Tenth Circuit

DIRTT ENVIRONMENTAL SOLUTIONS, INC. and
DIRTT ENVIRONMENTAL SOLUTIONS, LTD.,
Plaintiffs-Appellants,

v.

FALKBUILT LTD., FALKBUILT, INC. and MOGENS SMED,
Defendants-Appellees,

LANCE HENDERSON, KRISTY HENDERSON and
FALK MOUNTAIN STATES, LLC,
Defendants.

*Appeal from a Decision of the United States District Court
for the District of Utah - Salt Lake City
Case No. 1:19-CV-00144-DBB-DBP · Honorable David Barlow, U.S. District Judge*

APPELLEES' SUPPLEMENTAL APPENDIX
VOLUME II OF II - Pages 227 to 416

ARTEMIS D. VAMIANAKIS, ESQ.
TANNER J. BEAN, ESQ.
FABIAN VANCOTT
215 South State Street, Suite 1200
Salt Lake City, Utah 84111
(801) 531-8900 Telephone
(801) 596-2814 Facsimile
avamianakis@fabianvancott.com
tbean@fabianvancott.com

MAY 13, 2022

*Counsel for Appellees Falkbuilt Ltd.,
Falkbuilt, Inc. and Mogens Smed*



COUNSEL PRESS · (213) 680-2300

PRINTED ON RECYCLED PAPER



TABLE OF CONTENTS

Docket Entry	Description	Page
VOLUME I OF II – Pages 1 to 226		
—	Civil Docket, United States District Court for the District of Utah, Case No. 1:19-cv-00144-DBB-DBP	5
46	Falkbuilt, Ltd.’s Response to Plaintiff’s Motion for a Preservation Order and, Following Expedited Discovery, a Limited Preliminary Injunction to Preserve the Status Quo, Filed February 11, 2020	30
52	Defendants Lance Henderson, Kristy Henderson, and Falk Mountain States, LLC’s Opposition to Plaintiff’s Motion for a Preservation Order and, Following Expedited Discovery, a Limited Preliminary Injunction to Preserve the Status Quo, Filed February 12, 2020	42
55	Plaintiff’s Motion to Dismiss Counterclaim, Filed February 26, 2020	53
61	Order: • Granting In Part [5] Motion for Preliminary Injunction to Preserve the Status Quo; and • Finding as Moot [6] Motion to Expedite Discovery, Filed March 13, 2020	75
63	Plaintiff’s Motion to Dismiss First Amended Counterclaim, Filed April 1, 2020	79
68	Notice of Electronic Filing re: Order Finding as Moot Motion to Dismiss, Filed May 1, 2020	111
70	Plaintiff’s Reply in Support of Motion to Dismiss First Amended Counterclaim, Filed May 13, 2020	113
105	Plaintiff’s Motion for Leave to File First Amended Complaint [Selected Excerpts], Filed September 4, 2020	126
	Exhibit B: Redlined First Amended Complaint	134

VOLUME II OF II – Pages 227 to 416

156	Order Granting [63] Plaintiff’s Motion to Dismiss First Amended Counterclaim, Filed March 30, 2021	231
160	Citation of Supplemental Authority in Support of Motion to Dismiss First Amended Complaint as to Falkbuilt Ltd., Falkbuilt, Inc., and Mogens Smed, Filed May 18, 2021	233
	Exhibit 1: Letter from Duncan Marsden to James D. Murphy, Dated May 14, 2021	237
	Exhibit 2: Application to Amend Falkbuilt’s Counterclaim	296
171	Notice of Appeal [DIRTT Environmental Solutions, Inc. and DIRTT Environmental Solutions, Ltd.], Filed June 16, 2021	328
	Exhibit A: Memorandum Decision and Order Granting [134] Motion to Dismiss First Amended Complaint as to Defendants Falkbuilt Ltd., Falkbuilt Inc. and Mogens Smed and Denying Plaintiffs’ Oral Motion to Amend	331
179	Defendants Lance Henderson, Kristy Henderson, and Falk Mountain States, LLC’s Motion to Stay, Filed July 8, 2021	336
180	Notice of Appeal Pursuant To Rule 54(B) Certification [DIRTT Environmental Solutions, Inc. and DIRTT Environmental Solutions, Ltd.], Filed July 16, 2021	346
	Exhibit A: Memorandum Decision and Order Granting [134] Motion to Dismiss First Amended Complaint as to Defendants Falkbuilt Ltd., Falkbuilt Inc. and Mogens Smed and Denying Plaintiffs’ Oral Motion to Amend	350
	Exhibit B: Memorandum Decision and Order Granting [168] Motion for Rule 54(B) Certification of Docket No. 164	355
183	Order from the Tenth Circuit Court of Appeals re: Notice of Appeal, Filed July 19, 2021	358

185	Amended Notice of Appeal Pursuant To Rule 54(B) Certification [DIRTT Environmental Solutions, Inc. and DIRTT Environmental Solutions, Ltd.], Filed July 16, 2021	359
	Exhibit A: Memorandum Decision and Order Granting [134] Motion to Dismiss First Amended Complaint as to Defendants Falkbuilt Ltd., Falkbuilt Inc. and Mogens Smed and Denying Plaintiffs' Oral Motion to Amend	363
	Exhibit B: Memorandum Decision and Order Granting [168] Motion for Rule 54(B) Certification of Docket No. 164	368
195	Memorandum Decision and Order Granting Motion to Stay, Filed August 23, 2021	371
REPORTER'S TRANSCRIPT		
157	Reporter's Transcript, United States District Court for the District of Utah, Before the Honorable David Barlow, Date of Proceedings: March 30, 2021 [Filed On: April 8, 2021]	376

THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

<p>DIRTT ENVIRONMENTAL SOLUTIONS, INC.,</p> <p>Plaintiff,</p> <p>v.</p> <p>LANCE HENDERSON, KRISTY HENDERSON, FALKBUILT LTD., FALK MOUNTAIN STATES, LLC,</p> <p>Defendants.</p>	<p>ORDER GRANTING [63] PLAINTIFF’S MOTION TO DISMISS FIRST AMENDED COUNTERCLAIM</p> <p>1:19-cv-00144-DBB-DBP</p> <p>District Judge David Barlow</p> <p>Magistrate Judge Dustin B. Pead</p>
<p>FALKBUILT LTD.,</p> <p>Counterclaimant,</p> <p>v.</p> <p>DIRTT ENVIRONMENTAL SOLUTIONS, INC.,</p> <p>Counterclaim Defendant.</p>	

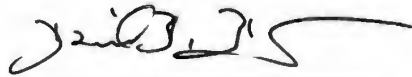
Before the court is Plaintiff and Counterclaim Defendant DIRTT Environmental Solutions, Inc.’s Motion to Dismiss First Amended Counterclaim.¹ The court considered the briefing, relevant law, and the parties’ oral argument. For the reasons stated on the record at the conclusion of the March 30, 2021 hearing on the motion, Plaintiff and Counterclaim Defendant’s

¹ ECF No. 63, filed April 1, 2020.

Motion to Dismiss First Amended Counterclaim is GRANTED. Defendant and Counterclaimant Falkbuilt Ltd.'s First Amended Counterclaim is DISMISSED WITHOUT PREJUDICE.

DATED this 30th day of March, 2021.

BY THE COURT:



David Barlow
United States District Judge

CHAD E. NYDEGGER (USB 9962)
cnydegger@wnlaw.com
WORKMAN NYDEGGER
60 East South Temple, Tenth Floor
Salt Lake City, Utah 84111
Telephone: (801) 533-9800
Facsimile: (801) 328-1707

JEFFREY J. MAYER (admitted *pro hac vice*)
Jeffrey.Mayer@akerman.com
CATHERINE A. MILLER (admitted *pro hac vice*)
Catherine.Miller@akerman.com
TIMOTHY K. SENDEK (admitted *pro hac vice*)
Tim.Sendek@akerman.com
AKERMAN LLP
71 S. Wacker Drive, 47th Floor
Chicago, Illinois 60606
Telephone: 312-634-5700
Facsimile: 312-424-1900

Attorneys for Plaintiff, DIRTT Environmental Solutions, Inc.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, NORTHERN DIVISION

<p>DIRTT ENVIRONMENTAL SOLUTIONS, INC.,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>LANCE HENDERSON, KRISTY HENDERSON, FALKBUILT LLC, FALKBUILT LTD. and FALK MOUNTAIN STATES, LLC,</p> <p style="text-align: center;">Defendants.</p>	<p>Civil Action No. 1:19-cv-00144</p> <p style="text-align: center;">PLAINTIFF’S MOTION TO DISMISS FIRST AMENDED COUNTERCLAIM</p> <p style="text-align: center;">Honorable David P. Barlow Magistrate Judge Dustin B. Pead</p>
---	---

TABLE OF CONTENTS

RELIEF SOUGHT AND GROUNDS FOR THE MOTION 1

ARGUMENT 1

I. INTRODUCTION 1

II. LEGAL STANDARD..... 3

III. CANADIAN LAW APPLIES TO THIS DISPUTE..... 4

 A. Canadian Law Applies to Falkbuilt’s Defamation Claim..... 5

 B. Canadian Law Also Applies to Falkbuilt’s Intentional Interference Claim
 9

IV. PURSUANT TO THE DOCTRINE OF *FORUM NON CONVENIENS*,
 FALKBUILT’S FIRST AMENDED COUNTERCLAIM SHOULD BE
 DISMISSED AND PURSUED BEFORE A CANADIAN COURT 10

V. IN THE ALTERNATIVE, FALKBUILT FAILS TO STATE A CLAIM FOR
 DEFAMATION WITH REGARD TO SEVERAL STATEMENTS
 IDENTIFIED IN ITS FIRST AMENDED COUNTERCLAIM 14

 A. Multiple Statements Contained in the Press Release are Not Actionable
 Under Canadian Law, or Any Law 15

 1. Falkbuilt Misleadingly Quotes Piecemeal Statements from the
 Press Release..... 15

 B. Several Statements from the Verified Complaint Are Also Not
 Actionable 18

 1. Statements Regarding Competition Are Not Defamatory 18

 2. Statements Related to Individuals’ Employment Are Not
 Defamatory 19

 3. Statements Regarding Lance Henderson’s Securities Fraud
 Convictions are a Matter for Which Judicial Notice Can be Taken
 20

VI. IN THE ALTERNATIVE, FALKBUILT FAILS TO STATE A CLAIM FOR
 INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS 22

A. Falkbuilt Cannot State a Claim for Intentional Interference Under Canadian Law 22

B. Falkbuilt’s Intentional Interference Claim Fails Under Any Legal System..... 23

VII. CONCLUSION..... 25

TABLE OF AUTHORITIES

Cases

1021018 Alberta, Ltd. v. Bazinet, 2015 ABQB 151 16

A.I. Enterprises Ltd. v. Bram Enterprises Ltd., 2014 SCC 12 22

Albers v. Bd. of Cty. Comm’rs of Jefferson Cty., 771 F.3d 697 (10th Cir. 2014)..... 4

Am. Nat’l Fire. Ins. Exchange v. Farmers Ins. Exchange, 927 P.2d 186 (Utah 1986)..... 5

Archangel Diamond Corp. Liquidating Trust v. OAO Lukoil, 812 F.3d 799 (10th Cir. 2016) 13

Ashcroft v. Iqbal, 556 U.S. 662 (2009)..... 3, 24

Chrysler Credit Corp v. Country Chrysler, Inc., 928 F.2d 1509 (10th Cir. 1991)..... 10

DeBry v. Godbe, 992 P.2d 979 (Utah 1999) 14

Eldridge v. Johndrow, 2015 UT 21, 345 P.3d 553 23

In re Ethicon, Inc., 2014 WL 346717 (S.D.W.V. Jan. 30, 2014) 12

Grant v. Torstar Corp., 2009 SCC 61 15

Guif Oil Corp. v. Gilbert, 330 U.S. 501 (1947)..... 10-11

Kansas Penn Gaming, LLC v. Collins, 656 F.3d 1210 (10th Cir. 2011) 4

Kay Kay Corp. v. Condo. Corp., No. 072 4807 2017 ABCA 335..... 21

Nunes v. Rushton, 299 F. Supp. 3d 1216 (D. Utah 2018)..... 5

O’Malley v. O’Callaghan, [1992] 89 DLR (4th) 577 (Alta QB)..... 15

Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981)..... 6, 10, 11

Rivendell Forest Prod., Ltd. v. Canadian Pac. Ltd., 2 F.3d 990 (10th Cir. 993) 10

Robbins v. Oklahoma ex rel Dept. of Human Servs., 519 F.3d 1242 (10th Cir. 2008)..... 3

Seattle-First Nat. Bank v. Carlstedt, 800 F.2d 1008 (10th Cir. 1986)..... 3

Sec. Sys., Inc. v. Alder Holdings, LLC, 2019 WL 4879424 (D. Utah Oct. 3, 2019)..... 6, 7

U.S. Aviation Underwriters, Inc. v. Pilatus Bus. Aircraft, Ltd., 582 F.3d 1131 (10th Cir. 2009) 6

Utah v. Lance Kent Henderson, Case # 021100948. 21

Waddoups v. Amalgamated Sugar Co., 54 P.3d 1054 (Utah 2002).....5, 6-7

Statutes and Other Authority

28 U.S.C. § 1404..... 1-

Federal Rules of Civil Procedure..... 1, 3, 25

Restatement (Second) Conflict of Laws5, 6, 7-8

Restatement (2d) Torts, §558 (1965).....14, 24

RSA 2000, c D-7..... 11

Plaintiff DIRTT Environmental Solutions Inc. (“DIRTT”), for its Motion to Dismiss Defendant Falkbuilt Ltd.’s (“Falkbuilt”) First Amended Counterclaim under the doctrine of *forum non conveniens* and pursuant to Federal Rule of Civil Procedure 12(b)(6), states:

RELIEF SOUGHT AND GROUNDS FOR THE MOTION

DIRTT moves the Court to dismiss the First Amended Counterclaim under the doctrine of *forum non conveniens* because both DIRTT and Falkbuilt are located in Canada, Falkbuilt’s alleged harm was suffered in Canada, and Canadian law applies to Falkbuilt’s claims. Alternatively, DIRTT moves the Court to dismiss Falkbuilt’s claims pursuant to Federal Rule of Civil Procedure 12(b)(6). Falkbuilt’s defamation claim fails because the allegedly defamatory statements are not actionable. Falkbuilt’s interference claim fails because Falkbuilt has not pleaded any conduct by DIRTT directed to a third party (as required by Canadian law), and has not pleaded any specific relationship with which DIRTT allegedly interfered, or any facts to demonstrate that DIRTT knew of the unidentified relationship (as required by Utah law).

ARGUMENT

I. INTRODUCTION

On February 27, 2020, DIRTT filed its Motion to Dismiss Falkbuilt Ltd.’s Counterclaim, arguing that Falkbuilt failed to meet federal pleading standards because: (1) its claim of multi-national, multi-state defamation lacked sufficient facts to determine which law applies, but it appeared that Canadian law controlled; and (2) its claim of intentional interference was too general to allow for evaluation, failing to even identify the relationship with which DIRTT allegedly interfered. (Dkt. #55). In the alternative, DIRTT moved to dismiss portions of Falkbuilt’s defamation claim on the basis that the statements alleged were not defamatory. (*Id.*).

In response, Falkbuilt filed its First Amended Counterclaim on March 18, 2020, purportedly to cure the deficiencies identified in DIRT T’s motion to dismiss. (Dkt. #62). The allegations of the First Amended Counterclaim fail to cure anything. The amended counterclaim still fails to identify the relationship with which DIRT T allegedly interfered, or how DIRT T purportedly knew about the unidentified relationship, dooming the cause of action to failure. And, despite its addition of the word “Utah” 91 times in the First Amended Counterclaim, Falkbuilt has failed to establish that Utah law applies. While Falkbuilt apparently believes that if it says something enough times it will make it true, its new substantive allegations only serve to bolster that Canadian law should apply to Falkbuilt’s claims, that this dispute belongs before a Canadian court, and that pursuant to the doctrine of *forum non conveniens*, it should be dismissed.

In Count I of the First Amended Counterclaim, Falkbuilt alleges (i) that the press release issued by DIRT T on December 11, 2019 (“Press Release”) contains defamatory statements and (ii) that DIRT T’s Verified Complaint, made accessible via a link in the Press Release, also contains purportedly defamatory allegations. In Count II, Falkbuilt alleges in a conclusory fashion that DIRT T must have known that Falkbuilt planned to close its first investment tranche on December 12, 2019, knew about Falkbuilt’s potential economic relationships with unidentified investors, customers, employees and dealers, and intentionally interfered with the closing and those relationships by issuing the Press Release one day before the scheduled closing. Yet, Falkbuilt admits that it has no facts to support this allegation and, flipping the rules of pleading on their head, seeks discovery to see if it can even allege this critical element of its claim. All of the critical elements of these claims, to the extent the First Amended Counterclaim includes facts, are in Canada and Alberta, Canada, is clearly the proper forum for this dispute.

If the Court does not agree that Falkbuilt’s claims belong before a Canadian court, DIRTT again moves in the alternative to dismiss portions of Count I on the following grounds: (1) two of the three allegedly defamatory Press Release statements are deceptively excerpted, with the full statements not adequately pled as defamatory; (2) several purportedly defamatory allegations in the Complaint merely allege that Falkbuilt is engaged in competition in the marketplace or simply state that employees left DIRTT for Falkbuilt, which no reasonable person would deem to defame Falkbuilt; and (3) several of the purportedly defamatory allegations in the Complaint constitute factual statements about Defendant Lance Henderson’s criminal record, which is a matter of public record and also not defamatory. These statements, as alleged, fail to meet the Canadian definition of defamation, or any legal system’s definition of defamation. DIRTT moves to dismiss Count II on the basis that Falkbuilt is unable to allege the elements of intentional interference.

II. LEGAL STANDARD

A claim is properly dismissed under Federal Rule of Civil Procedure 12(b)(6) if it fails to meet the pleading requirements of Federal Rule of Civil Procedure 8. *Seattle-First Nat. Bank v. Carlstedt*, 800 F.2d 1008, 1011 (10th Cir. 1986). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* at 678. The plaintiff bears the burden “to frame a complaint with enough factual matter (taken as true) to suggest that he or she is entitled to relief.” *Robbins v. Oklahoma ex rel Dept. of Human Servs.*, 519 F.3d 1242, 1247 (10th Cir. 2008).

All well-pleaded allegations are accepted as true and construed in the light most favorable to plaintiff. *Albers v. Bd. of Cty. Comm'rs of Jefferson Cty.*, 771 F.3d 697, 700 (10th Cir. 2014) (citation omitted). But, “a court should disregard all conclusory statements of law and consider whether the remaining specific factual allegations, if assumed to be true, plausibly suggest the defendant is liable.” *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011).

III. CANADIAN LAW APPLIES TO THIS DISPUTE

While Falkbuilt now includes the word “Utah” in its First Amended Counterclaim an additional 91 times, merely repeating the word over and over again does not mean the application of Utah law is proper. In fact, Falkbuilt’s substantive allegations demonstrate that Canadian law applies to its claims. Falkbuilt’s allegations involve a counterdefendant headquartered and doing business in Canada, that allegedly republished defamatory statements in Canada to multiple Canadian entities, a presumably Canadian investor (whose identity remains undisclosed in the amended counterclaim) with whom DIRTT supposedly interfered, and damages suffered in Canada, where investment funds were to have been deposited at a Canadian bank in a Canadian bank account held by Falkbuilt, a Canadian company headquartered and doing business in Canada.

Neither Falkbuilt nor DIRTT is domiciled in Utah. (Amd. Ctrclm. ¶¶ 1-2, Dkt. #62). Falkbuilt is incorporated under the laws of Alberta, Canada, maintains its headquarters and principal place of business in Calgary, Alberta and conducts business throughout Canada. (*Id.* at ¶ 1). Falkbuilt alleges that DIRTT’s headquarters and principal place of business are located in Calgary, Alberta, Canada and that DIRTT conducts business in Canada. (*Id.* at ¶ 2). The funds which Falkbuilt claims it lost based on DIRTT’s purported defamatory conduct were to be deposited into Falkbuilt’s bank account at Falkbuilt’s bank in Calgary, Alberta, Canada. (*Id.* at

¶ 8). Finally, Falkbuilt pleads that DIRTT published allegedly defamatory statements “throughout the United States, in Canada and throughout the world.” (*Id.* at ¶ 21). In support of this allegation, Falkbuilt identifies 24 websites that republished the Press Release, at least four of which are Canadian. (*Id.* at ¶ 23). It also alleges that multiple Canadian news channels discussed the Press Release during news broadcasts, and identifies multiple Canadian news organizations that followed up with articles of their own in response to the Press Release. (*Id.* at ¶¶ 25-26). Not a single Utah website, news channel or news organization is identified in the First Amended Counterclaim. Nor is a single Utah individual or Utah entity identified that the Press Release was published to, or that allegedly caused Falkbuilt harm as a result of the publication.

A. Canadian Law Applies to Falkbuilt’s Defamation Claim

Falkbuilt alleges that DIRTT republished its Press Release “throughout the United States, in Canada and throughout the world.” (Amd. Ctrclm. at ¶ 21, Dkt. #62). When multiple jurisdictions have an interest in applying their law to a claim, Utah courts must perform a choice-of-law analysis. *Am. Nat’l Fire. Ins. Exchange v. Farmers Ins. Exchange*, 927 P.2d 186, 188 (Utah 1986). Falkbuilt’s First Amended Counterclaim provides the Court with enough information to determine that Canadian law should apply to Falkbuilt’s claims.

In a choice-of-law analysis for defamation actions, Utah courts consider factors such as: (i) where the alleged defamatory publication occurred; (ii) where “all of the relevant conduct occurred”; (iii) where the party claiming that it has been defamed is domiciled; and (iv) where the relationship between the parties is centered. *Waddoups v. Amalgamated Sugar Co.*, 54 P.3d 1054, 1059-60 (Utah 2002); *Nunes v. Rushton*, 299 F. Supp. 3d 1216, 1224 (D. Utah 2018); Restatement (Second) Conflict of Laws §§ 149-50 (1971).

Courts “ordinarily must apply the choice-of-law rules of the State in which it sits.” *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 244 n. 8 (1981); *see also U.S. Aviation Underwriters, Inc. v. Pilatus Bus. Aircraft, Ltd.*, 582 F.3d 1131, 1143 (10th Cir. 2009) (same), *citing Anderson v. Commerce Const. Servs.*, 531 F.3d 1190, 1193 (10th Cir. 2008). Utah has adopted the “the most significant relationship” approach of Restatement (Second) Conflict of Laws § 145(a) (1971) to determine which substantive law will apply to a tort claim, including one for defamation and for intentional interference. *See Waddoups*, 54 P.3d at 1059; *Sec. Sys., Inc. v. Alder Holdings, LLC*, 2019 WL 4879424 at *3 (D. Utah Oct. 3, 2019). Based on the facts alleged, Utah’s choice-of-law rules mandate that Alberta, Canada’s defamation laws apply.

Falkbuilt’s First Amended Counterclaim mentions a number of U.S. cities, including Chicago, IL, San Francisco, CA and Portland, OR, but fails to establish that any of them actually played a role in this dispute. What it does conclusively allege, with facts that must be presumed as true, is that multiple Canadian news channels picked up and discussed DIRTT’s Press Release during news broadcasts and that multiple Canadian news organizations followed up with their own articles in response to DIRTT’s Press Release. (*Id.* at ¶¶ 25-26). Tellingly, not a single Utah television news channel or news organization is identified in the First Amended Counterclaim.

The First Amended Counterclaim also identifies at least four Canadian websites that republished the Press Release. (*Id.* at ¶ 23). Of the 24 total websites identified by Falkbuilt, it is also worth noting that while television stations in southwest Florida, Detroit, Michigan, and even Elmira, New York are listed, not a single website from Utah appears on the list. *Id.*

At the outset of any choice-of-law analysis, Utah courts must “first characterize the nature of the claim ... in order to identify an appropriate set of factors to determine which forum has the

most significant relationship to the cause of action.” *Waddoups*, 54 P.3d at 1059. The factors to help determine which State’s defamation law should apply are contained in the Second Restatement sections 149 (Defamation) and 150 (Multistate Defamation). *See Sec. Sys., Inc.*, 2019 WL 4879424 at *3 (applying section 149). Section 149 directs courts to apply the local law of the state where the allegedly defamatory statements occurred. *Id.* at *3.

Section 150 applies in situations involving an “aggregate communication” published to persons in two or more states. If applicable, section 150(3) contains a strong presumption that the most significant relationship to the claim will be the state “where the corporation [Falkbuilt], or other legal person, had its principal place of business at the time, if the matter complained of was published in that state.” DIRT’s Press Release, as an aggregate communication alleged to have been published “throughout the world”, leads to the strong presumption that Alberta’s defamation law should apply to the Counterclaim because Falkbuilt has its principal place of business in Calgary, Alberta and Falkbuilt alleges the Press Release was published in Canada to multiple news and media outlets. In this analysis, the fact that Utah might have been impacted is irrelevant, as a claim of multi-jurisdiction defamation includes as a premise that the alleged defamation circulated widely – here Falkbuilt alleges publication “throughout the world.” (Amd. Ctrclm. ¶ 21, Dkt. #62).

Based on its updated allegations, the First Amended Counterclaim confirms that no other jurisdiction has a more significant relationship to the claim, and thus a greater interest in applying its law, than Alberta. Section 150 favors applying the law of the allegedly defamed corporation’s principal place of business because a company’s “principal place of business is the place where its reputation will usually be most grievously affected.” Restatement (Second) Conflict of Laws § 150

cmt. f (1971). In other words, section 150 directs courts to apply the law of the jurisdiction where the allegedly defamed party may be most harmed by the defamatory communication.

Additionally, Falkbuilt alleges it suffered harm in Canada. The central harm asserted in the First Amended Counterclaim is that DIRTT purportedly interfered with an investment opportunity of over \$3 million. (Amd. Ctrclm. ¶ 32, Dkt. #62). While the “significant bank” remains unidentified even in the First Amended Counterclaim, Falkbuilt’s new allegations establish that the investment was scheduled to be deposited in Falkbuilt’s Canadian bank account at Falkbuilt’s bank in Calgary, Alberta, Canada. (*Id.* at ¶ 8). Falkbuilt also alleges harm to its reputation, identifying multiple Canadian websites, television news channels and news organizations that discussed the Press Release. (*Id.* at ¶¶ 23-26). It has failed to identify a single Utah website, television station or news organization that discussed the Press Release, or a single individual or entity in Utah that read or discussed the Press Release, subsequently causing harm to Falkbuilt.

This choice of law analysis is particularly important with respect to defamation because, despite a general common floor with respect to what constitutes a defamatory statement, defamation laws differ widely across jurisdictions in terms of elements and available privileges, defenses and exceptions thereto. Indeed, entire treatises are devoted to the developing body of defamation law, complete with annotations illustrating the varying treatments of privileges and other aspects of the tort in different jurisdictions. *E.g.*, Elder, David A., DEFAMATION: A LAWYER’S GUIDE (Clark Boardman Callaghan 2019). In today’s world, these issues are even more complex as statements cross international borders and are republished by agencies in the United States or other countries, which Falkbuilt alleges here. Moreover, given that Falkbuilt cites the involvement of journalists, the claim may implicate constitutional concerns in the United States and similar

laws in other countries. In order for the Court to evaluate a motion to dismiss, to guide discovery, and to determine what statements, if any, raise factual disputes, it must determine what law applies. What becomes clear from applying Utah’s conflict of laws analysis to the First Amended Counterclaim is that not only does Canadian law apply, but also that Utah has perhaps the *least* significant relationship to Falkbuilt’s defamation claim.

B. Canadian Law Also Applies to Falkbuilt’s Intentional Interference Claim

Using the same choice of law principles discussed above, the allegations of Falkbuilt’s First Amended Counterclaim demonstrate that Canadian law also applies to Falkbuilt’s intentional interference claim. For purposes of this claim, widespread dispersal of the statements is irrelevant. Falkbuilt’s allegations make clear that the only place that matters is Canada.

Here, DIRTT is alleged to have interfered with the “Planned Closing” of an investment in Falkbuilt that was to have funds deposited in Falkbuilt’s Canadian bank account at a bank in Canada. (Amd. Ctrclm. at ¶ 32, Dkt. #62). The First Amended Counterclaim alleges that the Press Release that supposedly caused the interference was published and discussed by numerous Canadian news channels, news organizations and websites. (*Id.* at ¶¶ 23-26). Not a single Utah entity is identified. Falkbuilt and DIRTT are both alleged to be Canadian companies, headquartered and doing business in Canada. (*Id.* at ¶¶ 1-2).

These allegations show that the injury about which Falkbuilt complains occurred in Canada; that the conduct causing the injury happened in Canada; that both Falkbuilt and DIRTT are domiciled in Canada; and that the parties’ relationship is centered in Canada. There can be no doubt that Canadian law applies to Falkbuilt’s intentional interference claim.

IV. PURSUANT TO THE DOCTRINE OF *FORUM NON CONVENIENS*, FALKBUILT'S FIRST AMENDED COUNTERCLAIM SHOULD BE DISMISSED AND PURSUED BEFORE A CANADIAN COURT

Having determined that Canadian law should apply to a dispute involving two companies alleged by Falkbuilt to be headquartered and doing business in Canada, and that the factual center of the claim is Alberta, the Court should dismiss the First Amended Counterclaim pursuant to the doctrine of *forum non conveniens*. Under 28 U.S.C. § 1404, this Court has discretion to change venue “[f]or the convenience of parties and witnesses, [and] in the interest of justice.” 28 U.S.C. § 1404(a). District courts have broad discretion in determining whether to grant motions to transfer venue. *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1515 (10th Cir. 1991). “[T]he central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient.” *Piper Aircraft*, 454 U.S. at 256. There are two threshold questions: first, is there an adequate alternative forum in which the defendant is amenable to process, *id.* at 254 n. 22, and second, does foreign law apply. *Rivendell Forest Prod., Ltd. v. Canadian Pac. Ltd.*, 2 F.3d 990, 994 (10th Cir. 1993). If the answer to both questions is yes, the court goes on to weigh the private and public interests bearing on the *forum non conveniens* decision.

The private interest factors to be considered are: (1) the relative ease of access to sources of proof; (2) availability of compulsory process for compelling attendance of witnesses; (3) cost of obtaining attendance of willing non-party witnesses; (4) possibility of a view of the premises, if appropriate; and (5) all other practical problems that make trial of the case easy, expeditious and inexpensive. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). The public interest factors include: (1) administrative difficulties of courts with congested dockets which can be caused by cases not being filed at their place of origin; (2) the burden of jury duty on members of a

community with no connection to the litigation; (3) the local interest in having localized controversies decided at home; and (4) the appropriateness of having diversity cases tried in a forum that is familiar with the governing law. *See id.* at 508-09.

Normally there is a strong presumption in favor of hearing the case in the plaintiff's chosen forum. That presumption is overcome "only when the private and public interest factors clearly point towards trial in the alternative forum." *See Piper*, 454 U.S. at 255. When the plaintiff is foreign, its choice of forum is entitled to less deference and the private and public interest factors need not so heavily favor the alternate forum. *See id.* at 255-56.

Here, DIRTT has demonstrated, based on the First Amended Counterclaim, that Falkbuilt's claims are centered in Canada and that Canadian law applies. The second threshold question requires DIRTT to demonstrate an adequate alternative forum in which it is amenable to service of process. That alternate forum is Calgary, Alberta, Canada, where DIRTT is amenable to service of process. Based on Falkbuilt's allegations, both Falkbuilt and DIRTT are headquartered there and conduct business there, the Press Release was published there, and Falkbuilt's primary damages, allegedly in excess of \$3 million, were suffered there. Alberta has enacted a defamation act that would apply to this dispute, RSA 2000, c D-7, and a Canadian court is certainly competent and adequate to hear both Falkbuilt's defamation claim and its intentional interference claim.

Having satisfied the threshold questions, DIRTT turns to an analysis of the private interest factors, all of which weigh in favor of shifting the First Amended Counterclaim to a Canadian forum. First, the likely sources of proof are located in Canada, as both DIRTT and Falkbuilt are headquartered and do business there, with critical witnesses and documents located in Canada. Just as importantly, the nature of a defamation action is that third-party testimony is critical. In order

to find out the circumstances surrounding the alleged injury, third parties must be compelled to testify, Canadian third parties. Based on the First Amended Counterclaim, not a single witness within this Court's subpoena power has information regarding the claim.

Documents relevant to the parties' arguments will be located on the companies' servers in those Canadian locations, and any physical documents or other evidence will also most likely be found in Canada. Second, only a Canadian court will have the power to compel the attendance of witnesses, the majority of whom will almost certainly be Canadian. A number of Falkbuilt employees could foreseeably be called as witnesses, in addition to the Company's founder, Mogens Smed. DIRT employees could also likely be called. All of these individuals reside and work in Canada. A Canadian forum would certainly be less costly and time-consuming than a scenario in which a U.S. court is required to compel the attendance of several Canadian witnesses. *See, e.g., In re Ethicon, Inc.*, 2014 WL 346717, *5 (S.D.W.V. Jan. 30, 2014) (analyzing process of a U.S. court compelling attendance of Canadian witnesses and stating "[The court's] review of Canada's letter rogatory process reveals that it is time-consuming, expensive, and burdensome.") (citations omitted). Similarly, the cost of obtaining the attendance of willing non-party witnesses would certainly be less in Canada, as these witnesses are much more likely to reside there, minimizing travel costs significantly in comparison to an action in the United States. Finally, considerations of ease, timing, and cost of trial favor a Canadian forum by a wide margin, as the parties, their employees, and the relevant materials and physical locations are readily accessible in Canada.

The public factors commonly considered in the *forum non conveniens* analysis also favor a Canadian forum. This Court, like all U.S. federal trial courts, has crowded civil and criminal

dockets which would be unnecessarily clogged if, in addition to actions properly connected to Utah, it were forced to hear claims not filed in their logical place of origin.¹ The Counterclaim's sole tether to this jurisdiction is the filing of the original Complaint in Utah, a complaint focused on the United States market and involving specific acts within this jurisdiction. All other factors relevant to the First Amended Counterclaim are rooted firmly in Canada. Although this Court could certainly familiarize itself with the relevant provisions of Canadian law, it would be more efficient for a Canadian court to apply the laws of its own country. Further, it would be unfair to burden citizens of Utah with serving as jurors in a purely Canadian dispute. Asking residents of Alberta to serve as jurors would be a much more logical proposition, as they live and work in the community where the parties are headquartered and where the damage allegedly occurred.

There also exists a great local interest in Alberta adjudicating a dispute between two businesses headquartered there where the alleged injury was sustained there. There is no such local interest in Utah. *See, e.g., Archangel Diamond Corp. Liquidating Trust v. OAO Lukoil*, 812 F.3d 799, 808-809 (10th Cir. 2016) (upholding district court's dismissal on *forum non conveniens* grounds when "the dispute has much closer connections and greater interest to Russia than to the

¹ A rough comparison of the relative docket congestion can be drawn from the following: according to Canada's national statistics office, Statistics Canada, 75% of civil cases filed in Alberta in 2017-18 reached a first disposition in less than six months. (A "disposition" is a court event that disposes of part or all of the civil case, including settlement, consent judgment and judgment). <https://www150.statcan.gc.ca/t1/tb11/en/tv.action?pid=3510011601&pickMembers%5B0%5D=1.5&pickMembers%5B1%5D=2.1&pickMembers%5B2%5D=3.1> (last accessed 3/26/20). By contrast, according to the Administrative Office of the United States Courts, the median time from filing to disposition of a civil case in this Court in 2018 was 9.7 months. <https://www.uscourts.gov/statistics/table/c-5/statistical-tables-federal-judiciary/2018/12/31> (last accessed 3/26/20).

United States”, the case was based upon conduct of Russian companies doing business in Russia, Russian law applied, and, accordingly, “[t]hese issues are ones in which Russia has a strong interest in resolving by its courts.”) (internal citations omitted). For the same reasons, it is appropriate for this diversity case to be heard in Alberta, a forum that is intimately familiar with Canadian law.

The public and private factors weigh heavily in favor of dismissing the Amended Counterclaim. A viable alternative forum exists in Canada, which has a much greater interest in adjudicating a dispute between companies headquartered and doing business there. Accordingly, the First Amended Counterclaim should be dismissed under the doctrine of *forum non conveniens*.

V. IN THE ALTERNATIVE, FALKBUILT FAILS TO STATE A CLAIM FOR DEFAMATION WITH REGARD TO SEVERAL STATEMENTS IDENTIFIED IN ITS FIRST AMENDED COUNTERCLAIM

If the Court is not inclined to dismiss Count I in its entirety pursuant to the doctrine of *forum non conveniens*, DIRTT moves in the alternative to dismiss numerous statements enumerated in Falkbuilt’s defamation claim on the basis that Falkbuilt fails to state a claim with respect to these statements under the defamation law of Canada, or any other jurisdiction.² With respect to the statements discussed below, Falkbuilt cannot make even a most basic showing that the statements tended to lower Falkbuilt’s reputation in the eyes of a reasonable person.

² Most U.S. jurisdictions rely upon the Restatement (Second) of Torts elements: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or special harm caused by the publication (Restatement (2d) Torts, §558 (1965)). In Utah, a plaintiff must allege: (1) statements were published by defendant concerning plaintiff; (2) the statements were false; (3) the statements were not subject to privilege(s); (4) the statements were published with the requisite degree of fault; and (5) the statements resulted in damages. *DeBry v. Godbe*, 992 P.2d 979, 982 (Utah 1999). Thus, even if the Court looked to U.S. law, these statements fail to state a cause of action.

A. Multiple Statements Contained in the Press Release are Not Actionable Under Canadian Law, or Any Law

Under Canadian law, a plaintiff in a defamation action is required to prove three things: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. *Grant v. Torstar Corp.*, 2009 SCC 61, para 28.³ With respect to the majority of statements Falkbuilt claims are defamatory, no claim for defamation can lie.

1. Falkbuilt Misleadingly Quotes Piecemeal Statements from the Press Release

Throughout its First Amended Counterclaim, Falkbuilt selectively quotes DIRTT's statements and allegations, using ellipses and citing incomplete sentences, in an attempt to fit these passages into its narrative of defamation. Falkbuilt takes this approach with two of the three allegedly defamatory statements contained in the Press Release, neither of which is defamatory when viewed in context and as a complete sentence. These snippets cannot support a claim.

Under Canadian law, the allegedly defamatory communications are to be viewed in context. "The danger to be avoided is the dissection of an overall inoffensive whole into incriminating fragments . . . The standard is one of common sense; the authorities are clear that words which have harmless meanings will not be unreasonably interpreted." *O'Malley v. O'Callaghan*, [1992] 89 DLR (4th) 577 (Alta QB) at para 15. Falkbuilt's subjective interpretation is irrelevant; the question to be asked is how a reasonable person would construe the words. *Id.* In *Brown, The Law of Defamation in Canada* (1987), vol. 1, at p. 124, Brown describes the contextual

³ Copies of all Canadian cases cited are attached as Group Exhibit 1.

approach to interpreting purportedly defamatory material: In determining the meaning to be attributed to the words, the court will take into consideration all the circumstances of the case, including any reasonable implication the words may bear, the context in which the words were spoken, and the audience to whom they were presented. *Id.*

Defamation must also be pled with particularity. The exact nature of the defamation must be particularized, including the words alleged to have been defamatory. *1021018 Alberta, Ltd. v. Bazinet*, 2015 ABQB 151 at para 49. Where the precise words are material:

It is not sufficient merely to give the purport of the words. Defamation actions are one of the few forms of actions where strictness in pleadings is still insisted on. In a slander action the exact words alleged to have been uttered must be pleaded. It is the utterance of the words which give rise to the action. It is the utterance of the words which is the foundation of the action.

Id. at para 54, citing *Olsen v. St. Martin* (1982) 32 AR 51 at para 10, 11 ACWS (2d) 412 (ABQB).

Falkbuilt initially claims that the statement, “[D]efendants [are] . . . misappropriating DIRTT’s confidential information, trade secrets, business intelligence and customer information,” is false. (Amd. Ctrclm. ¶ 34, Dkt. #62). The statement actually reads, “This action seeks to restrain the defendants from misappropriating DIRTT’s confidential information, trade secrets, business intelligence and customer information, and using that information to advance Falkbuilt’s U.S. businesses to the detriment of DIRTT.” (Press Release, Ex. D to Amd. Ctrclm.). The actual statement is quite different from Falkbuilt’s version, which is selectively quoted in order to make it appear more inflammatory. By taking this piecemeal approach, Falkbuilt not only improperly twists the words to say something they do not, but also ignores that the law prohibits dissecting DIRTT’s statement to try and arrive at a defamatory statement from an otherwise innocuous one.

Falkbuilt has distorted DIRTT’s words through ellipses and partial quotation to make it appear that DIRTT affirmatively stated in the Press Release that Falkbuilt was engaged in misappropriation, when the sentence merely states DIRTT’s subjective purpose in filing suit. This inaccurate depiction of the statement fails to meet the specific pleading standard for defamation. Further, the statement as actually written merely characterizes DIRTT’s lawsuit, and is not capable of damaging Falkbuilt’s business reputation.

Falkbuilt’s second allegedly defamatory statement from the Press Release fares no better. It not only ignores the words that come after the purportedly defamatory phrase, but also fails entirely to indicate that there are additional words that precede the phrase. According to Falkbuilt, the false statement of fact is “[T]hese efforts to interfere with our Company” (Amd. Ctrclm. ¶ 34, Dkt. #62). DIRTT’s actual statement in the Press Release reads, “While we do not believe these efforts to interfere with our Company have had a material impact on our financial performance to date, such activity cannot be overlooked.” (Press Release, Ex. D to Amd. Ctrclm.). Again, Falkbuilt’s allegation takes DIRTT’s statement out of context and fails to identify a statement with “the exact words alleged to have been uttered”. Falkbuilt entirely changes the context and meaning of the statement through improper selective quotation. The result is a nonsensical fragment that fails to meet the specific pleading standard for defamation and does not call Falkbuilt’s business reputation into question. Further, a reasonable person would not attribute a defamatory meaning to either the excerpted or full statement. Both of these Press Release statements should be dismissed.

B. Several Statements from the Verified Complaint Are Also Not Actionable

Falkbuilt goes on to allege that several statements from DIRTT’s Verified Complaint are also defamatory. Many of these allegations suffer from the same problems as the Press Release statements, either mischaracterizing what DIRTT actually alleges in the Complaint or constituting statements that are in and of themselves incapable of ever being considered defamatory.

1. Statements Regarding Competition Are Not Defamatory

The first type of statement Falkbuilt alleges is defamatory relates to Falkbuilt competing against DIRTT. Merely stating that Falkbuilt intends to compete with DIRTT, or is competing with DIRTT, fails to rise to the level of defamation. The statements at issue are as follows, none of which has been quoted in its entirety and as it actually appears in DIRTT’s Complaint:

- “The defendants have ‘the aim of setting up a competing business’” (Compl. p. 2)
- “Falkbuilt competes in the same general market as DIRTT” (*Id.* at ¶ 19)
- “Falkbuilt is bidding on the same projects as DIRTT and contacting DIRTT’s customers and prospective customers” (*Id.* at ¶ 28)
- “Falkbuilt is directly competing with DIRTT” (*Id.* at ¶ 27)
- “Falk Mountain States was intended to be, and is an affiliate of Falkbuilt, a direct competitor of DIRTT set up by former DIRTT employees” (*Id.* at ¶ 60)
- “Falkbuilt’s webpages and designs also mimic DIRTT’s appearance” (*Id.* at ¶ 19)

(*See* Amd. Ctrclm. ¶ 37, Dkt. #62).

None of these “statements” claim that Falkbuilt is doing anything wrong. A statement that a company intends to compete in the marketplace or competes in the same general market as another business does not suggest anything untoward about that company, its integrity, or its ability to engage in its chosen field. Even if these were, as Falkbuilt alleges, “false statements of fact,” a

statement that a business is competitive cannot form the basis of a defamation claim, as a reasonable person would not interpret it as damaging to Falkbuilt’s business reputation.

Moreover, all of the “statements” are nothing more than piecemeal phrases excerpted from the Complaint in such a way as to try to impute a defamatory meaning. For example, the claim that “Falkbuilt competes in the same general market as DIRTT,” is actually part of this sentence:

As can be seen from Falkbuilt’s website, (www.falkbuilt.com) (advertising interior component construction for healthcare, commercial and office, and education) Falkbuilt competes in the same general market as DIRTT (www.dirtt.com) (advertising projects in education, healthcare, office space, residential, government, and hospitality).

(Dkt. 2 at ¶ 19). When viewed in its entirety, as the law requires, there can be no doubt that this statement is not defamatory. Indeed, a reasonable reader could simply access the parties’ websites, which are clearly referenced, and draw his or her own conclusion. Nor are any of the other statements addressed above defamatory, either.

2. Statements Related to Individuals’ Employment Are Not Defamatory

Falkbuilt also identifies as defamatory a number of statements in the Complaint discussing individuals’ employment. The statements are as follows:

- “Mr. Henderson works for Falkbuilt, Ltd.” (Compl. at ¶ 24)
- “Ms. Buczynski started working on behalf of Falkbuilt immediately following her departure from DIRTT.” (*Id.* at ¶ 74)
- “Ms. Englebert left DIRTT on December 31, 2018 and subsequently went to work for Falkbuilt” (*Id.* at ¶ 78(a))
- “Ms. Shadow left DIRTT’s employ on January 31, 2019 and subsequently went to work for Falkbuilt” (*Id.* at ¶ 78(c))
- “Mr. Weeks left DIRTT on Feb. 28, 2019 and went to work for Mr. Smed at Falkbuilt” (*Id.* at ¶ 79)

- “Ms. Schoning now works for Falkbuilt.” (*Id.* at ¶ 80)

(*See* Amd. Ctrclm. ¶ 37, Dkt. #62).

Even accepting as true Falkbuilt’s allegation that these statements are false, the statements are not capable of being defamatory. A statement concerning when an employee left one company and that he or she started working for another company does not call into question the latter company’s business reputation.

3. Statements Regarding Lance Henderson’s Securities Fraud Convictions are a Matter for Which Judicial Notice Can be Taken

Falkbuilt finally claims that statements regarding Lance Henderson’s securities fraud convictions are defamatory. These statements, however, are true and ones for which the Court can take judicial notice. The alleged defamatory statements, many of which are presented in piecemeal fashion, are as follows:

- “Mr. Henderson’s 2003 felony securities fraud convictions” (Compl. at ¶ 35)
- “Mr. Henderson’s crimes were quite serious. According to press accounts of his sentencing, he pled guilty to a number of felony counts involving his stealing between \$6 million and \$8 million from investors in fraudulent business ventures, ultimately serving time in prison based on his convictions” (*Id.* at ¶ 36)
- “Press reports of Mr. Henderson’s sentencing hearing note that over 64 known victims, many of them senior citizens, lost their life savings and retirement pensions to Mr. Henderson’s fraudulent scheme. Mr. Henderson was ordered to repay those funds.” (*Id.* at ¶ 37)
- “Mr. Henderson’s prior criminal convictions . . .” (*Id.* at ¶ 41)
- “While Mr. Smed was aware of these convictions, while acting as DIRTT’s CEO, he nonetheless regularly supported Mr. Henderson in his role at DIRTT” (*Id.* at ¶ 38)

(*See* Amd. Ctrclm. ¶ 40, Dkt. #62).

These statements, based upon public documents of which the Court can take judicial notice, are true. The first statement actually reads in its entirety, “In May 2019, DIRTT’s Human Resources department received an administrative garnishment order from the State of Utah for \$11.3 million, which DIRTT learned was related to Mr. Henderson’s 2003 felony securities fraud convictions. (Exhibit C).” (Compl. at ¶35, Dkt. #2). This sentence is a statement of fact, supported by an Administrative Garnishment Order from the Office of State Debt Collection in *State of Utah v. Lance Kent Henderson, Defendant (“Judgment Debtor”) and DIRTT Environmental Solutions, Inc., Garnishee*, Case # 021100948. (Dkt. #2-3). The Court may take judicial notice of this state-issued public document, as well as the pleadings and orders issued in Mr. Henderson’s criminal case, in which he indisputably pled guilty to multiple felony securities violations. Under Canadian law, much like that of the U.S., a court may take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy. *Kay Kay Corp. v. Condo. Corp.*, No. 072 4807 2017 ABCA 335, at para. 17.

With respect to the last statement identified, and with respect to his criminal record in general, Lance Henderson (through his counsel) admits these allegations. He admits DIRTT received a garnishment order from the State. (Dkt. #43 at ¶ 35). He admits that he pled guilty to felony counts and served prison time. (*Id.* at ¶ 36). He admits he was ordered to pay restitution. (*Id.* at ¶ 37). And, he admits that Smed was aware of his convictions and supported him in his role at DIRTT. (*Id.* at ¶ 38).

It also bears noting that none of these statements make any reference to Falkbuilt, Falkbuilt has denied that Lance Henderson works for it, and none of the citations to press accounts of Mr. Henderson’s crimes and sentencing refer to Falkbuilt. In the mind of a reasonable person, without making any reference to Falkbuilt at all, it cannot be the case that these statements are either about Falkbuilt or would diminish Falkbuilt’s business reputation in any way. These claims should be dismissed.

VI. IN THE ALTERNATIVE, FALKBUILT FAILS TO STATE A CLAIM FOR INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS

Even if the Court does not dismiss Falkbuilt’s amended claim for intentional interference on *forum non conveniens* grounds, Falkbuilt’s First Amended Counterclaim does nothing to remedy the fundamental flaws in this claim. While Falkbuilt adds some allegations and slightly revises others, the changes still fail to amount to a viable claim that DIRTT intentionally interfered with Falkbuilt’s economic relations.

A. Falkbuilt Cannot State a Claim for Intentional Interference Under Canadian Law

Under Canadian law, Falkbuilt has no cause of action against DIRTT for intentional interference with economic relations. As recently confirmed by the Supreme Court of Canada in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, para 5, the tort of “interference with economic relations” (also referred to as “causing loss by unlawful means”) requires that the defendant’s alleged unlawful conduct give rise to a cause of action on the part of a third party. In other words, the defendant must intend to cause economic harm to the plaintiff by directing unlawful conduct at a third party. Falkbuilt has not alleged these elements here. Rather, it alleges

that DIRTT engaged in conduct that defamed *Falkbuilt*, not a third party, and that this purported defamation interfered with Falkbuilt’s economic relations with an unidentified third party.

B. Falkbuilt’s Intentional Interference Claim Fails Under Any Legal System

Even if Canadian law does not apply, Falkbuilt’s cause of action for intentional interference with economic relations still fails under any legal system’s standard because Falkbuilt has neither alleged the identity of the party with whom it had an economic relationship nor that DIRTT knew about this relationship.⁴

Falkbuilt revised its allegation that DIRTT somehow interfered with a potential investment from a “substantial investment banker” (Ctrclm. at ¶ 20) to refer instead to a “substantial investment *bank*” that purportedly dropped out of the “Planned Closing and proposed transactions of over \$3,000,000 USD”. (Amd. Ctrclm. at ¶ 32) (emphasis added). This edit is functionally meaningless, though, because Falkbuilt still fails to allege the identity of the bank, where it is located, or how or where DIRTT supposedly learned of the timing of Falkbuilt’s closing. It is also not clear from this revised allegation if the “substantial investment bank” proposed to invest \$3,000,000 USD itself, or whether it pulled out of a \$3,000,000 USD pool of proposed transactions.

As to how DIRTT supposedly learned of this alleged economic relationship, the revised allegation, still pled on information and belief, states that “DIRTT *could have learned* of such information, for example, secondhand from one of its own investors, who also *may have been* a

⁴ As an example of how states define this tort, in Utah the elements are: “(1) the defendant intentionally interfered with the plaintiff’s potential economic relations; (2) by improper means; (3) causing injury to the plaintiff.” *Eldridge v. Johndrow*, 2015 UT 21, ¶70, 345 P.3d 553, 565.

potential investor in Falkbuilt and who inappropriately leaked the information.” (Amd. Ctrclm. at ¶ 10) (emphasis added). Rather than serving to clarify the cause of action, the First Amended Counterclaim instead only adds more speculation, claiming that DIRTT “could have learned” of the Planned Closing from some unidentified DIRTT investor – who may not even exist – who “may have” also been a “potential” investor in Falkbuilt. Falkbuilt’s inability to even identify its own potential investors makes this already speculative claim even less credible.

Falkbuilt also fails to allege intent on the part of DIRTT. The word “intent” denotes that the actor desires to cause the consequences of his act or believes that the consequences are substantially certain to result from it. (Restatement (2d) of Torts § 8A (1965).) Falkbuilt merely alleges that DIRTT “could have learned” of the Planned Closing and “planned to interfere with and scuttle” it by filing the Complaint and “disseminating it on the internet and to numerous media outlets just before the Planned Closing.” (Amd. Ctrclm. at ¶ 10). To form intent to “scuttle the Planned Closing,” DIRTT would have had to know about it. Yet the only allegations regarding DIRTT’s supposed knowledge remain incredibly vague and speculative. This is just the type of conclusory statement that, according to *Iqbal* and its progeny, cannot constitute a proper allegation of fact: “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678. Falkbuilt cannot avoid its failure to adequately plead its causes of action by claiming that further discovery will yield the key details. Such a method of pleading is the tail wagging the dog: Falkbuilt cannot throw a threadbare pleading at the wall and hope that it sticks. Falkbuilt’s professed need for “further investigation and discovery” (Amd. Ctrclm. at ¶ 10, Dkt. #62) is an admission that it has not pled, and cannot plead, the requisite elements of its claims against DIRTT, and the First Amended Counterclaim should be dismissed.

The only prospective relationship partner that Falkbuilt even mentions is “a substantial investment bank.” (Amd. Ctrclm. at ¶ 32).⁵ Nowhere is this investment bank identified, nor is there any specific allegation that this unidentified bank was actually committed to investing \$3,000,000, or any other amount. This vague statement is not a specific allegation of prospective economic advantage sufficient to satisfy Fed.R.Civ.P. 8. Nor is there any allegation that DIRTT knew of the existence, much less the identity (which Falkbuilt still fails to allege), of this bank.

Falkbuilt has failed to allege (i) how DIRTT knew about the financing round and its closing date, and (ii) how DIRTT knew of the potential economic relationship Falkbuilt might have had with the unidentified “substantial investment bank.” Having failed to allege any intentional interference with Falkbuilt’s prospective economic relations, Count II should be dismissed.

VII. CONCLUSION

DIRTT respectfully requests that the Court enter an order dismissing the entire Counterclaim under the doctrine of *forum non conveniens* or, in the alternative, dismissing with prejudice the allegations from Count I discussed in Section IV above and dismissing with prejudice Count II in its entirety, and granting DIRTT such other relief as the Court deems proper.

⁵ Falkbuilt also refers to “numerous customers and potential customers of Falkbuilt . . . who have chosen not to conduct business with Falkbuilt” and “some potential employees” who have not accepted employment offers with Falkbuilt. (Amd. Ctrclm. at ¶¶ 46-47). None of these customers or employees are identified, nor is it alleged that DIRTT knew of these customers or employees. These allegations cannot state or support a claim for intentional interference.

Dated this 1st day of April, 2020

DIRTT ENVIRONMENTAL SOLUTIONS, INC.,
Plaintiff

By: /s/ Chad E. Nydegger
One of Its Attorneys

Chad E. Nydegger
Workman Nydegger
60 East South Temple, Suite 1000
Salt Lake City, Utah 84111
cnydegger@wnlaw.com

Jeffrey J. Mayer (pro hac vice)
Catherine A. Miller (pro hac vice)
Akerman LLP
71 S. Wacker Drive, Suite 4700
Chicago, IL 60606
jeffrey.mayer@akerman.com
catherine.miller@akerman.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2020, a true and correct copy of the foregoing PLAINTIFF'S MOTION TO DISMISS FIRST AMENDED COUNTERCLAIM was served through the court's e filing system which caused notice of filing to be sent to all counsel of record.

/s/ Chad E. Nydegger

CHAD E. NYDEGGER (USB 9962)
cnydegger@wnlaw.com
WORKMAN NYDEGGER
60 East South Temple, Tenth Floor
Salt Lake City, Utah 84111
Telephone: (801) 533-9800

JEFFREY J. MAYER (admitted *pro hac vice*)
Jeffrey.Mayer@akerman.com
CATHERINE A. MILLER (admitted *pro hac vice*)
Catherine.Miller@akerman.com
AKERMAN LLP
71 S. Wacker Drive, 47th Floor
Chicago, Illinois 60606
Telephone: 312-634-5700

Attorneys for Plaintiffs, DIRT Environmental Solutions, Inc. and DIRT Environmental Solutions, Ltd.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, NORTHERN DIVISION**

DIRTT ENVIRONMENTAL
SOLUTIONS, INC. and DIRTT
ENVIRONMENTAL SYSTEMS,
LTD.,

Plaintiffs,

v.

LANCE HENDERSON, KRISTY
HENDERSON, and FALK
MOUNTAIN STATES, LLC,

Defendants.

Case No: 1:19-cv-00144-DBB-
DBP

NOTICE OF APPEAL

Honorable David B. Barlow
Magistrate Judge Dustin B. Pead

Plaintiff DIRTT Environmental Systems, Inc., pursuant to 28 U.S.C. § 1292(a)(1), hereby gives notice that it is appealing to the Tenth Circuit Court of Appeals the Memorandum Decision and Order granting Motion to Dismiss First Amended Complaint as to Defendants Falkbuilt, Ltd., Falkbuilt, Inc. and Mogens Smed and Denying Plaintiffs' Oral Motion to Amend, which was entered in this case on May 21, 2021 (attached hereto as "Exhibit A"). Plaintiff appeals as of right as the ruling dissolved a previously entered injunction binding Falkbuilt, Inc. and Falkbuilt, Ltd. To the fullest extent authorized by 28 U.S.C. § 1292(a)(1), Plaintiff appeals the entirety of that order.

A Docketing Statement and a request that the Clerk of Courts prepare and assemble the documents constituting the record on appeal will be filed within 14 days of the filing of this Notice.

June 16, 2021

Respectfully Submitted,

WORKMAN NYDEGGER:

By: /s/ Chad E. Nydegger
Chad E. Nydegger

AKERMAN LLP:

By: /s/ Jeffrey J. Mayer
Jeffrey J. Mayer

Attorneys for Plaintiffs

CHAD E. NYDEGGER (USB 9962)
cnydegger@wnlaw.com
WORKMAN NYDEGGER
60 East South Temple, Tenth Floor
Salt Lake City, Utah 84111
Telephone: (801) 533-9800

JEFFREY J. MAYER (*admitted pro hac vice*)
Jeffrey.Mayer@akerman.com
CATHERINE A. MILLER (*admitted pro hac vice*)
Catherine.Miller@akerman.com
AKERMAN LLP
71 S. Wacker Drive, 47th Floor
Chicago, Illinois 60606
Telephone: 312-634-5700

Attorneys for Plaintiffs, DIRTT Environmental Solutions, Inc. and DIRTT Environmental Solutions, Ltd.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, NORTHERN DIVISION**

DIRTT ENVIRONMENTAL
SOLUTIONS, INC. and DIRTT
ENVIRONMENTAL SYSTEMS,
LTD.,

Plaintiffs,

v.

LANCE HENDERSON, KRISTY
HENDERSON, and FALK
MOUNTAIN STATES, LLC,

Defendants.

Case No: 1:19-cv-00144-DBB-
DBP

**NOTICE OF APPEAL PURSUANT
TO RULE 54(B) CERTIFICATION**

Honorable David B. Barlow
Magistrate Judge Dustin B. Pead

Plaintiff DIRTT Environmental Systems, Inc. (“Plaintiff”), hereby gives notice that it is appealing to the Tenth Circuit Court of Appeals the Memorandum Decision and Order granting Motion to Dismiss First Amended Complaint on *forum non conveniens* grounds as to Defendants Falkbuilt, Ltd., Falkbuilt, Inc., and Mogens Smed and Denying Plaintiffs’ Oral Motion to Amend, which was entered in this case on May 21, 2021 (“Order”) (Dkt. 164, attached hereto as “Exhibit A”). On July 1, 2021, this Court granted Plaintiff’s Motion for Certification of the Order Pursuant to Rule 54(b) (Dkt. 178, attached hereto as “Exhibit B”). Plaintiff appeals the entirety of the district court’s *forum non conveniens* dismissal against Falkbuilt, Ltd., Falkbuilt, Inc., and Mogens Smed. *See* Fed. R. App. Proc. 4(a)(1)(A); Fed. R. Civ. Proc. 54(b).

A Docketing Statement and a request that the Clerk of Courts prepare and assemble the documents constituting the record on appeal will be filed within 14 days of the filing of this Notice.

July 16, 2021

Respectfully Submitted,

WORKMAN NYDEGGER:

By: /s/ Chad E. Nydegger
Chad E. Nydegger

AKERMAN LLP:

By: /s/ Jeffrey J. Mayer
Jeffrey J. Mayer

Attorneys for Plaintiffs

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157
Clerk@ca10.uscourts.gov

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

July 19, 2021

Mr. D. Mark Jones
United States District Court for the District of Utah
351 South West Temple
Salt Lake City, UT 84101

RE: 21-4078, DIRTT Environmental Solutions v. Falkbuilt, et al
Dist/Ag docket: 1:19-CV-00144-DBB-DBP

Dear Clerk:

After review of the preliminary record sent to us on July 19, 2021, we have determined that it should be treated as an amended notice of appeal, and have docketed as such. We will not open a new appeal. Please note accordingly on your docket.

Please contact this office if you have questions.

Sincerely,



Christopher M. Wolpert
Clerk of Court

cc: P. Bruce Badger
Jason W. Hardin
Chad E. Nydegger

CMW/djd

CHAD E. NYDEGGER (USB 9962)
cnydegger@wnlaw.com
WORKMAN NYDEGGER
60 East South Temple, Tenth Floor
Salt Lake City, Utah 84111
Telephone: (801) 533-9800

JEFFREY J. MAYER (admitted *pro hac vice*)
Jeffrey.Mayer@akerman.com
CATHERINE A. MILLER (admitted *pro hac vice*)
Catherine.Miller@akerman.com
AKERMAN LLP
71 S. Wacker Drive, 47th Floor
Chicago, Illinois 60606
Telephone: 312-634-5700

Attorneys for Plaintiffs, DIRT Environmental Solutions, Inc. and DIRT Environmental Solutions, Ltd.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, NORTHERN DIVISION**

DIRTT ENVIRONMENTAL
SOLUTIONS, INC. and DIRTT
ENVIRONMENTAL SYSTEMS,
LTD.,

Plaintiffs,

v.

LANCE HENDERSON, KRISTY
HENDERSON, and FALK
MOUNTAIN STATES, LLC,

Defendants.

Case No: 1:19-cv-00144-DBB-
DBP

**AMENDED NOTICE OF APPEAL
PURSUANT TO RULE 54(B)
CERTIFICATION**

Honorable David B. Barlow
Magistrate Judge Dustin B. Pead

Plaintiffs DIRT Environmental Systems, Inc. and DIRT Environmental Systems Ltd. (“Plaintiffs”), hereby give notice that they are appealing to the Tenth Circuit Court of Appeals the Memorandum Decision and Order granting Motion to Dismiss First Amended Complaint on *forum non conveniens* grounds as to Defendants Falkbuilt, Ltd., Falkbuilt, Inc., and Mogens Smed and Denying Plaintiffs’ Oral Motion to Amend, which was entered in this case on May 21, 2021 (“Order”) (Dkt. 164, attached hereto as “Exhibit A”). On July 1, 2021, this Court granted Plaintiff’s Motion for Certification of the Order Pursuant to Rule 54(b) (Dkt. 178, attached hereto as “Exhibit B”). Plaintiffs appeal the entirety of the district court’s *forum non conveniens* dismissal against Falkbuilt, Ltd., Falkbuilt, Inc., and Mogens Smed. *See* Fed. R. App. Proc. 4(a)(1)(A); Fed. R. Civ. Proc. 54(b). This amended notice is being filed to clarify that both plaintiffs are seeking appeal following entry of the Court’s July 1 Order.

A Docketing Statement and a request that the Clerk of Courts prepare and assemble the documents constituting the record on appeal will be filed within 14 days of the filing of this Notice.

July 26, 2021.

Respectfully Submitted,

WORKMAN NYDEGGER:

By: /s/ Chad E. Nydegger
Chad E. Nydegger

AKERMAN LLP:

By: /s/ Jeffrey J. Mayer
Jeffrey J. Mayer

Attorneys for Plaintiffs

(ECF No. 164 p. 3.) The Canadian Defendants include Falkbuilt Ltd., Falkbuilt, Inc. and Mogens Smed, who consented to “service of process in Alberta, Canada, and to the jurisdiction of the Court of Queen’s Bench of Alberta.” (ECF No. 163.) Following the dismissal, Plaintiffs sought to certify the court’s ruling as final, which the court granted (ECF No. 178.), and an appeal of that decision was raised to the Tenth Circuit. That appeal is still pending.

Defendants take no position on the appeal. Yet, Defendants express concern that the disposition of the appeal in Plaintiffs’ favor will create problems with any discovery done during the pendency of the appeal. Presuming Plaintiffs’ prevail, the Canadian Defendants would then return to this case, which would create a need to redo discovery, such as depositions, because Plaintiffs are seeking joint and several liability toward the U.S. Defendants and the dismissed Canadian Defendants. Defendants therefore urge that the court stay this matter pending the Tenth Circuit’s decision.

DISCUSSION

As noted by the Supreme Court, “the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936). When deciding to exercise its inherent power to stay, the court considers: “(1) whether the stay would promote judicial economy; (2) whether the stay would avoid possible inconsistent results; and (3) whether the stay would not work undue hardship or prejudice against the plaintiff.” *U.S. ex rel. Cache Valley Elec. Co. v. Travelers Cas. & Sur. Co. cf Am.*, No. 2:13-CV-01120-DN, 2015 WL 164064, at *3 (D. Utah

Jan. 13, 2015) (quoting *Sparks v. Saxon*, No. 2:09-cv-00151-DAK, 2009 WL 2886029 at *5 (D. Utah Sep.3, 2009) (unpublished)). The court finds the factors narrowly weigh in favor of a stay.³

“The factor of judicial economy is ‘measured in terms of simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.’” *Capitol Specialty Ins. Corp. v. Sw. Clubs, Inc.*, No. 12-01299 MCA/LAM, 2015 WL 11117308, at *3 (D.N.M. Mar. 31, 2015) (quoting *CMAX, Inc. v. Hall*, 300 F.3d 265, 268 (9th Cir. 1962)); see also *Landis*, 299 U.S. at 256 (considering, among other factors, that “in all likelihood [resolution of a parallel proceeding] will settle many [issues] and simplify them all”). Defendants argue a “stay will promote judicial economy by avoiding the possibility of having to effectively duplicate expensive and time-consuming discovery and motion practice in the event the [Canadian Defendants] return to the case.” (ECF No. 179 p. 5.) The court agrees that motion practice would be simplified because if Plaintiffs prevail, the Canadian Defendants would need to file motions to reopen certain discovery or likely file additional motions to compel. Plaintiffs’ arguments that Defendants have been silent regarding any potential conflicts with the Canadian Defendants, and that they have not taken inconsistent positions thus far, does not undermine the judicial economy gains for a short stay. Moreover, Plaintiffs’ own arguments in its Motion for Rule 54(b) Certification note the risk of duplicative litigation following a successful appeal “because this Court would then have to address the merits of the claims against the Falkbuilt

³ Even under the “heavy burden” standard advanced by Plaintiffs, the court still finds a stay appropriate. See, e.g., *Miller v. Basic Rsch., LLC*, No. 2:07-CV-871 TS, 2011 WL 818150, at *3 (D. Utah Mar. 2, 2011) (“[A party seeking] a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to [someone] else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.”) (quoting *Landis*, 299 U.S. at 255).

Defendants after the merits of the claims against the Henderson Defendants are completely resolved.” (ECF No. 168 p. 8.) Avoiding costly and duplicative piecemeal litigation is a hallmark of judicial economy and thus supports a stay.

Next, the potential for piecemeal litigation as argued by Plaintiffs, also creates an increased risk of inconsistent results, especially in discovery disputes during the pending appeal. Plaintiffs argue that if the court “now determines that the case should be stayed ... it will be effectively conceding that Judge Barlow’s reasoning was incorrect.” Op p. 9, ECF No. 184. The court disagrees. A decision to stay, based upon the present circumstances, and Plaintiffs’ arguments made before the court in another motion, does not undermine the prior reasoning of the court. The second factor weighs in favor of a stay.

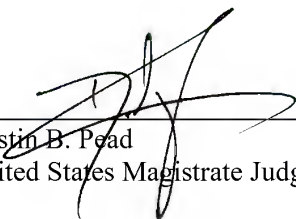
Finally, a stay does not work undue hardship or prejudice against Plaintiffs. A preliminary injunction is in place that reduces any risk of ongoing harm in this case. In addition, as noted by Defendants, it is very likely that the appeal will be decided by the Tenth Circuit in a relatively short time frame. In fact, the court bases its decision in part on the premise that the stay will be of a relatively short time frame, further minimizing any hardship or prejudice. Accordingly, the Motion for Stay is granted.

ORDER

Defendants’ Motion to Stay is GRANTED. The case is stayed pending decision by the Tenth Circuit of Plaintiffs’ appeal. The parties are ORDERED to provide an update on the status of the appeal, and this case, within 12 months if the Tenth Circuit has not rendered a decision on Plaintiffs’ appeal. All other pending motions, (ECF No. 191, ECF No. 192), are DENIED WITHOUT PREJUDICE at this time and may be renewed if needed following the resolution of Plaintiffs’ appeal.

IT IS SO ORDERED.

DATED this 23 August 2021.



Dustin B. Pead
United States Magistrate Judge

1 the factual allegations. If they want to turn you to
2 paragraph 47 of their First Amended Counterclaim, that's a
3 good place to start because you can't read that paragraph
4 and think they pled anything other than Canadian feature.

02:13:25

5 THE COURT: Okay. Thank you, Mr. Mayer.

6 Mr. Hardin, thank you as well. Gentlemen, I appreciate your
7 advocacy. And what I'm going to do now is we're going to
8 take a recess. It will probably be about a 15 minute recess
9 while I consider the arguments that you made today in light
10 of the briefing that I have before me.

02:13:40

11 We'll come back in and I'll tell you whether I'm
12 going to give you a ruling today or whether we'll issue one
13 in writing. So with that, let me remind you, of course, in
14 the zoom era, though these two experienced counsel before me
15 I'm sure do not need the reminder, you may wish to mute
16 yourself or turn off your camera if you don't want to be
17 heard or seen during the -- during the recess. I can't
18 quite see my court clock here, I think it says 2:15, I'm
19 going to say 2:30 local is about the time that we will
20 resume. And until then, we'll stand in recess.

02:14:09

21 MR. HARDIN: Thank you, Your Honor.

22 (Recess.)

23 THE COURT: All right. We are back on the record
24 in case number 1:19-CV-144, *DIRTT Environmental Solutions*
25 *versus Henderson, et al.* We're just coming back from recess

02:35:37

1 and I see here Mr. Mayer and Mr. Hardin both were the
2 individuals that we need to be able to continue to proceed.

3 Thank you for that time. It gave me an
4 opportunity to take the notes that I had made while you were
02:35:56 5 making your arguments, line them up with the materials that
6 I had brought with me, including your arguments in the
7 briefing. That was helpful to me and I will be able to give
8 you a ruling today. I think it's to the advantage of both
9 sides to be able to know where I am at on this motion today
02:36:18 10 and then be able to proceed accordingly.

11 Also as you know from your briefing, as you know
12 from your arguments, there are a considerable number of
13 factors that are involved here and a number of arguments
14 that both sides have made. As a result, that means it is
02:36:34 15 going to take me a little bit of time to articulate my
16 decision. I'll be as crisp and precise as I can be, but it
17 will take a little bit to do that.

18 As all are aware, the forum non conveniens
19 determination is committed to the sound discretion of the
02:36:50 20 trial court. That's *Piper Aircraft versus Reyno*, 1981. To
21 determine whether dismissal is appropriate based on forum
22 non conveniens, the court weighs a set of private and public
23 interest factors. Some of those have been discussed today
24 in the hearing, all of them were discussed in the briefs.
02:37:07 25 That's the *Archangel Diamond Corp* case, Tenth Circuit, 2016.

1 However, there are two threshold requirements that must be
2 met before the court can engage with the private public
3 interest factors.

4 The first threshold requirement is that there
02:37:22 5 must be an adequate alternative forum where the defendant is
6 amenable to process. And, of course, both parties have
7 acknowledged that that exists here. Alberta, Canada serves
8 as an adequate alternative forum where DIRTT is amenable to
9 process and that requirement is met.

02:37:37 10 The second threshold requirement is that foreign
11 law is applicable and domestic law does not control the
12 matter. A court ordinarily adopts the choice-of-law rules
13 of the state in which it sits. Again, that's the *Piper*
14 case, 1981. The parties are in agreement that the court
02:37:53 15 should apply Utah's choice-of-law rules.

16 For tort claims, such as the ones that Falkbuilt
17 asserts as counterclaims here, Utah employs the most
18 significant relationship test from the Restatement (second)
19 of Conflict of Laws accompanied by, if available, specific
02:38:09 20 factors identified in Restatement for a particular tort.
21 That's the *Waddoups* case, Utah Supreme Court, 2002.

22 The Section 6 high-level principles are
23 identified in the briefing (a) through (g). I'm not going
24 to repeat them here although I am going to discuss them in
02:38:26 25 my ruling. Same for Section 145, there is a four factor

1 test, and that has been identified by both parties in the
2 briefing. We'll discuss those.

3 So let's start with the First Restatement Factor
4 from Section 145 and that involves the place where the
02:38:42 5 injury occurred. Falkbuilt alleges economic harm from the
6 alleged defamation and interference with economic relations.
7 That's not limited to a single place. The Amended
8 Counterclaim indicates that the statements that are its
9 subject were published in websites in North America,
02:38:58 10 multiple Canadian publishing news channels and articles from
11 multiple Canadian news organizations, it includes multiple
12 examples from Alberta. That's the Amended Counterclaim at
13 Paragraphs 23 through 26.

14 The Amended Counterclaim does allege harm in Utah
02:39:14 15 also, though it does not identify any publication of the
16 statements in Utah media. Also, the Amended Complaint
17 focuses on the significant economic harm Falkbuilt suffered
18 from DIRTT's alleged interference with the Planned Closing
19 causing investors to drop out. That's the Amended
02:39:30 20 Counterclaim at Paragraphs 10, 11, 31, 32 and 67. The
21 transactions were expected to fund in Calgary, Alberta,
22 Canada. That's the Amended Counterclaim at 32. Not
23 coincidentally, the amount that is alleged in controversy
24 is, quote, "in excess of \$3,000,000," close quote, which is
02:39:51 25 the same as the over \$3,000,000 from the proposed Planned

1 Closing. I'm not finding that it would be limited to that,
2 but those numbers, the \$3,000,000 mark, is present in both.

3 So while the alleged economic injury may have
4 extended beyond Canada, based on Falkbuilt's allegations,
02:40:12 5 Canada has the much stronger claim to being the place where
6 the injury occurred. And this factor favors applying
7 Canadian law.

8 Second, the court looks to the place where the
9 conduct causing the injury occurred. Falkbuilt does not
02:40:24 10 explicitly identify where the actions that originated the
11 republication of the alleged defamatory material and
12 resulting cause of the injury occurred. However, Falkbuilt
13 notes that the geolocations of IP addresses involved the
14 uploading of the Complaint containing the alleged defamatory
02:40:43 15 material as being in San Francisco, California or Chicago,
16 Illinois, and an IP address for the DIRTT website Press
17 Release containing the information from the Complaint as
18 being in Portland, Oregon. That's Amended Counterclaim at
19 Paragraphs 12 and 18. As noted earlier, Falkbuilt also
02:41:01 20 identifies news organization websites throughout North
21 America as places where the Press Release would be
22 published, multiple Canadian tv news channels that picked up
23 the story from the Press Release, and multiple Canadian news
24 organizations that followed up with articles about the
02:41:18 25 complaint. The Amended Counterclaim identifies that at

1 Paragraphs 23, 25 and 26. These allegations do not make it
2 clear where the majority of the conduct causing the injury
3 occurred, but they suggest that there were multiple
4 instances of republication in Canada without alleging any
02:41:35 5 instances of republication in Utah. Accordingly, the court
6 does not weigh this factor heavily, but it does weigh
7 slightly in favor of the applicability of Canadian law.

8 Third, the court looks to the domicile,
9 residence, nationality, place of incorporation and place of
02:41:50 10 business of the parties. Both parties conduct business
11 internationally. Falkbuilt is incorporated in Calgary,
12 Alberta, Canada and has its headquarters and principal place
13 of business there. DIRTT is a Colorado corporation with its
14 principal place of business in Calgary, Albert, Canada.
02:42:09 15 Thus, both parties have strong ties to and presence in
16 Calgary and this factor points to the applicability of
17 Canadian law.

18 The fourth and final factor looks to the place
19 where the relationship between the parties is centered.
02:42:20 20 While it is true that the parties have this case together in
21 Utah, it is also apparent that the parties have a
22 relationship in Canada based on the alleged interference
23 with the Planned Closing which was to take place in Canada.
24 This factor does not support one place in relationship over
02:42:36 25 the other, and thus the court determines that the factor is

1 neutral in its analysis.

2 Now, we've got to turn to Section 150 of the
3 Restatement which was discussed both in the hearing today
4 and also in the briefing. It applies to multistate
02:42:51 5 defamation claims, which is exactly what we have here,
6 providing that the state of most significant relationship
7 will usually be where the state corporation had its
8 principal place of business at the time, if the matter
9 complained of was published in that state. Falkbuilt's
02:43:07 10 principal place of business at the time was Calgary,

11 Alberta, Canada, and the Press Release was republished in
12 Alberta, Canada, among other places. This reinforces the
13 applicability of Canadian law as to the defamation
14 counterclaim. The Court further notes that while the
02:43:21 15 counterclaim contains two counts based on different legal
16 theories, the factual predicate for both is that DIRTT
17 allegedly published injurious falsehoods about Falkbuilt.
18 So the Restatement's admonition on this point the about
19 importance of the principal place of business in claims
02:43:38 20 involving defamatory statements is very applicable and
21 particularly strong here.

22 Considering all of these choice-of-law factors
23 together, the factors clearly demonstrate that Canadian law
24 is applicable to Falkbuilt's counterclaims.

02:43:52 25 Understandably, Falkbuilt prefers to focus on the

1 high-level Section 6 principles that apply to causes of
2 action generally. On the facts of this case, those are less
3 helpful than the tort-specific factors in Section 145 and
4 the defamation-specific guidance in Section 150. And, in
02:44:10 5 any event, I do not really find Falkbuilt's discussion of
6 the Section 6 factors persuasive, though the argument was
7 reasonable and in good faith.

8 Falkbuilt argues that the needs of the interstate
9 and international system will be met by applying Utah law
02:44:25 10 because the choice of law approach in Utah and Alberta is
11 similar. That may be the case, but this does not suggest
12 that Utah law, rather than Canadian law, should apply.

13 Falkbuilt also argues in its briefing that the
14 relevant policies of the forum favor Utah law because Utah
02:44:41 15 has a clear policy against broadcasting false judicial
16 pleadings, but provides no significant evidence that
17 Canadian law does not hold similarly.

18 Falkbuilt skips the next principle, the relevant
19 policies of other interested states and the relative
02:44:57 20 interests of those states in the determination of the
21 particular issue. If anything, Alberta would have a much
22 greater interest in the application of its policies to two
23 businesses with their principal places of business in
24 Alberta rather than Utah would have in applying its policies
02:45:14 25 to two non-Utah companies despite their litigation here.

1 Falkbuilt next argues that the protection of
2 justified expectations favors Utah law because DIRTT should
3 have known that Utah defamation law would apply. But the
4 defamation claim turns not on the filing of the complaint in
02:45:31 5 Utah, but the rebroadcasting of the defamatory statements
6 elsewhere. The record does not suggest that Utah is
7 well-connected to those events and it appears that Canada
8 likely is.

9 Falkbuilt then argues that Utah defamation law
02:45:46 10 will better vindicate the wrongs against Falkbuilt, but I'm
11 unpersuaded by the argument factually and find it a poor fit
12 for the actual Restatement principle, which is, quote, "the
13 basic policies underlying the particular field of law,"
14 close quotes. The Supreme Court also has cautioned courts
02:46:02 15 not to give substantial weight to less favorable law in the
16 forum non conveniens analysis. Again, that's *Piper*
17 *Aircraft*, 1981.

18 Finally, Falkbuilt argues that the application of
19 Utah law will be easy and predictable. I see no reason to
02:46:16 20 say it would not be true in Alberta.

21 Thus, having considered the relevant Section 145
22 and 150 and Section 6 factors, Canadian law is applicable to
23 both counterclaims and the second threshold requirement of a
24 forum non conveniens analysis is met.

02:46:32 25 Because both threshold requirements have been

1 met, the next step in a forum non conveniens analysis is to
2 weigh the set of private and public interests. Generally,
3 there is a strong presumption in favor of hearing the case
4 in the plaintiff's or in this case counterclaim plaintiff's
02:46:47 5 choice of forum unless the private and public interests
6 weigh in favor of an alternative forum. However, again in
7 the *Piper* case, the Supreme Court made clear that foreign
8 plaintiff's choice is entitled to less deference.

9 Regarding private interests. Those relevant
02:47:06 10 interests are, one, relative ease of access to sources of
11 proof. Two, availability of compulsory process for
12 compelling attendance of witnesses. Three, cost of
13 obtaining attendance of willing non-party witnesses. Four,
14 possibility of a view of the premises, if appropriate. And
02:47:23 15 five, all other practical problems that make trial of the
16 case easy, expeditious, and inexpensive. And again, that's
17 the *Archangel* case.

18 The first private interest, relative ease of
19 access to sources of proof weighs in favor of dismissal
02:47:37 20 based on forum non conveniens. Falkbuilt and DIRTT both
21 have principal places of business in Calgary. Falkbuilt has
22 identified multiple Canadian news media outlets potentially
23 involved with the dissemination of the allegedly defamatory
24 material. Also, the impact on the Planned Closing, which
02:47:55 25 was scheduled to fund in Canada is tied to Falkbuilt's

1 counterclaims. Relatedly, given the likely need for
2 witnesses from these news outlets or from the parties'
3 principal places of business, the second and third interests
4 also weigh in favor of dismissal based on forum non. The
02:48:11 5 fourth interest, a view of the premises, is inapplicable
6 here. Finally, all other practical problems weigh in favor
7 of dismissal based on forum non conveniens for the reasons
8 stated - the parties' business presence in Canada, the
9 dissemination of the alleged defamatory material in Canada,
02:48:27 10 and the alleged impact on the Planned Closing, which would
11 have taken place in Canada. The private interests,
12 considered together, firmly weigh in favor of dismissal.

13 Now, regarding public interests. They are, one,
14 administration difficulties of the court with congested
02:48:43 15 dockets. Two, the burden of jury duty on members of the
16 community with no connection to the litigation. Three, the
17 local interest in having localized controversies decided at
18 home. And four, the appropriateness of having diversity
19 cases tried in a forum that is familiar with the governing
02:48:59 20 law. Again, from the *Archangel* case.

21 The public interests also weigh in favor of
22 dismissal based on forum non conveniens. The first
23 interest, administrative difficulties of the courts with
24 congested dockets, does not play a strong role in the
02:49:13 25 court's analysis because there is insufficient information

1 about court congestion.

2 The second interest is the burden of jury duty on
3 the members of a community with no connection to the
4 litigation. This interest weighs in favor of dismissal
02:49:26 5 based on forum non conveniens because it is not apparent
6 that members of the Utah community have a strong connection
7 to the counterclaim. By contrast, Albertans are more
8 connected to both the parties here, were more likely to have
9 read or seen the news articles or coverage than Utahans,
02:49:45 10 seemingly, and the Planned Closing was set to fund in
11 Alberta as well. Moreover, Falkbuilt has not specifically
12 identified any Utah entities that are either involved in or
13 related to the alleged defamation and alleged intentional
14 interference with economic relations. The entities
02:50:03 15 identified are either Canadian or located elsewhere in North
16 America. So this interest favors dismissal.

17 The third interest also weighs in favor of
18 dismissal, albeit not as strong as the other interests.
19 While it's apparent that much of the republication of the
02:50:18 20 allegedly defamatory material and the impact of the Planned
21 Closing happened in Canada, Falkbuilt does conduct business
22 internationally and so the interest in deciding the
23 controversy may not be entirely localized. Nevertheless,
24 based on Falkbuilt's allegations, these counterclaims center
02:50:36 25 primarily around dissemination of material within Canada, or

1 at least elsewhere in North America rather than in Utah.

2 The fourth interest weighs most heavily in favor
3 of dismissal based on forum non conveniens. Based on the
4 outcome of the court's choice-of-law analysis, it seems far
02:50:54 5 more appropriate to allow the case to be decided in a forum
6 familiar with the applicable law. Although there is pending
7 litigation in Utah between these parties, Canadian law is
8 applicable to these particular counterclaims and so
9 adjudication in Canada rather than Utah is appropriate.

02:51:09 10 When I consider these factors together, both the
11 private and public interest factors weigh heavily in favor
12 of a forum non conveniens dismissal, even before adding in
13 the fact that Falkbuilt is not filing its counterclaims in
14 its home forum.

02:51:24 15 Therefore, based on the two threshold issues of
16 an adequate alternative forum and the applicability of
17 Canadian law and the balance of private and public interests
18 in making this determination, the court dismisses
19 Falkbuilt's Amended Counterclaims without prejudice, but
02:51:39 20 notes that it may not be refiled in this litigation.

21 Counsel, I might have said right at the outset
22 but I will add now, Mr. Hardin I heard your arguments about
23 considering this motion together with the more recently
24 filed motion for forum non dismissal that you have made. I
02:51:57 25 determined that that was not necessary and will save that

1 motion for a full and appropriate consideration for another
2 day.

3 With that, counsel, I thank you both for your
4 excellent advocacy today. It was excellent advocacy on
02:52:12 5 behalf of your clients. Are there any other matters
6 regarding this motion which we should take up today?

7 MR. MAYER: Nothing for DIRTT, Your Honor.

8 MR. HARDIN: No, Your Honor, nothing from
9 Falkbuilt.

02:52:27 10 THE COURT: Very well. Thank you, Mr. Hardin.
11 My thanks to each of you. Be well and we will stand in
12 recess.

13 MR. HARDIN: Thank you.

14 MR. MAYER: Thank you.

02:52:35 15 (Whereupon, Court adjourned at 2:52 p.m.)
16
17
18
19
20
21
22
23
24
25