

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT

KNEEBINDING, INC.,  
Plaintiff,

V.

MARKER VOLKL USA, INC.,  
Defendant.

CIVIL ACTION NO. 2:15-cv-00121-wks

## MARKER VOLKL USA, INC.'S OPENING CLAIM CONSTRUCTION BRIEF

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## **I. INTRODUCTION**

This patent infringement action concerns United States Patent No. 8,955,867 (the “’867 patent”) (Ex. A), which is entitled “Alpine Ski Binding Heel Unit.” The patent has one independent claim and eight dependent claims. As its title suggests, the patent claims a ski binding attached to a ski. In particular, the patent claims a ski binding having what it calls a “vector decoupling assembly,” which serves to “separat[e] and isolat[e]” lateral force vectors and vertical force vectors applied to the ski binding. This separation and isolation of different force vectors purportedly makes the ski binding safer for the skier.

The ’867 patent is the third patent that KneeBinding, Inc. (“KneeBinding”) has obtained from an original application filed in 2003. The earlier two patents have claim language based on the description found in their common specification. Eight years after filing its original application, and two years after the named inventor left the company following a dispute with its principal outside investor, KneeBinding filed a continuation patent application utilizing claim language that is found nowhere in the specification. Unfortunately, that language now appears in claim 1 of the issued ’867 patent. The result is claim language that is convoluted and indefinite in several respects.

Plaintiff KneeBinding has asserted the ’867 patent against defendant Marker Volkl USA, Inc. (“Marker”), alleging that Marker’s Kingpin touring ski bindings infringe the patent. This is a case where claim construction should facilitate early resolution by summary judgment of non-infringement or invalidity. Accordingly, Marker asks that the Court construe the disputed claim terms as proposed herein, so the case can move toward resolution.

## II. BACKGROUND

### A. Background Regarding The Patent-In-Suit

The sole named inventor of the '867 patent is Richard Howell ("Howell"). Howell originally filed a provisional patent application in February 2003, and then a full patent application in February 2004.

Howell formed KneeBinding to bring his ski binding design to market. In 2007, an outside investor named John Springer-Miller ("Springer-Miller") invested \$1,065,000 in KneeBinding and gained control of the company's board of directors. *KneeBinding, Inc. v. Howell*, No. 74-3-09 LeCv, slip op. at 10 (Lamoille Superior Court Aug. 17, 2016) (Ex. B). Thereafter, the relationship between Howell and Springer-Miller deteriorated. Howell's employment with the company ended in December 2008. He resigned as a director shortly thereafter, and no longer had a role in management of the company. *Id.* at 22.

In January 2008, a patent issued from Howell's 2004 patent application as United States Patent No. 7,318,598 (the "'598 patent") (Ex. C). This patent had just two claims, focused on the components (*e.g.*, a tongue component) of Howell's ski binding design as described in the specification. Before that patent issued, KneeBinding had also filed a so-called divisional patent application in December 2007, with the same specification as in the '598 patent. A patent issued from that 2007 application in February 2011 as United States Patent No. 7,887,084 (the "'084 patent") (Ex. D). The '084 patent has eighteen claims, but again those claims are focused on the components (*e.g.*, cams, heel cup, tension shaft) of Howell's ski binding design as described in the specification. The claims of both the '598 and '084 patents utilize the language of the specification's description of Howell's invention.

In January 2011, shortly before the '084 patent issued and two years after the named inventor Howell had left the company, KneeBinding filed another continuation patent

application, based again on the same original specification. On this occasion, however, KneeBinding used language in its claims that cannot be found in the patent specification. That application eventually issued in February 2015 as the '867 patent.

Claim 1 of the '867 patent reads as follows (elements to be construed are those in bold):

**A vector decoupling assembly for separating and isolating two or more force vectors applied to a safety binding securing a heel portion of a ski boot to a ski,** comprising:

a **lower heel assembly** attached to the ski;

an **upper heel assembly** coupled to the lower heel assembly and **having a lateral release assembly for applying lateral securing pressure to the ski boot**, the upper heel assembly comprising an upper heel housing that is configured to compress the heel portion of the ski boot downward;

a **linkage element fixedly attached** to the lateral release assembly;

**wherein the linkage element, a first surface and a second surface cooperate to limit motion of the lateral release assembly to within a predetermined region within a plane defined by the longitudinal and horizontal axes of the ski.**

'867 patent, 11:33–12:8.<sup>1</sup>

## **B. Background Regarding The Accused Product and the Alleged Patented Product**

KneeBinding alleges that Marker's Kingpin ski binding infringes the '867 patent. The Kingpin binding is a specialized "touring binding" used by skiers who wish to ski downhill (Alpine skiing) and also walk and climb without changing their skis. Touring is typically done "off-piste," *i.e.* off regular ski trails.

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<sup>1</sup> As noted in Section I above, the '867 patent also has eight dependent claims. KneeBinding has asserted five of those dependent claims (nos. 4, 5, 6, 7, 8 and 9) against Marker and has proposed constructions for certain language found in those claims. Marker does not dispute KneeBinding's proposed constructions for those claims and, therefore, does not address those claims in this brief.

By contrast, KneeBinding sells bindings for Alpine skiing. KneeBinding expressly markets its bindings as protecting skiers' knees. KneeBinding brochure (Ex. E). Marker makes no such claims regarding the Kingpin binding. The market for touring ski equipment, including bindings, is specialized, and as a consequence, the products at issue do not compete with each other in the market.

### III. APPLICABLE LEGAL STANDARDS

#### A. Claim Construction

“‘[T]he claims of a patent define the invention’” and determine the scope of the patentee's right to exclude. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (*en banc*) (quoting *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1115 (Fed. Cir. 2004)). “[T]he words of a claim ‘are generally given their ordinary and customary meaning,’ . . . the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention.” *Id.* at 1312–13 (quoting *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996)).

A person of ordinary skill in the art is deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent, including the specification (the written description of the invention) and the prosecution history of the patent. *Id.* at 1313; 52 F.3d 967, 979–80 (Fed. Cir. 1995), *aff'd* 517 U.S. 370 (1996). Examination of this intrinsic evidence ordinarily will resolve any ambiguity in a disputed claim term. *Vitronics*, 90 F.3d at 1583. “[E]xtrinsic evidence, which ‘consists of all evidence external to the patent and prosecution history, including expert and inventor testimony, dictionaries, and learned treatises,’” may be useful in claim construction as well, although it is less significant than the intrinsic record. *Phillips*, 415 F.3d at 1317 (quoting *Markman v.*

*Westview Instruments, Inc.*, 52 F.3d 967, 980 (Fed. Cir. 1995) (*en banc*), *aff'd*, 517 U.S. 370 (1996)).

**B. Indefiniteness**

The patent statute requires that patent claims must “particularly point[] out and distinctly claim[] the subject matter which the applicant regards as his invention.” 35 U.S.C. § 112, ¶ 2. Marker contends that several terms used in claim 1 of the ‘867 patent are indefinite, and hence that the claim does not satisfy this statutory requirement.

As the Supreme Court held in 2014, “a patent is invalid for indefiniteness if its claims, read in light of the specification delineating the patent, and the prosecution history, fail to inform, with reasonable certainty, those skilled in the art about the scope of the invention.” *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2124 (2014). While “[s]ome modicum of uncertainty . . . is the price of ensuring the appropriate incentives for innovation,” “a patent must be precise enough to afford clear notice of what is claimed, thereby apprising the public of what is still open to them.” *Id.* at 2128–29. “And absent a meaningful definiteness check . . . patent applicants face powerful incentives to inject ambiguity into their claims.” *Id.* at 2129. “Otherwise there would be ‘[a] zone of uncertainty which enterprise and experimentation may enter only at the risk of infringement claims.’” *Id.* (quoting *United Carbon Co. v. Binney & Smith Co.*, 317 U.S. 228, 236 (1942)).

“Indefiniteness is a matter of claim construction, and the same principles that generally govern claim construction are applicable to determining whether allegedly indefinite claim language is subject to construction.” *Praxair, Inc. v. ATMI, Inc.*, 543 F.3d 1306, 1319 (Fed. Cir. 2008); *see also Bayer Intellectual Prop. GmbH v. Warner Chilcott Co.*, No. 12-1032-GMS, slip op. at 4 (D. Del. Apr. 21, 2015). Definiteness, like claim construction, is a question of law sometimes involving subsidiary factual determinations. *Biosig Instruments, Inc. v. Nautilus*,

Inc., 783 F.3d 1374, 1382 (Fed. Cir. 2015). “[I]n assessing definiteness, claims are to be read in light of the patent’s specification and prosecution history.” *Nautilus*, 134 S. Ct. at 2128. Finally, “definiteness is measured from the viewpoint of a person skilled in the art at the time the patent was filed.” *Id.* (alterations and quotation omitted).

### **C. Means-Plus-Function Claim Language**

The patent statute provides for the use of so-called “means-plus-function” language in patent claims, as follows:

An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof.

35 U.S.C. § 112, ¶ 6.

In this case, Marker contends that certain terms in claim 1 of the ’867 patent are means-plus-function terms. In 2015, the *en banc* Federal Circuit held that even if a claim term does not use the express word “means,” it will nonetheless be a means-plus-function term if the claim term fails to recite sufficiently definite structure, or else recites function without reciting sufficient structure for performing that function. *Williamson v. Citrix Online, LLC*, 792 F.3d 1339, 1349 (Fed. Cir. 2015) (*en banc*). This issue is addressed in greater detail *infra* in Section IV.B.2.

## **IV. ARGUMENT**

### **A. The Preamble Of Claim 1 Is Limiting**

Claim 1 of the ’867 patent has a preamble that reads as follows:

A vector decoupling assembly for separating and isolating two or more force vectors applied to a safety binding securing a heel portion of a ski boot to a ski . . . .

Both sides have proposed constructions for terms used in the specification (“vector decoupling assembly for separating and isolating two or more force vectors,” “safety binding” and “securing a heel portion of a ski boot to a ski”). Having acknowledged that the language of the preamble must be construed, both sides necessarily agree that the preamble is a limitation of the claim – or, in other words, that any device accused of infringing claims 1 must satisfy all elements of the claim, including the preamble. *See Pac-Tec Inc. v. Amerace Corp.*, 903 F.2d 796, 801 (Fed. Cir. 1990) (determining that preamble language that constitutes a structural limitation is actually part of the claimed invention).

**B. “Safety Binding,” “Having a Lateral Release Assembly for Apply Lateral Securing Pressure to the Ski Boot,” “Linkage Element,” “A First Surface,” and “A Second Surface” are Indefinite.**

**1. “Safety Binding”**

Disputed Term	KneeBinding’s Proposed Construction	Marker’s Proposed Construction
safety binding	<p>No construction is needed and the term should be given its plain and ordinary meaning.</p> <p>Should the Court require further construction, a ski binding that releases a ski boot under certain conditions</p>	Indefinite.

The term “safety binding” is indefinite because the ’867 patent does not inform a person of skill in the art (“POSA”) what this term means with reasonable certainty.

A POSA—as well as the Court—would turn first to the ’867 patent and its prosecution history to discern the patent’s approach to defining a safety binding. However, the only time the term “safety binding” is used in the ’867 patent is in claim 1. ’867 patent, 11:34. This single reference in the ’867 patent tells a POSA nothing about how to determine what constitutes a “safety binding” as distinct from any other type of ski binding. The prosecution history of the ’867 patent (Ex. F) provides no further detail on the meaning of this term. As the patent drafter,

KneeBinding was “in the best position to resolve the ambiguity” by providing some indication of how to analyze a ski binding to determine whether it meets the criteria of being a safety binding as required in the claims. *Nautilus*, 134 S. Ct. at 2129 (quotations and citation omitted). But it chose not to. *See id.* (“[A]bsent a meaningful definiteness check ... patent applicants face powerful incentives to inject ambiguity into their claims.”).

The ’867 patent criticizes prior art ski bindings for the increasing incidence of knee injuries, particularly strained or ruptured anterior cruciate ligaments (“ACLs”), and suggests that the claimed invention averts such injuries:

Despite improvements in multi-directional toe release bindings, the incidence of knee injuries continues to increase. Frequently the anterior cruciate ligament (ACL) of knee is strained or ruptured. ACL strain intensifies when lateral forces are applied to the ski immediately under or near the projected tibial axis (coaxial with the tibia), generally known as phantom-foot fall kinematics. In phantom-foot falls a lateral heel release binding will avert ACL strain . . . . However, a multi-directional heel release binding that accommodates the release of the ski in the above described situation, which provides proper lateral release during edge-induced roll moments and also prevents pre-release during normal skiing conditions has yet to be reduced to practice.

’867 patent, 1:49–2:6.

Accordingly, to the extent the ’867 patent provides any guidance as to the term “safety binding,” it seems to imply that such a binding prevents strain or rupture of the ACL.

In summary, the intrinsic evidence leaves a POSA without any guidance on the meaning of the term “safety binding.” The Supreme Court “has warned” that this level of uncertainty “would diminish the definiteness requirement’s public-notice function and foster [an] innovation-discouraging ‘zone of uncertainty’ . . . .” *Nautilus*, 134 S. Ct. at 2130. Accordingly, the claims fail to “inform those skilled in the art about the scope of the invention with reasonable certainty” (*id.* at 2129) and the “safety binding” term is indefinite. Alternatively, should the



Court determine that the claim is amenable to construction, Marker suggests that it be construed as meaning “a ski binding that would prevent injuries on the lower leg of a skier.”

**2. “Having a Lateral Release Assembly for Apply Lateral Securing Pressure to the Ski Boot” and “Linkage Element”**

<b>Disputed Term</b>	<b>KneeBinding’s Proposed Construction</b>	<b>Marker’s Proposed Construction</b>
having a lateral release assembly for applying lateral securing pressure to the ski boot	No construction is needed and the term should be given its plain and ordinary meaning.  Should the Court require further construction, an assembly that applies pressure to resist the ski boot heel from moving laterally	Indefinite.
linkage element	An element that allows free-coupling between the upper heel assembly and the lower heel assembly	Indefinite.

The terms “having a lateral release assembly for applying lateral securing pressure to the ski boot” and “linkage element” are indefinite because the ’867 patent does not inform a POSA what these terms mean with reasonable certainty, and they have no established meaning in the art.

Neither the term “lateral release assembly” nor “linkage element” are a term of art in the ski binding industry and do not convey a specific structure or material that meets this limitation.<sup>2</sup> This is the hallmark of means-plus-function claiming. While a means-plus-function term is typically limited to the structures disclosed in the specification, in this case no such construction is possible. That is because neither the specification nor the intrinsic evidence are capable of informing a POSA, with reasonable certainty, as to what “structures” disclosed in the specification perform the recited function. As a result, the limitation is indefinite under 35

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<sup>2</sup> The phrases “lateral release assembly” and “linkage element” also are not found anywhere in the ’867 patent specification outside of the claims.

U.S.C. § 112, ¶ 2. *Nautilus*, 134 S. Ct. at 2129 (holding the definiteness requirement of 35 U.S.C. § 112, ¶ 2, requires “that a patent’s claims, viewed in light of the specification and prosecution history, inform those skilled in the art about the scope of the invention with reasonable certainty.”).

**a. The Word “Means” Need Not be Recited for Means-Plus-Function Claiming**

Means-plus-function claiming occurs when a claim term is “expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof . . . .” 35 U.S.C. § 112, ¶ 6. In such cases, the “claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof.” *Id.* However, a claim need not recite the word “means” in order to be construed in means-plus-function format. For example, in *Williamson v. Citrix Online, LLC*, the *en banc* Federal Circuit recently clarified the standard for application of § 112, ¶ 6 when a claim does not recite the word “means”:

The standard is whether the words of the claim are understood by persons of ordinary skill in the art to have a sufficiently definite meaning as the name for structure. When a claim term lacks the word “means,” the presumption can be overcome and § 112, para. 6 will apply if the challenger demonstrates that the claim term fails to “recite sufficiently definite structure” or else recites “function without reciting sufficient structure for performing that function.”

*Williamson v. Citrix Online, LLC*, 792 F.3d 1339, 1349 (internal citations omitted).

Once a term is found to be in means-plus-function format, the Court must apply a two-step process to construe its scope. First, the Court identifies the claimed function performed by that claim element. *Id.* at 1351 (citing *Noah Sys., Inc. v. Intuit Inc.*, 675 F.3d 1302, 1311 (Fed. Cir. 2012)). Then, the Court determines what structure, if any, disclosed in the specification corresponds to the claimed function. *Id.*

In *Williamson*, the Federal Circuit held that generic terms such as “mechanism,” “element,” “device,” and other nonce words that reflect nothing more than verbal constructs, are tantamount to using the word “means” because they “typically do not connote sufficiently definite structure” and, therefore, may invoke § 112, ¶ 6. *See id.* at 1350 (citing *Mass. Inst. of Tech. & Elecs. for Imaging, Inc. v. Abacus Software*, 462 F.3d 1344, 1354 (Fed. Cir. 2006)). That is precisely the case here, because the terms “assembly” and “element” are black boxes and are tantamount to the word “means.” That is, neither “lateral release assembly” nor “linkage element” is a term of art in the ski binding industry, and they have no commonly accepted definition. Each one is simply a generic description for any structure that performs the specified function; a nonce term.

The inclusion of the prefix “lateral release” or “linkage” fails to impart any definite physical structure in the claim as they merely further describe the function of the claimed “assembly” and “element,” respectively. *Williamson*, 792 F.3d 1339 at 1350–51 (holding the prefix “distributed learning control” did not impart structure into the term “module” because those words do not describe a sufficiently definite structure.”). Accordingly, because these terms merely set forth the same black box apparatus as does the word “means,” the presumption against means-plus-function claiming is rebutted and “lateral release assembly” and “linkage element” should be construed properly as means-plus-function terms.

**b. The Term “Lateral Release Assembly” is Not Described in the Specification**

Turning to the first step in construing a means-plus-function term, the Court must identify the claimed function to be performed. *Id.* at 1351. The claimed function of the claim term “lateral release assembly” is “applying lateral *securing pressure* to the ski boot.” ’867 patent, 11:38–39 (emphasis added). This point is clear from the claim language itself.

The Court next looks to the specification to determine what structure, if any, corresponds to that claimed function. *Williamson*, 792 F.3d at 1351–52 (“Structure disclosed in the specification qualifies as ‘corresponding structure’ if the intrinsic evidence clearly links or associates that structure to the function recited in the claim.”). The specification is unclear on this point.

First, the term “lateral release assembly” is not disclosed anywhere in the ’867 patent other than in the claims. Instead, the specification discloses the use of “lateral release cams,” which are found in the lateral heel release. ’867 patent, 3:53–54. These “lateral release cams” control the *release efforts* when the heel of the boot displaces from the longitudinal center of the ski and restrict the movement of the lateral heel release to predetermined paths of rotation and translation. *Id.* at 3:54–67. In other words, the “lateral release cams” function to release the ski boot, not to apply securing pressure to the ski boot.

Likewise, the ’867 patent specification also discloses “lateral heel release cam surfaces” that allow the lateral release cam to both rotate and translate relative to the lower heel housing to *displace* the ski boot laterally relative to the long axis of the ski. *Id.* at 9:33–36. Again, the “lateral heel release cam surfaces” function to release the ski boot, not to apply securing pressure to the ski boot.

Both of these structures serve a different function from the “lateral release assembly” as required by the claims of the ’867 patent. The only structures discussed in the ’867 patent’s specification that applies any kind of pressure to the ski boot are the “lower heel housing” and “upper heel housing.” *Id.* 7:5–7. For instance, the ’867 patent states that “[t]he lower heel housing 27 applies longitudinal pressure to the ski boot via the upper heel housing 16 at surface 32 of heel cup 47.” *Id.* However, the specification and figures make it clear that both of these

structures are distinct components of the heel unit from the purported lateral release component. *See, e.g., id.* at Fig. 1; 5:53–55.

For the foregoing reasons, Marker asks the Court to construe the phrase “lateral release assembly” in accordance with the provisions of 35 U.S.C. § 112, ¶ 6 and to find that the specification fails to link the claimed function to a specific structure with reasonable certainty such that the claims are indefinite under 35 U.S.C. § 112, ¶ 2.

**c. The Term “Linkage Element” is Not Described in the Specification**

As before, we turn to the first step in construing a means-plus-function term, the Court must identify the claimed function to be performed. *Williamson*, 792 F.3d 1339 at 1351. The “linkage element” works in concert with “a first surface” and “a second surface” and functions “to limit motion of the lateral release assembly to within a predetermined region within a plan defined by the longitudinal and horizontal axes of the ski.” ’867 patent, 12:5–8.

The Court next looks to the specification to determine what structure, if any, corresponds to that claimed function. *Williamson*, 792 F.3d 1339 at 1351–52. The specification is again unclear on this point.

The ’867 patent provides nothing in the claims to inform a POSA about how to determine what constitutes a “linkage element” in the context of the claimed invention. Instead, all that is revealed by the claim language of the ’867 patent is that the “linkage element” is to be “fixedly attached to the lateral release assembly” (claim 1, ’867 patent, 12:3–4) and that “the first surface and the second surface cooperate to limit motion of the linkage element to the longitudinal and horizontal plane of the ski” (claim 3, *id.* at 12:12–15). However, for the reasons discussed above and below, “lateral release assembly,” “a first surface,” and “a second surface” are also not defined in the specification and provide no additional guidance on the structure of the “linkage element.”

Furthermore, the word “linkage” appears only once in the specification, in the context of a longitudinal linkage between a tongue and a cantilevered plate. *Id.* at 8:53. However, this “linkage” as it is used in this passage of the ’867 patent specification is not an element and/or is not included in any of the figures or in any other discussion as an apparatus incorporated in the heel binding. The prosecution history provides no further detail on the meaning of this term.

Moreover, the term “linkage element” is not a term of art in the ski binding industry and does not convey a specific structure or material that meets this limitation. As the patent drafter, KneeBinding was “in the best position to resolve the ambiguity” by providing some indication of how to analyze a ski binding to determine whether it meets the criteria of being a safety binding as required in the claims. *Nautilus*, 134 S. Ct. at 2129 (quotations and citation omitted). But it chose not to. *See id.*

In summary, the intrinsic evidence leaves a POSA without any guidance on the meaning of the term “linkage element” and the industry itself does not use this term with respect to ski bindings. Accordingly, the claims fail to “inform those skilled in the art about the scope of the invention with reasonable certainty” (*id.* at 2129) and the “linkage element” term is indefinite. For the foregoing reasons, Marker asks the Court to construe the phrase “linkage element” in accordance with the provisions of 35 U.S.C. § 112, ¶ 6 and to find that the specification fails to link the claimed function to a specific structure with reasonable certainty such that the claims are indefinite under 35 U.S.C. § 112, ¶ 2.

### 3. “A First Surface” and “A Second Surface”

Disputed Term	KneeBinding’s Proposed Construction	Marker’s Proposed Construction
a first surface		Indefinite.
a second surface		Indefinite.

The terms “a first surface” and “a second surface” are indefinite because the ’867 patent does not inform a POSA what these terms mean with reasonable certainty.

The only time the terms “first surface” and “second surface” are used in the ’867 patent is in claims 1–3. ’867 patent, 12:5–15. These references in the ’867 patent’s claims tells a POSA nothing about what part of the safety binding would be considered a first surface vs. a second surfaces vs. any other surface within the safety binding. For example, the patent specification discusses a number of surfaces, including surfaces of the vertical release cam, a surface on the heel cup, a bottom surface of an interface support, a top surface of a ski, a low-friction surface, a top surface of a vector decouple assembly, a mating surface, a top surface of the lower heel housing, a surface of the vector decoupler tongue, a bottom surface of a cantilevered plate, lateral release cam surfaces, curved surfaces, and boot interface surfaces. However, none of these are discussed in the specification as a first or second surface. Further, none of these are discussed in the specification as working with a linkage element to perform any function.

The prosecution history provides no further detail on the meaning of this term. As the patent drafter, KneeBinding was “in the best position to resolve the ambiguity” by providing some indication of how determine which of the surfaces cooperate with the linkage element to limit motion of the lateral release assembly. *Nautilus*, 134 S. Ct. at 2129 (quotations and citation omitted). But it chose not to, just as it chose not to for “lateral release assembly” and “linkage element” (see discussion above). *See id.*

In summary, the intrinsic evidence leaves a POSA without any guidance on the meaning of the terms “a first surface” or “a second surface.” Therefore, the claims fail to “inform those skilled in the art about the scope of the invention with reasonable certainty” (*id.* at 2129) and the “a first surface “ and “a second surface” terms are indefinite.

**C. “Vector Decoupling Assembly for Separating and Isolating Two or More Force Vectors”**

<b>Disputed Term</b>	<b>KneeBinding’s Proposed Construction</b>	<b>Marker’s Proposed Construction</b>
vector decoupling assembly for separating and isolating two or more force vectors	<p>No construction is needed and the term should be given its plain and ordinary meaning.</p> <p>Should the Court require further construction, a heel unit of a ski binding for separating and isolating multiple forces</p>	The vector decoupling assembly separates and isolates vertical force vectors from lateral force vectors, so that a principally vertical force vector will not result in release of a ski boot in a lateral direction, and a principally lateral force vector will not result in release of a ski boot in a vertical direction.

Marker’s proposed construction of “vector decoupling assembly for separating and isolating two or more force vectors” is consistent with the intrinsic evidence, specifically the description of the invention in the specification. In contrast, Plaintiff’s proposed construction simply restates the claim term without providing any clarification on what is meant by the subterms “separating,” “isolating,” and “force vectors.”

The ’867 patent emphasizes that the alleged invention separates vertical and lateral releases. For example, the ski binding heel unit includes an independent vertical heel release and an independent lateral release mechanism. ’867 patent, Abstract, Figs. 1–4, 3:45–47. Likewise, the ski binding disclosed in the ’867 patent has a vector decoupler mechanism that acts to “redirect the non-lateral forces without effecting the vertical heel release, lateral heel release or forward pressure compensator.” *Id.*

Furthermore, the patentee distinguished the purported invention from the prior art based on the separation of vertical and lateral forces. For example, the patentee states the following regarding the alleged problems with prior art ski bindings:

Multi-directional release bindings that exhibit unsatisfactory lateral and vertical ski retention fail to retain skis to boots during normal controlled skiing which gives rise to a condition called pre-release.



Pre-release occurs when a ski binding releases a ski during normal controlled skiing . . . .

. . . .

Pre-release in a multi-directional release heel (that provides release in the lateral and vertical directions) is primarily caused by an improper cross-linking of the design of the lateral and vertical release mechanisms; or by the cross-linked design of the mechanisms that control lateral, vertical, longitudinal, roll (induced edging), and forward and backward bending moments, causing the pure lateral release mode or the pure vertical release mode (the injurious modes) to become overloaded by the linked addition of the other non-lateral and non-vertical stresses (non-injurious/innocuous modes), by excessive friction between the release interfaces (low friction interfaces not only improve combined-loading release, but also enhance the rapid re-centering of the ski to the boot during innocuous stresses), and by insuring that the fitting adjustments that properly connect the binding to the individual sizing of the boot are correct.

*Id.* at 2:14–17, 3:7–23. In contrast, the vector decoupler mechanism described in the ’867 patent “separates and isolates undesired vertical release conditions from intended release conditions.”

*Id.* at 4:47–49. The patent abstract states that “[t]he lateral release cams and vector decoupler mechanism avert non-lateral, benign loads from the lateral heel release, and avert non-vertical, benign loads from the vertical heel release thereby reducing the incidence of inadvertent pre-release of a boot from a ski.” *Id.* at page 1, Abstract. More specifically, the alleged invention is described as “delinking” or “filter[ing]” vertical release, lateral heel release, and longitudinal pressure, such that they are “functionally independent mechanisms.” *Id.* at 3:47–50; 4:49–56; 5:4–9; *see also id.* at 8:11–27; 9:33–10:57.

As shown above, the patentee repeatedly emphasized the importance of vertical and lateral forces being delinked or treated as independent of one another by the ski binding as the feature that sets the alleged invention of the ’867 patent apart from the prior art. The Court “cannot look at the ordinary meaning of the term . . . in a vacuum,” it must “look at the ordinary

meaning in the context of the written description and the prosecution history.” *Medrad, Inc. v. MRI Devices Corp.*, 401 F.3d 1313, 1319 (Fed. Cir. 2005). The Federal Circuit has emphasized that the specification may be dispositive on the term meaning as “it is the single best guide to the meaning of a disputed term.” *Phillips*, 415 F.3d at 1315 (internal citation omitted). Therefore, the term “vector decoupling assembly for separating and isolating two or more force vectors” should be construed such that the vector decoupling assembly separates and isolates vertical force vectors from lateral force vectors and that a principally vertical force vector will not result in release of a ski boot in a lateral direction, and a principally lateral force vector will not result in release of a ski boot in a vertical direction, as set forth in the ’867 patent specification.

**D. “Securing a Heel Portion of a Ski Boot to a Ski”**

<b>Disputed Term</b>	<b>KneeBinding’s Proposed Construction</b>	<b>Marker’s Proposed Construction</b>
securing a heel portion of a ski boot to a ski	No construction is needed and the term should be given its plain and ordinary meaning.  Should the Court require further construction, <b>holding</b> the heel portion of a ski boot <b>in place for skiing</b>	The safety binding <b>secures</b> a heel portion of a ski boot <b>to a ski</b> .

With respect to the term “securing a heel portion of a ski boot to a ski,” the parties’ proposed constructions are not far apart. The core difference between the parties’ proposed constructions for this term are shown in bold in the chart above.

Marker’s proposed construction mirrors the disputed term by using the words “secures” and “to a ski.” Plaintiffs’ construction, however, broadens the term, as it only requires that the heel portion of the ski boot be held rather than secured. Furthermore, Plaintiffs’ construction also makes the term ambiguous by adding the limitation “in place for skiing,” which is found

nowhere in the claims nor the specification and which provides no guidance as to what “in place” means in the context of the claimed invention.

Because “the claims themselves provide substantial guidance as to the meaning of particular claim terms,” the Court should adopt Marker’s proposed claim construction for the term “securing a heel portion of a ski boot to a ski.” *Phillips*, 415 F.3d at 1314.

**E. “Lower Heel Assembly” and “Upper Heel Assembly”**

<b>Disputed Term</b>	<b>KneeBinding’s Proposed Construction</b>	<b>Marker’s Proposed Construction</b>
lower heel assembly	No construction is needed and the term should be given its plain and ordinary meaning.  Should the Court require further construction, a lower portion of a heel unit of a ski binding	The lower heel assembly is attached to the ski, and does not have any components or parts in common with, the upper heel assembly.
upper heel assembly	No construction is needed and the term should be given its plain and ordinary meaning.  Should the Court require further construction, an upper portion of a heel unit of a ski binding	The upper heel assembly is coupled to, but does not have any components or parts in common with, the lower heel assembly.

Marker’s proposed construction of “lower heel assembly” and “upper heel assembly” are consistent with the intrinsic evidence, specifically the description of the invention in the specification. In contrast, Plaintiff’s proposed constructions make these terms even more vague by incorporating the ambiguous terms “lower portion” and “upper portion,” respectively, neither of which appear anywhere in the patent nor provide any relationship between these “portions” and the rest of the ski binding.

The specification of the ’867 patent clearly distinguishes the upper heel housing and the lower heel housing as separate components of the ski binding. For example, in describing the upper and lower heel housings in relation to the figures disclosed in the ’867 patent, each are given different numbers (numbers 16 and 27, respectively). *See* ’867 patent, Figs. 1–4, 5:52–55.

The specification also discusses the upper heel housing (*id.* at 5:59–64, 6:4–29) and lower heel housing (*id.* at 4:57–63, 6:62–7:17) in completely separate sections of the specification.

Therefore, it is clear from the '867 patent's specification that the "lower heel assembly" does not have any components or parts in common with the "upper heel assembly," and vice versa, and the two should be construed as such. *See Phillips*, 415 F.3d at 1315 (stating that the specification "is the single best guide to the meaning of a disputed term").

**F. "Fixedly Attached"**

<b>Disputed Term</b>	<b>KneeBinding's Proposed Construction</b>	<b>Marker's Proposed Construction</b>
fixedly attached	The linkage element cannot be detached without damaging or breaking the ski binding	The "linkage element" is attached to the lateral release assembly in a fixed manner, such that it cannot be removed without destroying or damaging the safety binding.

With respect to the term "fixedly attached," the parties' proposed constructions are not widely divergent from each other. As can be seen in the chart above, the core difference between the parties' proposed constructions for "fixedly attached" is whether the "linkage element" is attached to the "lateral release assembly" or not. Both parties agree, however, that the linkage element cannot be detached/removed without damaging the ski/safety binding.

It is well-established that "the claims of a patent define the invention to which the patentee is entitled to the right to exclude." *Phillips*, 415 F.3d at 1312 (citing *Innova/Pure Water, Inc. v. Safari Water Filtration Systems, Inc.*, 381 F.3d 1111, 1115 (Fed. Cir. 2004)). Further, "the claims themselves provide substantial guidance as to the meaning of particular

claim terms.” *Id.* at 1314. In this case, the claims do not just provide substantial guidance, but are dispositive as to the proper construction of “fixedly attached.”<sup>3</sup>

Claim 1 requires “a linkage element fixedly attached to the lateral release assembly.” ’867 patent, 12:3–4 (emphasis added). Thus, by its express terms, claim 1 requires (i) that the linkage element be fixedly attached and (ii) that it be fixedly attached to the lateral release assembly.

However, despite this clear claim language, Plaintiff’s construction is limited to the linkage element alone, without any connection to the lateral release assembly. A construction that is inconsistent with the claims is not correct. *Papst Licensing GmbH & Co. KG v. Fujifilm Corp. (In re Papst Licensing Digital Camera Patent Litig.)*, 778 F.3d 1255, 1261 (Fed. Cir. 2015) (“[t]he construction that stays true to the claim language and most naturally aligns with the patent’s description of the invention will be, in the end, the correct construction.”) (citations omitted); *see also, e.g., Becton, Dickinson & Co.*, 616 F.3d at 1257 (“Claims must be ‘interpreted with an eye toward giving effect to **all** terms in the claim.’”) (quoting *Bicon, Inc. v. Straumann Co.*, 441 F.3d 945, 950 (Fed. Cir. 2006)) (emphasis added). In direct contrast, Plaintiff’s construction overtly attempts to read-out this express claim limitation without justification and in direct conflict with the clear canons of claim construction. *See e.g., Unique Concepts, Inc. v. Brown*, 939 F.2d 1558, 1563 (Fed. Cir. 1991) (“When the language of a claim is clear, as here, and a different interpretation would render meaningless express claim limitations, we do not resort to speculative interpretation....”).

Thus, the Plaintiff’s attempt to sever the connection between the linkage element and the lateral release assembly is contrary to the express claim language. Accordingly, the Court should

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<sup>3</sup> As discussed *supra*, the terms “linkage element” and “lateral release assembly” are not found anywhere in the ’867 patent specification outside of the claims and are indefinite.

construe the term “fixedly attached” as “the ‘linkage element’ is attached to the lateral release assembly in a fixed manner, such that it cannot be removed without destroying or damaging the safety binding.”

**G. “Wherein the Linkage Element, a First Surface and a Second Surface Cooperate to Limit Motion of the Lateral Release Assembly to Within a Predetermined Region Within a Plane Defined by the Longitudinal and Horizontal Axes of the Ski”**

Disputed Term	KneeBinding’s Proposed Construction	Marker’s Proposed Construction
wherein the linkage element, a first surface and a second surface cooperate to limit motion of the lateral release assembly to within a predetermined region within a plane defined by the longitudinal and horizontal axes of the ski	<p>No construction is needed and the term should be given its plain and ordinary meaning.</p> <p>Should the Court require further construction, the linkage element and at least two surfaces cooperate to ensure that the lateral release assembly only moves within a known region within a plane defined by the longitudinal and horizontal axes of the ski</p>	<p>Indefinite.</p> <p>Alternatively, motion of the lateral release assembly is limited, to within a predetermined region within a plane defined by the longitudinal and horizontal axes of the ski, by only the “linkage element,” a “first surface,” and a “second surface.”</p>

As discussed in detail above, the terms “a first surface” and “a second surface” are not disclosed in the ’867 patent’s specification and are indefinite, thereby rendering this term indefinite as a consequence. Alternatively, the specification and prosecution history provide some guidance with respect to limiting the motion of the lateral release assembly to within a predetermined region within a plane defined by the longitudinal and horizontal axes of the ski, as incorporated in Marker’s proposed construction.

Claims are to be interpreted in view of the intrinsic evidence, which includes the claim language, the specification, and the prosecution history. *See Phillips*, 415 F.3d at 1312–17. Although the specification is vital to the interpretation of a claim term, the Federal Circuit has emphasized that the “‘undisputed public record’ of proceedings in the Patent and Trademark Office is of primary significance in understanding the claims.” *Markman*, 52 F.3d at 980. A

patent applicant often makes statements concerning the scope of the invention in order to convince the PTO that a patent application should be granted, and thus the statements are extremely relevant for claim interpretation. *Southwall Techs., Inc. v. Cardinal IG Co.*, 54 F.3d 1570, 1576 (Fed. Cir. 1995). Thus, the prosecution history constitutes part of the “intrinsic evidence” that directly reflects how the patentee and the PTO understood the invention. *Phillips*, 415 F.3d at 1317.

Here, the ’867 patent’s specification teaches that the alleged invention “features a decisively controlled level of release effort as the heel of the boot displaces from the longitudinal center of the ski.” ’867 patent, 3:54–56. In other words, the movement of release is restricted “to a predetermined path of both rotation and translation.” *Id.* at 3:64–67.

It becomes clear in the prosecution history that this limitation is a key distinction over the prior art. Specifically, the patentees argued that the limitation of movement of the lateral release assembly to a plane defined by the longitudinal and horizontal axes of the ski overcame the Examiner’s rejection of the claims over U.S. Patent No. 4,165,883 (Weigl). *December 20, 2011 Amendment in Response to Non-Final Office Action Under 37 C.F.R. 1.111* in U.S. Appln. Ser. No. 12/984,293, at 5–7. The patentee made similar arguments to overcome a rejection over U.S. Patent No. 4,858,946 (Stritzl), further emphasizing that the prior art did “not include any side elements that would enable applying lateral securing pressure to the ski boot” and that it did not teach or suggest a combination of three elements (“a linkage element, a first surface and a second surface”) that “cooperate to limit motion of the lateral release assembly.” *January 9, 2013 Request for Continued Examination Pursuant to 37 C.F.R. 1.114 and Amendment* in U.S. Appln. Ser. No. 12/984,293, at 5–6. The patentee reemphasized that these three elements were required to limit motion of the lateral release assembly in order to overcome another rejection, this time

over U.S. Patent No. 4,505,494 (Gertsch). *October 8, 2013 Response After Final Action Under 37 C.F.R. 1.116* in U.S. Appln. Ser. No. 12/984,293, at 6.

Based on the specification and the prosecution history, it is apparent that the limitation of the motion of the lateral release assembly to within a predetermined region within a plane defined by the longitudinal and horizontal axes of the ski is accomplished by *only* the “linkage element,” a “first surface,” and a “second surface.” Consequently, the intrinsic evidence all points to Marker’s proposed construction of “wherein the linkage element, a first surface and a second surface cooperate to limit motion of the lateral release assembly to within a predetermined region within a plane defined by the longitudinal and horizontal axes of the ski” that “motion of the lateral release assembly is limited, to within a predetermined region within a plane defined by the longitudinal and horizontal axes of the ski, by only the ‘linkage element,’ a ‘first surface,’ and a ‘second surface’.”

## V. CONCLUSION

For all the foregoing reasons, Marker respectfully requests that the Court adopt its proposed constructions and reject KneeBinding’s proposed constructions.

Dated: December 23, 2016

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 23, 2016, a true and correct copy of the foregoing document was electronically filed with the United States District Court for the District of Vermont and was served on all counsel by the court's electronic filing notification or via email.

/s/ Anthony J. Fitzpatrick

Anthony J. Fitzpatrick

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## EXHIBIT A



US008955867B2

(12) **United States Patent**  
**Howell**

(10) **Patent No.:** **US 8,955,867 B2**  
(45) **Date of Patent:** **Feb. 17, 2015**

(54) **ALPINE SKI BINDING HEEL UNIT**

(75) Inventor: **Richard J. Howell**, Stowe, VT (US)

(73) Assignee: **Kneebinding, Inc.**, Stowe, VT (US)

(\*) Notice: Subject to any disclaimer, the term of this patent is extended or adjusted under 35 U.S.C. 154(b) by 0 days.

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(21) Appl. No.: **12/984,293**

(22) Filed: **Jan. 4, 2011**

(65) **Prior Publication Data**

US 2011/0193324 A1 Aug. 11, 2011

**Related U.S. Application Data**

(60) Continuation of application No. 12/001,436, filed on Dec. 11, 2007, now Pat. No. 7,887,084, which is a division of application No. 10/780,455, filed on Feb. 17, 2004, now Pat. No. 7,318,598.

(60) Provisional application No. 60/448,645, filed on Feb. 18, 2003.

(51) **Int. Cl.**  
*A63C 9/00* (2012.01)  
*A63C 9/084* (2012.01)

(52) **U.S. Cl.**  
CPC ..... *A63C 9/0844* (2013.01); *A63C 9/001* (2013.01); *A63C 9/0845* (2013.01); *A63C 9/0846* (2013.01)  
USPC ..... **280/628**; **280/632**

(58) **Field of Classification Search**  
USPC ..... 280/618, 624, 625, 626, 627, 628, 62, 280/632, 634  
See application file for complete search history.

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*Primary Examiner* — J. Allen Shriver, II

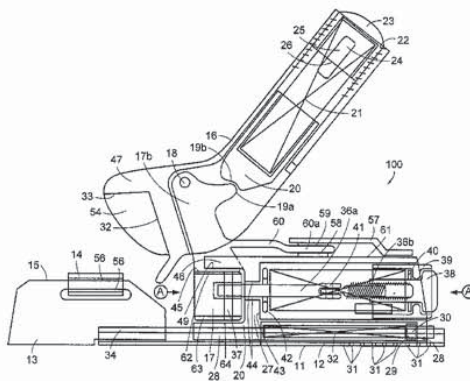
*Assistant Examiner* — Bridget Avery

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(57) **ABSTRACT**

Ski binding heel unit includes lateral release cams and a vector decoupler mechanism that provide lateral shear release of the heel of a ski boot from a ski. The ski binding heel unit includes an independent vertical heel release mechanism, independent lateral release mechanism and a forward pressure compensator. The lateral release cams have laterally outwardly flaring contact points. The vector decoupler mechanism restricts heel unit lateral rotation and translation to a control path. The shape of the lateral release cams dictates the control path. The vector decoupler mechanism redirects the non-lateral forces without effecting the vertical heel release, lateral heel release or forward pressure compensator. The lateral release cams and vector decoupler mechanism avert non-lateral, benign loads from the lateral heel release, and avert non-vertical, benign loads from the vertical heel release thereby reducing the incidence of inadvertent pre-release of a boot from a ski.

**9 Claims, 4 Drawing Sheets**



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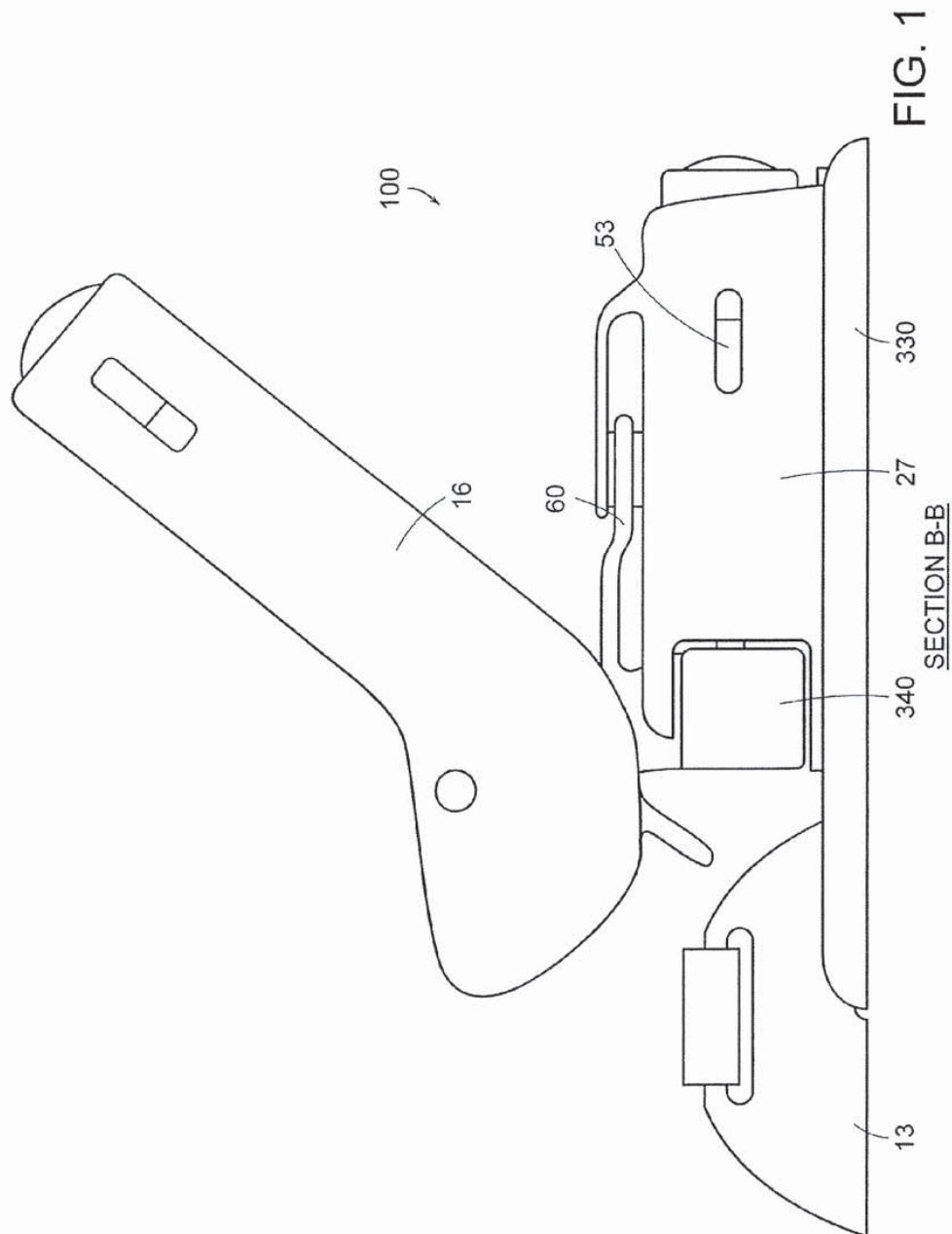
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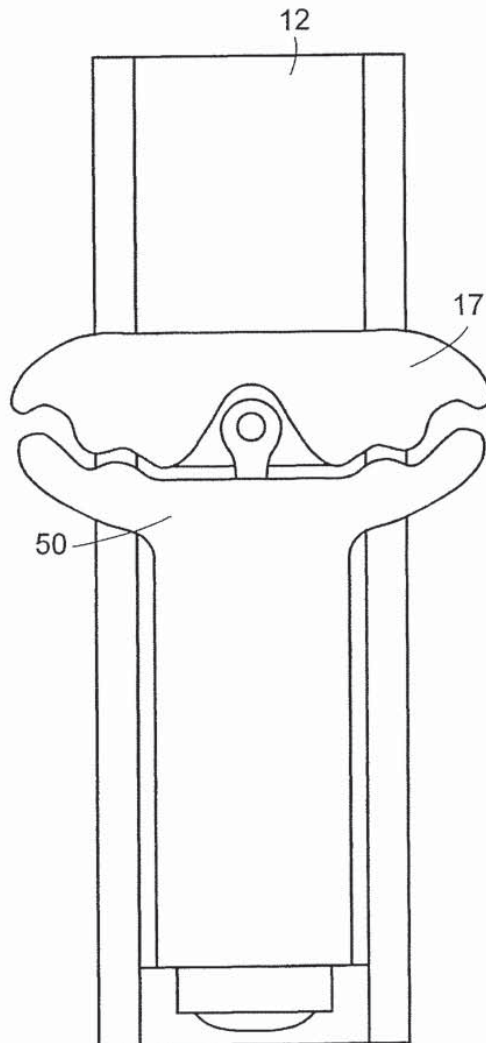


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**FIG. 3**

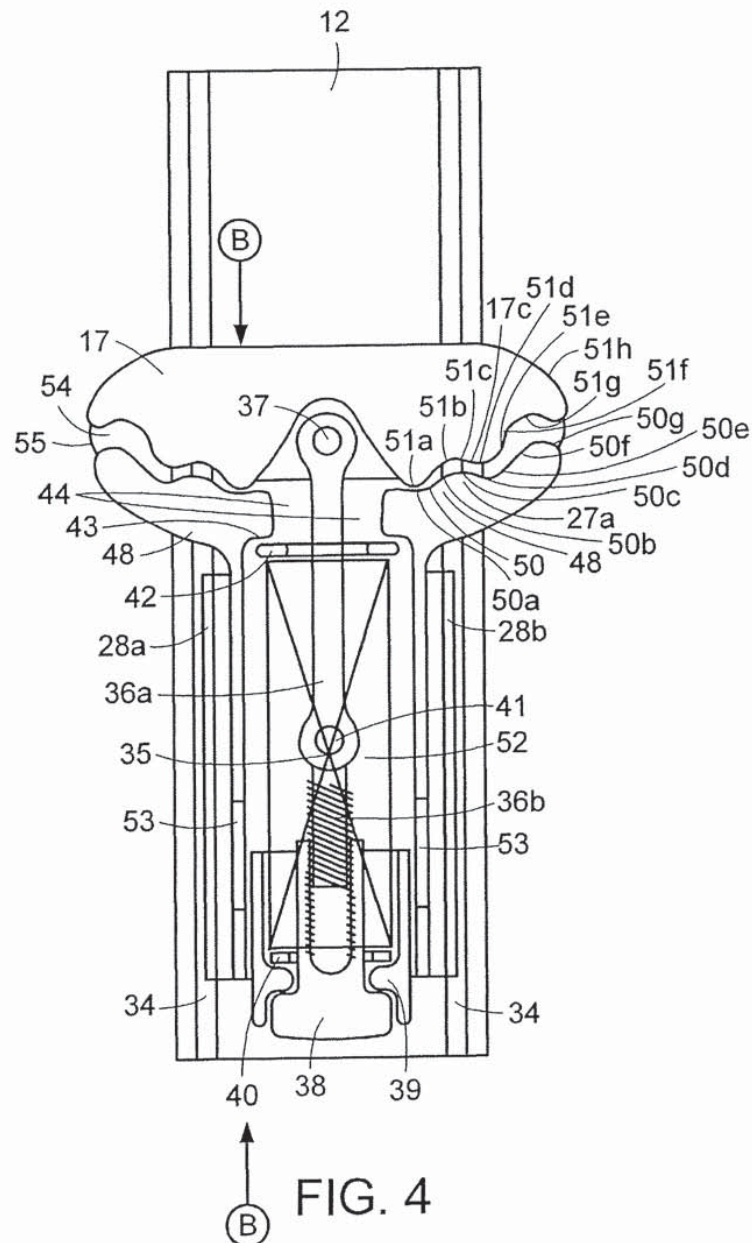


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**ALPINE SKI BINDING HEEL UNIT****CROSS-REFERENCE TO RELATED APPLICATIONS**

This patent application is a Continuation Patent Application of U.S. patent application Ser. No. 12/001,436, filed on Dec. 11, 2007 entitled ALPINE SKI BINDING HEEL UNIT, which is a Divisional Patent Application of U.S. patent application Ser. No. 10/780,455, filed on Feb. 17, 2004, which claims priority under 35 U.S.C. §119(e) to U.S. Provisional Application Ser. No. 60/448,645, filed on Feb. 18, 2003, all of which are expressly incorporated herein by reference in their entirety.

**BACKGROUND**

This invention relates in general to alpine ski bindings and, in particular, to multi-directional release alpine ski binding heel units that release in the vertical and lateral directions.

Ski binding heel units have a jaw that is adapted to hold a boot and move between a boot retention position and a release position. The jaw vertical pivots around an axis transverse to the longitudinal axis of the ski and/or binding against the action of an elastic system. The elastic system comprises a mobile member biased by a spring against a release incline on a support attached to the ski. Vertical heel release bindings have serious disadvantages because vertical release bindings only release the ski when there is downward stress imparted by the skier on the ski where the area of applied stress is located in front of the boot's fulcrum point, which fulcrum is typically located under the ball of the foot; or release the ski when there is an upward stress applied to the ski by the skier when the skier is turned backwards in a fall with the top/aft section of the ski being dragged in the snow. Ski binding heel units that only release vertically rely on the mating ski binding toe units (which toe units release in response to lateral stresses or in the case of multi-directional toes units, release in response to lateral and special vertical stresses), which in the case of multi-directional release toes that provide vertical release in response to vertical stresses applied to the ski by the skier to the top after-body section of the ski during pure backward falls and release vertically at the toe in response to vertical stresses being applied by the snow surface when the skier is backwards and the tip of the ski is being dragged in the snow. Heels that release only in the vertical direction rely on the mating ski binding toe units to provide lateral release in response to lateral stresses that enter the fore-body of the ski during forward twisting falls and in response to pure straight-downward twisting loads where an almost pure-torque is applied to the ski. Accordingly, with heels that only provide vertical release, lateral release of the ski from the boot is not possible when lateral forces are applied to the ski immediately under or near the heel that only releases vertically.

In an equal- and opposite vernacular, the boot can release from the ski, or the ski can release from the boot.

All alpine ski bindings provide lateral toe release to release the ski from the boot when a transverse-longitudinal (side of the ski) force is applied to the ski at all points along the ski, except where a lateral force is applied to the ski immediately under or near a non lateral releasing heel. A heel that releases in the vertical direction only which relies on a lateral releasing toe can be dangerous to the knee in the event of lateral forces being applied to the ski immediately under a heel that only provides vertical release, because a lateral force applied to a non-releasing ski, under a non-lateral releasing heel, can act over the entire length of the lower leg to generate a moment

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about the femur when the knee is bent at nearly 70-degrees to 110-degrees, which femur is semi-rigidly attached to the hip, thereby producing very high strain across the anterior cruciate ligament of the knee, often causing rupture of the ACL.

Heel unit bindings that release both vertically and laterally have been proposed. Multi-directional heel unit bindings can have a jaw that laterally pivots around a vertical axis located on the longitudinal plane of symmetry of the ski or a jaw mounted on a universal joint and biased to a centered retention position by an elastic locking system. These heel unit bindings, however, have serious disadvantages. These disadvantages include unsatisfactory lateral and vertical retention of the ski to the boot.

Multi-directional release bindings that exhibit unsatisfactory lateral and vertical ski retention fail to retain skis to boots during normal controlled skiing which gives rise to a condition called pre-release. Pre-release occurs when a ski binding releases a ski during normal controlled skiing. Pre-release can be caused by an undesired relationship between the vertical forces, the lateral forces, the fore-and-aft forces, the forward and backward bending moments, the torsional moments (pure torques) and the roll moments (edging loads) that enter the binding.

To overcome pre-release, some skiers manually increase the release level biasings of the ski binding which increases the retention of the ski to the boot in the binding. The increase in release level offsets inadvertent pre-release. However, the increase in retention also increases the release level, negating the original benefits that multi-directional bindings are intended to resolve.

Many of the multi-directional heel release bindings have offered the promise of improved release but have failed to provide adequate retention in practice. Consequently, previous multi-directional heel bindings do not meet fundamental design requirements of an alpine ski binding including providing proper retention of a ski to a boot during controlled skiing maneuvers.

There is also one multi-directional heel unit which provides false-positive retention, because it provides retention during controlled skiing, but fails to allow proper lateral heel release when roll moments (from edging) are induced into the binding, and is being taken to market, regardless, because there is no international standard that tests for the effects of induced roll moments on proper lateral heel release. Therefore, in this special case, the important promise of multi-directional release is not present during edging, which is almost always occurring during controlled and uncontrolled skiing (potentially injurious falls).

Despite improvements in multi-directional toe release bindings, the incidence of knee injuries continues to increase. Frequently the anterior cruciate ligament (ACL) of knee is strained or ruptured. ACL strain intensifies when lateral forces are applied to the ski immediately under or near the projected tibial axis (coaxial with the tibia), generally known as phantom-foot fall kinematics. In phantom-foot falls a lateral heel release binding will avert ACL strain. For example, when the knee is in a flexion angle of approximately 70 to 110-degrees, lateral forces applied to the bottom of the project tibia axis generate a torque about the femoral axis when the hip is semi-fixed. Due to the long length of the lever-arm from the base of the ski, including the thickness of the ski, the thickness of the binding (often also including "under-binding devices"/plates), the thickness of the heel section of the boot sole and the long length of the tibia), this high leverage generates a large torque about the femur where the instant unit stress through the knee is applied as strain to the ACL. In this frequent circumstance, a lateral heel release



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binding could release. However, a multi-directional heel release binding that accommodates the release of the ski in the above described situation, which provides proper lateral release during edge-induced roll moments and also prevents pre-release during normal skiing conditions has yet to be reduced to practice.

Pre-release in a multi-directional release heel (that provides release in the lateral and vertical directions) is primarily caused by an improper cross-linking of the design of the lateral and vertical release mechanisms; or by the cross-linked design of the mechanisms that control lateral, vertical, longitudinal, roll (induced edging), and forward and backward bending moments, causing the pure lateral release mode or the pure vertical release mode (the injurious modes) to become overloaded by the linked addition of the other non-lateral and non-vertical stresses (non-injurious/innocuous modes), by excessive friction between the release interfaces (low friction interfaces not only improve combined-loading release, but also enhance the rapid re-centering of the ski to the boot during innocuous stresses), and by insuring that the fitting adjustments that properly connect the binding to the individual sizing of the boot are correct.

In related art with a multi-directional heel release, a center release mechanism is used. However, center release mechanisms show evidence of internal friction, especially during induced roll moments from edging. Furthermore, snow can be forced into the front end of the binding where the moving twist release interface resides between the bottom side of the binding and the ski. The snow builds up, and when compressed by the cyclical action of ski flex and counter-flex, forms an expanding layer of ice that greatly increases the resultant twist release. The presence of snow and ice melts deposits large amounts of dirt and grit in the release interfaces. The deposition greatly increases the resultant twist release and subsequent resultant torsional loading induced into the tibia during combined forward twisting falls, by as much as 300%, easily causing a fractured tibia.

A multi-directional release binding that takes into consideration the aforementioned intricacies and prevents pre-release has not been reduced to practice.

#### SUMMARY OF THE INVENTION

An alpine ski binding heel unit is disclosed that includes a primary vertical release, lateral heel release and longitudinal pressure compensator. The primary vertical release, lateral heel release and longitudinal pressure compensator are de-linked from each other. That is, they are functionally independent mechanisms. The forward release, the lateral heel release, and longitudinal pressure compensator include independent adjustment.

In one embodiment, the lateral heel release includes a lateral release cam. The lateral release cam features a decisively controlled level of release effort as the heel of the boot displaces from the longitudinal center of the ski. The lateral release cam and similarly matched cam interface include two pairs of individual cam members. Each pair includes a left individual cam member and right individual cam member for lateral heel release in the left and right direction, respectively. The individual cam member comprise rounded faces such that during dynamic motion of the lateral release only one or two cam members are in contact with the matched cam interface. The lateral release cam restricts the movement of the lateral heel release to a predetermined path of both rotation and translation. The shape of the individual cam members and the matched cam interface define this predetermined path.

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In one embodiment, the left and right side individual cam members are shaped symmetrically providing similar lateral release in either the inward or outward directions. In another embodiment, the two sides are shaped asymmetrically to provide unequal release in the inward and outward directions. The asymmetry is shaped so that the gross features of the individual cam members are either curved toward the fore body of the ski or curved aft toward the after-body of the ski. Curving forward increases the net lateral release, while curving aft decreases the net lateral release.

During dynamic actuation, the shape of the individual cam members shifts the instant center of contact between the lateral release cam and the matched cam interface. The contact center during its initial phase of lateral movement is at the inner pair of individual cam members. Specifically, one of the individual cam members (left or right) will contact the matched cam interface during the initial phase of lateral release. Then, during the latter phase of lateral movement, the contact center shifts from the inner pair to the outer pair of individual cam members (either left or right).

Analytically, the lateral heel release includes an incremental lever arm that resists lateral motion. The incremental lever arm is defined by the distance between the point of contact between the tension shaft and the point of contact on the lateral release cam. The incremental lateral release cam tilts during initial and latter phases of release. The lateral release cam tilt allows the instant lateral center of effort (from the longitudinal pressure) of the boot to shift laterally to a point that is farther away from the concentrated point of contact. The rolling nature of the contact interface, defined by the lateral release cam and the matched cam interface, minimizes changes in the coefficient of friction within the cam interface of the lateral heel release mechanism.

Lateral release of the ski from the boot occurs after the instant lateral center of the boot's longitudinal pressure is displaced past the outer most individual cam member (either left or right). The incremental lever arm offsets an opposing lever arm of the lateral release spring-bias. When the boot's lateral instant center of longitudinal pressure is disposed near the outer pair of individual cam members, the ski, relative to the boot, can either continue to move laterally until release if the induced load increased, or the ski, relative to the boot, can be pulled back to center if the loading innocuously dissipates. The net effect of multiple lever arms as described above pulls the ski, relative to the boot, back to center.

In one or more embodiments, a vector decoupler mechanism separates and isolates undesired release conditions from intended release conditions. The vector decoupler mechanism filters events including induced roll loads (due to edging on snow or ice), forward bending moments, vertical forces and backward bending moments from the primary lateral and vertical heel release mechanisms. The vector decoupler prevents influence on objects including the lateral heel release, the vertical heel release and the longitudinal pressure compensator.

The vector decoupler mechanism includes a tongue that extends from the upper stem of the lateral release cam. The tongue moves between two plates disposed above and below the tongue. The two plates are stationary relative to lateral heel release and are a part of a lower heel unit housing. The lower heel unit housing connects to the non-moving side of the lateral release cams.

The heel unit as described also provides the function of entry and exit into and out of the ski by virtue of the movement of the vertical release feature. Stepping upon a treadle latches the heel unit to the boot. The other protruding end of



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the heel unit can be stepped upon by the opposite ski, boot, pole or hand to effect stepping-out of (i.e., disengaging the boot from) the heel unit.

The vector decoupler mechanism filters out unwanted non-lateral loads away from the lateral release cam. The unwanted loads include those that occur when stepping-into the binding (as during latching the vertical release mechanism), those that occur during vertical only release, and those that occur during edging on snow or ice (roll moments).

The longitudinal pressure compensator includes a spring. The spring bias produces linear force between the boot and the jaw (heel interface of the binding) of the binding. Ski flex causes the spring to become compressed. In one embodiment, the longitudinal pressure compensator mechanism is semi-linked to the primary vertical heel release and lateral heel release mechanisms. Consequently, the longitudinal pressure on the lateral heel release mechanism and vertical release mechanism increases proportionally and predictably in the event of ski flex as a function of the spring rate of the forward pressure spring.

The design largely blocks the introduction of foreign matter into the lateral heel release cam mechanism, thereby not significantly affecting performance. The open space between the lateral release cam and the matching cam interface may be partially filled with a compressible rubber-like polymer to prevent the introduction of mud, road-salt and ice contaminants.

Another embodiment describes a heel pad, to which the heel area of the sole of the boot rests, which is coated with a low-friction element to minimize the lateral friction produced by normal forces (downward forces). An alternative describes a different coefficient of friction coating surface, such as, polytetrafluoroethylene (PTFE) or polypropylene. This low-friction interface maintains an expected level of lateral-twist release during the introduction of combined vertical-downward and roll loads, as primarily controlled by the spring-biased lateral heel release.

#### BRIEF DESCRIPTION OF THE DRAWING

FIG. 1 illustrates a side view of the alpine ski binding heel unit;

FIG. 2 is a more detailed side view of the heel unit of FIG. 1;

FIG. 3 illustrates a cross-sectional top view of a lateral release mechanism including the spring biasing; and,

FIG. 4 is a more detailed cross-sectional top view of the lateral release mechanism of FIG. 3.

#### DETAILED DESCRIPTION

FIG. 1 shows a sectional side view of a ski binding heel unit 100. The ski binding heel unit includes an upper heel housing 16, lower heel housing 27, heel pad 13, lateral release 340, interface support 330, and vector decoupler mechanism 60. Heel pad 13 connects to interface support. The heel housing is disposed on the lateral release 340, which is connected to the vector decoupler mechanism 60.

FIG. 2 details a side view of the alpine ski binding heel unit shown in FIG. 1. Upper Heel housing 16 includes a pivot rod 18, cam surfaces 19a and 19b stem section 17b, lateral release cam assembly 17, vertical release cam follower 20, vertical release spring 21, threaded cap 22, window 24, polymer piece 25, surface 26, region 33, and heel cup assembly 47.

As used herein, the longitudinal and horizontal plane of the ski is that plane which is parallel to the bottom surface of the ski. The longitudinal and vertical plane of the ski is that plane

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which is perpendicular to the longitudinal and horizontal plane of the ski and parallel to the longitudinal centerline of the ski.

Upper heel housing 16 connects to lateral release cam 17 by way of a pivot rod 18. Vertical release is a function of opposing vertical release cam surfaces 19a and 19b on the aft-most end of the upper one-third stem section 17b of lateral release cam 17, and the vertical release cam follower 20. The vertical release spring 21 (shown by an "X") in the large internal pocket of the upper heel housing 16 pushes cam follower 20. Forward release threaded cap 22 compresses the opposing end of spring.

A window 24 on surface 26 registers the release adjustment value. In one embodiment, a transparent polymer piece 25 covers the window 24. In a forward skiing fall, which generates a forward bending moment on the lower leg of the skier, the ski boot applies an upward vertical force to region 33 of the underside of heel cup 47 which heel cup is integral with upper heel housing 16.

The upper heel housing 16 holds and compresses a ski boot heel downward to oppose the upward forces generated by the ski boot during skiing. Forces include those from forward bending moments and roll moments generated during edging because region 33 and pivot rod 18 have a lateral width to resist such induced roll moments from edging. The skier removes the ski boot from the alpine ski binding heel unit by applying downward pressure to the top end of upper heel housing 16 with the opposite ski, opposite boot, by ski pole, or by an open hand.

Cam follower 20 moves along the length of the pocket of the long axis of upper heel housing 16 in response to upward vertical forces being applied to region 33 or in response to downward exiting forces applied to the upper end of upper heel housing 16. The shape of cam surfaces 19a and 19b control the relationship of the forces and corresponding displacement of cam follower 20, as biased by spring 21, which allows for the rotational displacement about a horizontal axis 18 of upper heel housing 16 and the vertical displacement of the ski boot in concert with region 33.

The vertical release cam follower 20 is made of plastic, while the moving lateral release cam 17/17b is made of coated die cast metal or injection molded plastic, although other suitable materials known in the art may also be used. The vertical release cam interface between cam surfaces 19a and 19b can be heavily greased with moderately high viscosity low-friction grease such as molybdenum disulfide or the like. The wicking action of cam surfaces 19a and 19b, as in the way an eye-lid functions, preclude mud, road-salt and ice from interfering with smooth vertical release cam action.

Interface support 330 includes bottom surface, stop-lock/nut 29, teeth 30, longitudinal spring 32, and lower carriage 12.

Lower carriage 11, connects to the top surface of a ski (not shown), to a riser plate (not shown), a lifter (not shown) or to an integral rail-system (not shown). Stop-lock/nut 29 has one or more teeth 30 to allow selective movement of lower heel housing 27 along the length of lower carriage 12 in conjunction with slots 31 that are formed in lower carriage 12. Turning stop-lock/nut 29 facilitates movement of lower heel housing 27 relative to lower carriage 12 to properly fit various lengths of ski boots between the lower heel housing 27 and an alpine binding toe piece (not shown).

In series with the stop-lock/nut 29 and lower heel housing 27 is longitudinal spring 32, which provides a spring bias between lower heel housing 27 and lower carriage 12. Longitudinal spring 32 also provides longitudinal pressure between the lower heel housing 27 and alpine binding toe piece to ensure proper hold of a boot during the ski's counter-



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flex. Counter-flex increases the strain on the top surface of the ski, thereby increasing the distance between the toe piece and heel unit 100. The longitudinal pressure maintains the contact of the binding's toe piece and heel unit 100 throughout the ski counter-flex. The lower heel housing 27 applies longitudinal pressure to the ski boot via the upper heel housing 16 at surface 32 of heel cup 47. An internal shoulder on stop-lock/nut 29 prevents the nut 29 from falling out of its opening at the end of the lower heel housing 27. Longitudinal pressure increases substantially during ski flex. Such pressure is addressed by the longitudinal pressure spring biasing means that is comprised of elements 32, 29, 30, 31 within lower heel housing 27.

The lower heel housing 27 fits to and integrates with lower carriage 12 by flanges 28. Specifically, flanges 28a, 28b, on each side of the lower heel housing 27, mate with lower carriage 12.

Heel pad 13 includes low-friction element 14, low-friction surface 15, and bearing grease 56. Low-friction element 14 is disposed on the heel pad 13 and is lubricated with bearing grease 56. In an alternate embodiment low-friction surface 15 and bearing grease 56 is replaced with a low-friction surface 15 to which a boot can contact. Low-friction means 14 and 15 provide smooth lateral heel release during combined downward-vertical and lateral stresses, which mitigate torque about the femur and correspondingly strained ACL. Low-friction means 14 and 15 contribute to rapid re-centering of the heel of a boot during innocuous lateral heel loads.

The vector decoupler assembly 60 includes cantilevered plate 57, vector decoupler tongue 60a, top surface 61, and low-friction elements 58 and 59.

The cantilevered plate 57 joins to the moving lateral release cam element 17. The low friction elements 58 and 59 are made of a low-friction polymer, such as polytetrafluoroethylene (PTFE), or are made of other low-friction materials or surfaces that are already well known in the art. One side of the low-friction element 58 bonds to a mating surface (not shown). For example, the top-side of low-friction element 58 can be bonded to the bottom side of vector decoupler assembly 60, allowing the low friction element 58 to slide while rotating and translating laterally. The translation occurs with the vector decoupler tongue 60a when a force is applied to the vector decoupler tongue 60a such that the vector decoupler tongue 60a is applied against top surface 61 of lower heel housing 27. Optionally, the bottom side of low-friction element 58 can be bonded to the top surface 61 of lower heel housing 27. Accordingly, the vector decoupler tongue 60 can rotationally and translationally slide laterally against low friction element 58. If the vector decoupler tongue is made of an aluminum die casting, a low friction coating (such as Teflon impregnated epoxy paint) is applied to the contact surfaces of the vector decoupler tongue 60a and the top surface 61 of the lower heel housing 27. Low friction coatings provide a low friction interface between the vector decoupler tongue 60 and the lower heel housing. If the vector decoupler tongue is made of injection molded plastic, the plastic material itself can be of a low coefficient of friction material without any coating, such as DuPont Delrin blended with PTFE, low-coefficient of friction grades of Nylon 12 or Nylon 66 or other low-coefficient of friction/high impact at low-temperature grades of plastics that are already well known in the art.

In a similar way, the top-side of low-friction element 59 bonds to the bottom side of cantilevered plate 57 so that the vector decoupler tongue 60a can slide smoothly while rotating and translating in the general lateral direction. Or, optionally, the bottom side of low-friction element 59 can be bonded

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to the top surface of the vector decoupler tongue 60a while the top surface of the low-friction element 59 slides by rotating and translating against the bottom side of the cantilevered plate 57. If the vector decoupler tongue is made of die castable aluminum, low friction coatings, such as Teflon impregnated epoxy paint, are applied to the contact surfaces of the vector decoupler tongue 60a and the bottom surface of the cantilevered plate 57. The application provides a low-friction interface between the vector decoupler tongue 60a and the cantilevered plate 57.

The vector decoupler assembly 60 has sufficient width between 1 cm and 3 cm in the lateral direction. The augmented width resists a roll moment induced by a skier. The width also resists the stresses induced in the roll direction when skiing on snow or icy surfaces when a boot is forced to overturn laterally (roll), so that an upward unit force is applied to one side of the lateral region 33 of the underside of heel cup 47 thereby decoupling the effects of induced roll moments from the vertical release mechanism—minimizing inadvertent pre-release. The resistance supplied by the vector decoupler substantially decouples the roll moment from the moving lateral release cam surfaces 17c and interfacing lateral release cam surfaces 27a, thereby decoupling the effects of induced roll moments from the lateral heel release.

The vector decoupler assembly 60 allows free lateral translational and rotational movement of the moving lateral release cam 17 relative to the lower heel housing 27. The vector decoupler assembly 60 also allows free coupling of moving lateral release cam 17 against the mating cam surfaces 27a in the presence of lateral heel release loads. This occurs even when induced roll moments and upward force vectors are applied through the vector decoupler assembly 60. Free coupling is partially limited by friction generated between the sliding surfaces of low-friction elements 58 and 59 and the respective mating surfaces of components 60a and 61. Component 61 can be affixed to the lower heel housing 27 by band 18 that wraps around the lower heel housing 27.

In an alternate embodiment, cantilevered plate 61 is formed integrally with lower heel housing 27 as an aluminum die-casting or as an injection molded plastic part. The long length of vector decoupler tongue 60a reduces the unit compressive stresses at the far end of the tongue, between its interfacing components, low-friction element 59 and cantilevered plate 61 during induced forward bending moments. The long length of vector decoupler tongue 60 also serves to reduce the compressive stresses between interfacing components, low friction element 58, and the lower heel housing 27 during the latching action of stepping into the lower heel housing 27.

Vector decoupler mechanism 60 above is de-coupled from longitudinal pressure loads generated between moving lateral release cam 17 and lower heel housing 27, due to the longitudinally-open linkage between tongue 60a and cantilevered plate 57. In another embodiment, the side-to-side movement of the tongue 60a may be limited either on one side or both sides and substantially restricted on one side to block lateral heel release in one lateral direction to cut the probability of lateral heel pre-release in half while at the same time allowing release in the other lateral direction to provide for the lateral stresses that cause the inward twisting abduction loads present in ACL ruptures, described in part by the phantom-foot injury mechanism/fall mechanics described above.

FIG. 3 illustrates a sectional top view of a lateral heel release mechanism. FIG. 4 shows the view of FIG. 3 in greater detail. Lateral release cam 17 is disposed next to matched cam interface 50. Both lateral release cam 17 and matched cam interface is disposed on top of lower carriage 12. Lateral



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release 340 includes lateral release cam 17, matched cam interface 50, spring biasing means 52, lateral heel release spring 35, tension shaft parts 36a and 36b, connector rod 41, shaft-rod 37, lateral release indicator washer 39, internal washer 40, integral opening 44, rectangular opening washer 42, and interface curved surfaces 51a, 51b, 51c, 51d, 51f, 51g.

Referring to FIGS. 2 and 4, the lateral heel release mechanism comprises lateral release cam surfaces 17c and lower heel housing lateral cam surfaces 27a, which are biased (i.e., forced together) by lateral heel spring-biasing component 52. Lateral spring biasing component 52 includes lateral heel release spring 35 that is placed in compression by the opposing force of the tension shaft parts, 36a and 36b (or by optional unitary tension shaft 36), and connector rod 41. These are supported at each tensioned two ends of the rod(s). At one end, shaft-rod 37, lateral release cam 17, and rectangular opening washer 42 support the equal and opposite compression against internal wall 43 of lower heel housing 27. At the other end, lateral release threaded cap 38, lateral release indicator washer 39, internal washer 40 support the equal and opposite compression of the tension rod(s). Internal opening 44 and the internal opening of rectangular opening washer 42 are both rectangular in shape to permit tension shaft 36a (or 36) to rotate and translate laterally upon the lateral movement of moving lateral release cam 17. While the vertical gaps of internal opening 44 and the vertical gaps of rectangular opening washer 42 are each smaller than their respective lateral gaps, such vertical gaps restrict the vertical movement of tension shaft 36a (or 36), so that upper heel housing 16 provides vertical movement of the ski binding heel unit about its pivot axis 18, rather than by the forced vertical movement of other elements.

Lateral heel release cam surfaces allow the lateral release cam 17 to both rotate and translate relative to the lower heel housing 27, so that the heel area of the ski boot can displace laterally relative to the long axis of the ski. Boot displacement occurs when lateral loads are induced. Such lateral movement of the boot occurs across low-friction element 14 and heel pad top surface 15, as well as laterally against heel cup 47 boot-interface surfaces 32 and 33.

The lateral release cam surfaces 17c and 27a of the lateral release cam 17 and the mating cam surfaces 27a of the lower heel housing 27 displace relative to each other in a path described by their curved surfaces—specifically, curved surfaces 50a, 50b, 50c, 50d, 50f, 50g and their respective incremental interface curved surfaces 51a, 51b, 51c, 51d, 51f, 51g.

A partial lateral boot heel displacement occurs when the projected longitudinal-pressure center-of-effort between the boot and the heel cup 47 shifts laterally and the moving lateral release cam 17 tilts by rotating and translating a small amount, biased by lateral heel release spring 35. During such a partial lateral boot heel displacement, the opposing curved cam surfaces 50a, 50b, 50c, 50d, 50f, 50g move by translating and rotating (tilting) from their at-rest position to the next point of cam contact 50c and 51c, biased by lateral heel release spring 35. Accordingly, cam surfaces 50b and 51b space apart the “a-a” (as in 50a and 51a) surfaces from the “c-c” surfaces to provide an incremental lever arm. The incremental lever arm permits lateral translational and rotational movement of 17 relative to 27a. The at-rest position is defined to be when the surfaces on the symmetrically opposite side of the lower heel housing 27 are touching each other. For example, the at-rest position occurs when surfaces 50a and 51a are contacting each other.

As the heel of the boot continues to move laterally and lateral release cam 17 rotates and translates more to the point where cam surfaces “c-c” touch, a reverse-polarity lever-arm

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is generated that vector-adds to the spring bias effect of 52. The resultant incrementally abates the rotational and translational movement of lateral release cam 17. The abatement acts to re-center lateral release cam 17 toward its at-rest position, thereby providing incremental retention in the advent of large amounts of longitudinal pressure between the boot and lateral release cam 17, which would otherwise cause inadvertent pre-release. If the lateral load at the heel persists in magnitude and/or duration, the boot’s instant center of effort of longitudinal pressure then shifts outside of cam contact surfaces “c-c” to release the ski from the boot quickly and efficiently as is the case with ACL injury producing loads.

A similar benefit results if a load continues to persist in magnitude and duration while lateral release cam 17 continues to translate and rotate past the boot’s projected longitudinal pressure shifts “outside” of cam contact surface “e-e.” This reverses the polarity of the lever arm that acts perpendicular to the boot’s projected center of effort of longitudinal pressure, thereby vector-subtracting from spring biasing means 52 to precipitate efficient release. Cam surfaces “f-f” begin to separate as cam surfaces “g-g” contact one another.

Finally, when cam surfaces “g-g” contact and the boot’s projected instant center of longitudinal pressure shifts “outside” of cam surface contact point “g-g”, the perpendicular lever arm finally reverses polarity again to vector-subtract from the spring bias 52, causing the moving lateral release cam 17 to rotate and translate toward lateral heel release.

The novel incremental vector additions and subtractions along the progressive cam surfaces that progress from cam surfaces “a-a” to cam surfaces “g-g” as described above, are also progressively effected by the increasing overall lateral lever arm generated between those cam contact surfaces and the reaction force of spring bias 52 applied at the instant-center-of-effort of shaft-rod 37. This arrangement makes lateral pre-release incrementally more difficult, the maximum point of release being a function of the exact spring constant of lateral heel spring 35, the amount of compression of spring 35 as controlled by lateral release threaded cap 38 (as indicated in lateral release level windows 53 on each side of lower heel housing 27). The maximum point of release is off-set by the incrementally decreasing longitudinal distance of the lever arm, between the lateral instant-center-of-contact of the side of the boot’s heel and the lateral heel cup surface 54, to the instant-point of surface-contact on the progressive cam surfaces 17c and 27a.

If the moving progressive cam 17 were to rotate only about a central pivot located over the center of the ski, the alpine binding heel unit 10 would be too biased toward release and skiers would suffer from pre-release. On the other hand, if the moving progressive cam were to rotate only about opposing cam surfaces “g-g” (as in 50g and 51g) the alpine binding heel unit would be too biased toward retention and skiers would suffer from ruptured ACL injuries. The progressive cams thus strike a decisive balance over release and retention by incrementally reversing polarity between release and retention during the course of lateral heel movement when moving cam 17 rotates and translates accordingly.

The kinematics of the incremental lateral release path of the boot relative to the ski can be controlled by the geometry of the mating cam surfaces as noted above. Adjustments to control the point of maximum lateral release can be adjusted by the compressive movement of lateral release threaded cap 38.

In one embodiment, a compressible elastomeric material 54 such as Dupont Crayton is placed between lateral release cam surfaces 27a and 17c to minimize the contamination effects of ice, mud and road-salt. Alternatively, a very highly



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elastic membrane 55 can be placed at the open end of the surfaces as a barrier to such contaminants. In yet another embodiment, the gap between the surfaces can remain open and exposed so that visual inspection of the gap can be easily performed by skiers or service technicians and because of the curved end surface of 51*h*. The curved end serves as a snow, ice and road-salt deflector to mitigate the practical effects of such environmental exposure. The entire lateral release mechanism including components 38, 39, 40, can be easily removed from parts 35, 36*a*, 36*b*, 41, 42, 37 and 17 to allow for periodic cleaning of the lateral release cam surfaces 17*c* and 27*a*. Snow pack does not build-up and compress into ice in the gap between 17*c* and 27*a* because the lateral orientation of the gap is at right angles to the direction of travel through the snow, mitigating the practical and important concerns about snow-pack and ice formation and its interference with lateral heel release.

Low-friction journals, or integral surfaces 62 and 63 of moving lateral release cam 17 further serve to decouple induced roll and vertical loads when acting against surfaces 49 and 64. They are, however, limited in their structural capacity due to the high unit stresses imposed on these surfaces. Such stresses exist because of the necessary restricted longitudinal lengths of elements 62, 63, 49 and 64, due to the need for the lower heel housing 27 to be compact in overall size, thereby causing the vector decoupler mechanism 60 to act in concert together with elements 62, 63, 49 and 64 to provide counter resistive fulcrum points as well as sliding bearing interface surfaces.

Other aspects, modifications, and embodiments are within the scope of the following claims.

What is claimed is:

1. A vector decoupling assembly for separating and isolating two or more force vectors applied to a safety binding securing a heel portion of a ski boot to a ski, comprising:
  - a lower heel assembly attached to the ski;
  - an upper heel assembly coupled to the lower heel assembly and having a lateral release assembly for applying lateral securing pressure to the ski boot, the upper heel assem-

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bly comprising an upper heel housing that is configured to compress the heel portion of the ski boot downward; a linkage element fixedly attached to the lateral release assembly;

5 wherein the linkage element, a first surface and a second surface cooperate to limit motion of the lateral release assembly to within a predetermined region within a plane defined by the longitudinal and horizontal axes of the ski.

10 2. The vector decoupling assembly of claim 1, wherein the first surface and the second surface are substantially parallel to one another.

15 3. The vector decoupling assembly of claim 1, wherein the first surface and the second surface cooperate to limit motion of the linkage element to the longitudinal and horizontal plane of the ski.

4. The vector decoupling assembly of claim 1, wherein the lateral release assembly is maintained in a predetermined neutral position in the absence of force vectors applied to the vector decoupling assembly.

20 5. The vector decoupling assembly of claim 4, wherein the lateral release assembly moves in both a first direction and a second direction with respect to the neutral position.

25 6. The vector decoupling assembly of claim 5, wherein the motion of the lateral release assembly is at least partially rotational.

7. The vector decoupling assembly of claim 5, wherein a force required to move the lateral release assembly increases as the lateral release assembly moves away from the neutral position.

30 8. The vector decoupling assembly of claim 7, wherein a relationship between a position of the lateral release assembly with respect to the neutral position and the force required to move the lateral release assembly is linear.

35 9. The vector decoupling assembly of claim 7, wherein a relationship between a position of the lateral release assembly with respect to the neutral position and the force required to move the lateral release assembly is non-linear.

\* \* \* \* \*

## EXHIBIT B



STATE OF VERMONT  
SUPERIOR COURT CIVIL DIVISION  
LAMOILLE UNIT Docket No. 74-3-09 LeCv

KNEEBINDING, INC.  
Plaintiff/Counterclaimant

vs.

RICHARD HOWELL  
Defendant  
Third Party Plaintiff

FILED

AUG 17 2016

vs.

VERMONT SUPERIOR COURT  
LAMOILLE UNIT

JOHN SPRINGER-MILLER  
TINA SPRINGER-MILLER and  
ACL INVESTMENTS, LLC  
Third Party Defendants

**OPINION**

**FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER**

***Background***

The plaintiff, KneeBinding, Inc., is a Delaware corporation with its principal place of business in Stowe, Vermont. It manufactures and sells a modern ski binding of the same name. The "KneeBinding" first went on the market during the 2008-2009 winter ski season. The company produced less than 300 pairs of bindings that first year, and sold approximately sixty pairs. Since then, the KneeBinding has become increasingly popular. Today, it is one of the bindings sold in the United States that ski shops incorporate into their regular maintenance and adjustment training programs for ski shop personnel. Its principal claim to fame is an inward lateral heel release, a feature designed to reduce the incidence of torn anterior cruciate ligaments (ACL) when skiers take a fall, particularly one backwards and to the side.

Ski bindings since the 1950s have incorporated markedly improved safety features. As a result, the incidence of leg fractures has decreased significantly, but the rate of knee injuries has remained high and may actually have increased. A number of ski bindings over the years were designed with multi-directional release features, but they generally were not successful because they tended to “pre-release,” a term describing the release of the ski by the binding when the skier has neither fallen nor hit anything that should have caused the binding to release. A pre-release can cause a fall, which obviously is not desirable. A skier wants the bindings to release during a fall or collision with an object just prior to the point where a leg injury could be sustained.

Most modern ski bindings release laterally at the toe in both directions and vertically at the heel. In most situations, this is sufficient to avoid the most common lower leg fractures, although no ski binding will always release at the perfect time and under all conditions. Where the skier falls backward and to the side, a knee may sustain sufficient twisting forces to damage the ACL well before a properly mounted and set ski binding encounters sufficient twisting forces at the toe to cause a lateral toe release of the ski. In some instances, an ACL may be damaged in a fall where the tibia encounters little, if any, twisting forces at all. The KneeBinding was the first ski binding to successfully address the injury-causing forces at the knee, while still maintaining the settings and release characteristics horizontally at the toe and vertically at the heel required for reliable skiing performance. It did this, at least in part, by providing an independent lateral heel release to the inside only. That is, the right heel would release inward to



the left. The left heel would release inward to the right. Because of the varying mobility of the leg in different directions, there is less need to provide lateral outward release at the heel.<sup>1</sup>

Early in the 2000s, the defendant, Richard Howell, designed the lateral heel release for the KneeBinding and obtained in 2003 the necessary patents to protect the invention. He then formed the company, KneeBinding, Inc. and began to look around for investors. He had been a skier since childhood, became an accomplished skier and racer with significant rankings, and during and after college began associating with binding manufacturers and various guiding lights in the ski safety binding profession. Mr. Howell has known and had some relationship with many of the significant ski safety experts in the field for many years. For eight years, he was employed by a major international ski binding manufacturer and was its U.S. marketing director for much of that time. Although not a licensed engineer, he has picked up the principles of ski safety engineering, can speak the language, and can articulate the history and success of the modern ski binding. Along the way, Mr. Howell designed a clipless binding for bicyclers and a snowshoe binding for a modern lightweight snowshoe. He is handy and capable in the shop and can fabricate materials for use in a test product. Through his college training and work in the ski industry, he is fully familiar with the principles of marketing and management in the ski industry.

#### *Negotiations between Howell and Springer-Miller*

In the mid-2000s, Mr. Howell set out to raise money to bring his KneeBinding to production and to the market. In this effort, he met John Springer-Miller, an experienced businessman with some financial success, who was in a position to invest in an interesting idea.

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<sup>1</sup> For a partial history of the development of the ski safety binding, as well as an explanation of lateral heel release and ACL injuries, see generally Plaintiff's Exhibit 156. As to the development of ASTM skiing standards, see Plaintiff's Exhibit 157.

The KneeBinding, with its potential to make a significant contribution to solving the problem of ACL ski injuries, certainly appeared interesting. Mr. Springer-Miller also thought it had the potential to be profitable. Negotiations between Mr. Howell and Mr. Springer-Miller began during April 2007 and continued throughout the spring and summer. The investment was to be slightly over \$1,000,000.

The needs and interests of both men at the time they began negotiations were fairly simple and straightforward. As the inventor, Mr. Howell needed sufficient money to get the binding into production and on the market. As the investor, Mr. Springer-Miller wanted to invest in a project with the potential for a high return. But, Mr. Howell was wary of giving up control of the company, and Mr. Springer-Miller needed to be sure that those in charge were competent and that the proper corporate and financial structures were in place to reasonably ensure success and a likely profit. They had not known each other previously and did not know much about each other. Mr. Howell knew that Mr. Springer-Miller had little, if any, experience in the ski business, and Mr. Springer-Miller was soon aware that Mr. Howell appeared not to have had long-term financial success in his prior attempts as an entrepreneur. The negotiations became strained. Mr. Howell wanted full control of company operations and product development, and the issue of control became a more serious concern for him as the negotiations went along. For his part, Mr. Springer-Miller was increasingly concerned that Mr. Howell was not capable of building the project into a highly valuable company.

In early October 2007, Mr. Howell and Mr. Springer-Miller appeared to reach an impasse. An email from Rick Howell to John Springer-Miller dated October 9, 2007, at 7:16 p.m., reads as follows:

John:



It has become clear to me from our discussions that there are fundamental and irreconcilable disagreements between KneeBinding, Inc. and you relating to a prospective investment in the company. Accordingly, I think it is in our respective best interests to cease all further negotiations at this time. Thank you for your consideration of an investment in KneeBinding.

Rick

Defendant's Exhibit 251 (Attachment A).<sup>2</sup>

Mr. Springer-Miller responded on October 9 as follows:

I am really sorry this isn't working out.  
I'm sure that with *your invention and my business savvy*, you (and I) could have made a whole lot of money.

As you know, I believe whole-heartedly in what you have created. I sincerely hope you succeed in bringing the product forward. I can't wait to buy my first pair.

John

Defendant's Exhibit 251 (Attachment A) (emphasis added). Mr. Howell immediately focused on the words "your invention and my business savvy" and replied with a lengthy message on October 13, at 8:14 a.m., stating, in part:

John

You identified the problem in your reply. I am a professional business manager with considerable successful business management experience . . . [description of Howell's business experience since childhood] . . .

Very little of the above success is from "inventions" – the sales and profitability successes are from my professional business management.

The "invention" as you call it is not what I bring to the table. I just listened, as a good business manager, to what the market wants – and came up with a solution, which solution is 90% a business proposition and 10% an invention.

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<sup>2</sup> Selected exhibits have been attached to the end of this opinion in PDF form and are referenced as "Attachment (letter)."

The deal was for you to be the investor and for me to run the company. As you decided with each meeting to reverse this proposition by having me invest my business proposition while you would increasingly run the company, matters became strained.

If you can somehow see [me as successfully running] another sports product company, again, then I will be able to sit down with you under these terms to finalize the investment into KneeBinding, Inc. Where we were headed was to wipe me out, again, personally. I will not let that happen. I need to be respected as a strong, already-proven-successful business manager in order to make this work. If you are willing to respect me for what my proven talents are, and therefore what I can do for KneeBinding, Inc. as a business manager, then I will be willing to come back to the negotiating table, then run this business, successfully (while watching that I'm not wiped-out, personally).

Rick

Defendant's Exhibit 251 (Attachment A).

Mr. Springer-Miller responded on October 13. He saw the point that Mr. Howell was making and thought that Mr. Howell had misunderstood his intentions. His detailed reply to Mr. Howell clearly expresses his concerns regarding the investment. Mr. Springer-Miller's reply attempts to distinguish between the success of a product, on one hand, and the financial success of a business for the owners, on the other. He had little interest in investing money in a business with little potential for a significant financial return. Nor was he interested in the day-to-day operation of a business. His reply to Mr. Howell reads as follows:

Rick

Thanks for sending this. It helps to have you explain what happened. I am very attached to this project, and I hope there is still some way to make it work.

I think you complete misunderstood me. I neither have the time nor the interest in running the business. In fact, one of my biggest concerns with Kneebinding (sic) is that it would take more time than I have to offer. My goal in our negotiations has been to lock



you into a business plan that will really work – that will allow you to focus all your time on building the business – and to protect my investment if you do not succeed.

I have never wanted to take over the business plan. At the same time, I admit that I have always had concerns about your ability to achieve the plan. I am confident that you can get the product off the ground, market it, create sales for it – and so on. Building and running the business is something I think you can do. But creating something that “flips” for a significant amount of money five years from now isn’t the same thing as building the business.

I have been very consistent about my requirements as an investor, but you have not met them. My wrangling over the terms and/or the financial plan have all been about meeting those requirements. The single significant concern with this – all along – has been to make sure the company had the ability to succeed. This means a financial plan that fits in with the amount of available funding. That’s all it has ever been about.

Let’s clear the air – sit down again over the financial plan, and see if there is still something we can do.

John

Plaintiff’s Exhibit 251.

Mr. Howell replied the next day, thanking Mr. Springer-Miller for his “kind note,” saying, “This is heartening.” He explained how he now had “trimmed the financials back to reflect the combination of the necessary updates that the business must now have, plus your max investment requirements.” Mr. Springer-Miller responded the same day by asking Mr. Howell to “send it to me. It may be better to look at it by myself first.” Following the above email exchange, discussions resumed. Whether each of them fully understood the other remained to be seen.

By October 17, 2007, Mr. Springer-Miller was still not satisfied that their understanding was sufficient for him to commit to this kind of investment. In this regard, Mr. Springer-Miller

sent another email to Mr. Howell at 7:03 a.m. See Defendant's Exhibit 325. Mr. Springer-Miller's message reads as follows:

One week ago, you sent me a message terminating our negotiations. To be honest, I think it was a mistake for you to try to rekindle our discussions.

I think you have invented something very special, Rick. It fills a distinct need and solves a significant problem. It has the potential to revitalize the ski hardware industry.

I would love to be involved with it.

But we are clearly on completely different planets, Rick. You deserve an investor who believes in you as much as the product.

I can see no reason to continue on with our discussions. With great sadness, I am cancelling our meeting today, and declining to invest in KneeBinding.

Best of luck,  
John

Defendant's Exhibit 325. While the message is not clear in just what respect Mr. Howell was not suitable for the job at hand, it was at least clear that their visions and requirements regarding the project were "on completely different planets."

As noted above, the email dated October 17, 2007 was sent just after 7:00 a.m. for a meeting set for early that morning. It is possible that Mr. Howell did not receive the email, or that he left the house before reading it. In any event, he showed up at Mr. Springer-Miller's house for the cancelled meeting and the two talked further. There was no record made of what was said between them or what they agreed to that morning. However, at the meeting they determined that Mr. Howell would go along with being a minority shareholder and that Mr. Springer-Miller would have control of the Board of Directors.



### *The Closing and Transaction Documents*

After the meeting on October 17, 2007, the lawyers for each party finalized the transaction documents, which included the Employment Agreement, KneeBinding, Inc. Series A Preferred Stock Purchase Agreement, Amended and Restated Certificate of Incorporation of KneeBinding, Inc., Non-Competition and Non-Solicitation Agreement, Invention and Non-Disclosure Agreement, KneeBinding, Inc. Voting Agreement, and Investors' Rights Agreement.<sup>3</sup> The Investors' Rights Agreement included as attachments copies of the Company Business Plan and Company Financial Plan, collectively referred to as the "Business and Financial Plan." KneeBinding, Inc. was represented by Jeffrey Stein of Wilmer Hale in Boston. Mr. Springer-Miller's attorney was Bill Contente.

Mr. Howell and Mr. Springer-Miller signed the transaction documents as of November 1, 2007. The closing resulted in Mr. Howell having 641,672 shares of Common Stock.<sup>4</sup> In addition, 3,279 shares were issued to David Arnold, 36,321 shares to Roland Boehme and 36,724 shares to Steve Walkerman.

Under the KneeBinding, Inc. Voting Agreement, Section 1.1 provided for the size of the Board to be five directors. See Plaintiff's Exhibit 1.5 (Attachment B). Section 1.2(a) provided for the Board Composition and permitted the holders of the Series A Preferred Stock to elect three directors. Mr. Howell, as a "Founder," was one director for the Common Stock Shareholders. See Plaintiff's Exhibit 1.5, Section 1.2(b) (Attachment B). The Voting

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<sup>3</sup> The Amended and Restated Certificate of Incorporation of KneeBinding, Inc. was filed in Delaware. This amended certificate provides: "1,065,000 shares of the authorized and unissued Preferred Stock of the Corporation are hereby designated 'Series A Preferred Stock.'" See Plaintiff's Exhibit 1.2 at 2.

<sup>4</sup> Prior to the closing, Mr. Howell was the sole stockholder of KneeBinding, Inc. He and David Arnold were the two directors. Mr. Howell, as the inventor and patent holder of the KneeBinding, had transferred ownership to KneeBinding, Inc. so that at the time of the closing, KneeBinding, Inc. was sole owner of all intellectual property relating to the ski binding.

Agreement then provided for a fifth director with “substantial business experience relevant to the Company’s business” and who was “independent of the Company.” Mr. Howell and Mr. Springer-Miller were to jointly select the fifth director, each voting their shares as a class. See Plaintiff’s Exhibit 1.5, Section 1.2(c) (Attachment B). Effectively, then, the Series A Preferred Stock shareholders had control of the Board of Directors, and all the Series A Preferred Stock shares were owned by John Springer-Miller in return for his investment of \$1,065,000.

The initial three directors were John Springer-Miller, his wife Tina Springer-Miller, and Richard Howell. They never did expand the size of the Board.

Control of KneeBinding, Inc. operations by the Series A Preferred Stock shareholders also included strict control over company funds. The investment account, which would hold Mr. Springer-Miller’s invested funds, could not be accessed without his approval. The Investors’ Rights Agreement was signed on behalf of KneeBinding, Inc. by Mr. Howell and by Mr. Springer-Miller on his own behalf as Investors. See Plaintiff’s Exhibit 1.4, Section 5.5(a) at page 21, Howell 0109.

KneeBinding, Inc. employed Mr. Howell pursuant to an Employment Agreement dated November 1, 2007. See Plaintiff’s Exhibit 1.15. Mr. Howell signed the Employment Agreement on behalf of KneeBinding, Inc. as President and Chief Executive Officer, as well as individually on behalf of himself. As the Series A Directors controlled the Board, they, too, controlled Mr. Howell’s employment duties and responsibilities.

Pursuant to the transaction documents, Mr. Howell became President and Chief Executive Officer (CEO), as well as Secretary and Treasurer of the Corporation. Mr. Springer-Miller had the title of Chief Financial Officer (CFO). Mr. Howell’s employment as President, CEO, Secretary, and Treasurer put him in daily control of the Company, and charged him with



developing the KneeBinding for production and marketing to the public. But, Mr. Howell did not have control of the investment funds in the investment account, at least not until they were transferred to the operating account. He was but one member of three on the Board, and his employment was “at-will.” Mr. Springer-Miller invested the funds and in all major respects had final control over everything of financial importance that was to happen in the Company.

***Howell’s Eleven Month Employment as CEO of KneeBinding, Inc.***

In the months after the transaction closing in November 1, 2007, there was very little discussion regarding the composition of the Board, although the Voting Agreement allowed for the appointment of a fourth director by the Series A Stock shareholders and a fifth director who was independent of the Company. At one point, Mr. Howell suggested Dave Arnold to Mr. Springer-Miller, presumably as the fifth and independent director. Because they had never met, Mr. Springer-Miller suggested that Mr. Howell arrange to have them meet to become acquainted with each other. Mr. Howell never followed through, and Mr. Springer-Miller heard nothing from Mr. Arnold.

At another point, Mr. Springer-Miller suggested John Merrill as the independent Board member. He apparently had experience in the ski industry and had been a director of a bank. Mr. Howell absolutely refused, became upset, and called Mr. Merrill a crook. Mr. Springer-Miller dropped the subject. Prior to September 15, 2008, it does not appear that there was any significant effort on the part of either Mr. Howell or Mr. Springer-Miller to increase the size of the Board, either by appointing an independent director or to appoint the third director to fill the spot available for the Series A Preferred Stock shareholders.

Before business operations even got underway, there was disagreement between Mr. Howell and Mr. Springer-Miller. On November 3, 2007, just days after the closing, Mr.

Springer-Miller wrote an email to Mr. Howell saying that he would be gone for four days on business, but that the day after his return, he would “like to have three meetings”—their first Board of Directors meeting to “document our beginning,” an “operations meeting of the three of us to outline immediate plans,” and a meeting which “includes the three of us and Roland” (Roland Boehme, European sales). See Defendant’s Exhibit 268.1. The email went on to say the following:

We all need to focus on the business of getting the product designed and prototyped as quickly as possible. Obviously, we each have our role in making this succeed, and time is critical. If we can quickly divide the work along reasonable lines – and if we all support each other in our areas – I am hopeful that we will achieve the desired results in the shortest time possible.

Mr. Springer-Miller continued with more specific details. He proposed potential roles and duties for each of them: himself, Steve Walkerman, Roland Boehme, and Rick Howell. Mr. Springer-Miller made it clear that “Rick, as CEO and fearless leader, needs to provide the vision we will all execute on,” “will have responsibility for the overall plan” and “for making sure we cover all the steps required to succeed,” and “will need to be our leader in virtually every area of the company.” Defendant’s Exhibit 268.1 (emphasis added). However, it was the following statements in the message that seem to have caught Mr. Howell’s attention:

I see us as a three-person executive committee” [Springer-Miller, Howell, and Walkerman]) I see my CFO role as the one that heads up financial strategy and legal administration. I would review and approve all agreements made by the company – everything from a car lease to an agreement to purchase metal washers, to sales commissions and benefits packages. . . .

Steve, as COO, would have overall responsibility for operational systems and processes . . . and for managing the process of creating and distributing product. Ideally, Steve should approve anything we do in these areas, and even help to create these relationships. He will be much better able to manage them if he has a hand in creating them.



Mr. Springer-Miller concluded by saying: “Anyway – these are my early thoughts I am anxious to hear yours.”

Mr. Howell responded the next day, November 4, 2007. He did not like what he saw as giving Steve Walkerman responsibility for contract management, administration of agreements with suppliers, or distribution control. Mr. Howell thought he himself should have control of legal matters, especially “in the field” [with suppliers] where he “should have the lead legal role,” stating, “I must be able ‘to move’ in order to meet our goals. I cannot move if I am restricted in the ways that you have described.” Yet in his response, Mr. Howell was generally restrained and did not fly off the handle, instead ending by stating, “Let’s meet to discuss and resolve these critical issues, earliest.”

Mr. Springer-Miller responded via email the following day, November 4. He was firm on the “legal stuff,” stating:

I will need to review and approve every contract. This is an appropriate, and mandatory, check/balance thing. If I am in the loop earlier rather than later, this should be a non-issue. I’m not interested in slowing things down. We have the same goals – to move rapidly short term – but also to protect the long term. I should think you would be insisting on my involvement.

However, he backed off from what he had said about work to be assigned to Steve Walkerman, making it clear that he meant “the day-to-day administration – managing the paperwork, and so on – not setting them up, nor designing them. This is what YOU said he would be doing. If I misunderstood, I am sorry.”

Mr. Springer also added:

Look – we need to not be adversarial here – we need to work together! This isn’t about control – it’s about the three of us splitting up the effort to maximize our efficiency. Anything I say isn’t intended to challenge your leadership role in the company.

Mr. Howell responded that same evening, writing:

Hello John,

Thank you for your note. I had a couple of excellent days off –  
Thank You.

I feel that it is essential that we slow down to insure that our overall objectives are in place BEFORE we execute strategy and tactics: we will be in a good position to move forward quickly after we are all clear on our objectives.

I look forward to meeting with you at your earliest convenience upon your return.

Rick

There is no documentary evidence of what happened at the meetings on November 7, 2007 after Mr. Springer-Miller returned from his business trip, or if they met at all. We do know that the Company went ahead with the development of the ski binding. However, the problems continued between Mr. Howell and Mr. Springer-Miller and seemed to get worse as time went on.

It was not long before Mr. Howell also took issue with Mr. Springer-Miller's suitability as CFO. In the evening of December 10, 2007, Mr. Howell wrote an email to Jeff Stein at Wilmer Hale, stating, "It is not advantageous to KneeBinding Inc.'s stated goals, per the financials of the closing docs, to continue w John Springer-Miller (JSM) as CFO." Plaintiff's Exhibit 170 (Attachment C). Mr. Howell's complaints to Jeff Stein pertained to Mr. Springer-Miller's involvement with financial matters, product pricing and volume forecasts, sales management hierarchy, and legal matters, as well as what Mr. Howell deemed to be inappropriate behavior on a couple of occasions. Mr. Howell asked Mr. Stein, as the Company's



lawyer, to “advise how to appropriately replace him w another CFO who will help KneeBinding achieve its financial-operational goals.”

Mr. Stein replied as follows the next day:

Rick,

As we had discussed at the time of the financing, the appointment of officers is a BOD matter. I really think you need to talk these issues out with John, rather than communicating through emails, as through his board rights he controls the company and all of its personnel decisions, including your own position. It is going to have to be a personal approach throughout.

Jeff

Later in December, emails were exchanged involving issues around a website. See Plaintiff’s Exhibit 186 (Attachment D). Roland Boehme apparently sent a blind copy of one of them to Mr. Springer-Miller, which prompted Mr. Springer-Miller to write Roland Boehme to hold off on acting with regard to the website for a while because the Company was shortly to overhaul the KneeBinding website. This prompted Mr. Howell to write Roland Boehme:

Roland,

“Pls do NOT ever blind-copy JSM on any emails again.

Additionally, this email should never have been copied to him (blind or not). You knew that he would try to stop this. Now I have to fight JSM on one more point. This is a major fight that I do not want to have with him.

Please think these steps through before acting.

Thank you, Roland – you are the best – but we are dealing w very complex human-issues (JSM) at this time, which means that you must think-through this next 4 Chess-moves BEFORE you make each move.

All best,  
Rick

At this point, it appears that the flow of information from the company to Mr. Springer-Miller dried up. Mr. Howell admits that he did not keep Mr. Springer-Miller informed. Tr. 12/10/15, P. 31, L. 1-6. By May 2008, lack of information had become a real issue. The subject was brought up at a Board meeting, ending in a resolution. See Plaintiff's Exhibit 35 (Attachment E); see also Tr. 12/10/15, P. 35, L. 21. But, communication was a problem between Mr. Howell and Mr. Springer-Miller throughout Mr. Howell's employment with KneeBinding, Inc.

By early 2008, the relationship between Mr. Springer-Miller and Mr. Howell had deteriorated to such a degree that Mr. Howell consulted a lawyer, Tris Coffin. Apparently, Mr. Howell did not take Jeff Stein's advice "to talk these issues out with John." Mr. Coffin wrote a lengthy letter to Mr. Springer-Miller on February 14, 2008, which detailed a long list of complaints that Mr. Springer-Miller was threatening to remove Mr. Howell as President and CEO, violating "the essence of the November 1 Agreements." Defendant's Exhibit 226 (Attachment F). The list of complaints included failure to hold board meetings, failure to provide financial information, not following the Company business plan (threatening to remove Mr. Howe), interference and improper conduct with potential customers, failure to prepare necessary financing materials, failure to engage essential engineering support, and restructuring the Company website contrary to the President's wishes. Mr. Coffin asserted that Mr. Springer-Miller was breaching his fiduciary duties to Mr. Howell by not informing him of intended changes to the business plan and proposed that Mr. Springer-Miller, and counsel if he wished, meet at Mr. Coffin's office in Burlington on Thursday, February 21, 2008.

When Mr. Springer-Miller did not reply, Mr. Coffin wrote Bill Contente, Mr. Springer-Miller's lawyer at the November 1, 2007 closing, repeating some of the allegations, adding new



ones, and asking for a meeting. Defendant's Exhibit 227 (Attachment G). Notable in this February 26, 2008 letter is the following statement:

Despite the acts and omissions [by JSM] noted above and in the enclosed correspondence [earlier correspondence with JSM], Mr. Howell is proceeding as best he can with the implementation of the business plan and has been remarkably successful. For example, last week he was able to obtain an order for 3,000 bindings valued at approximately \$875,000 from REI.

No order for 3,000 bindings was ever obtained while Mr. Howell was CEO and President. All the information that Mr. Coffin included in his correspondence to Mr. Springer-Miller and his attorney came from Mr. Howell. Mr. Coffin obtained no information from documents or other sources. REI later did place an order, but it was only for 60 pairs of bindings.

These accusations did not sit well with Mr. Springer-Miller, who declined to respond to Mr. Coffin and instructed his lawyer not to be involved. Mr. Contente later advised Mr. Coffin that "Rick needs to talk to John. John doesn't want to be involved with lawyers in the day-to-day operation of the business." Defendant's Exhibit 229.

Other serious problems arose early in Mr. Howell's employment, which made matters worse. In Mr. Howell's original business and financial plan, he stated that "From a timing perspective, the initial production molds will be finalized by April of 2008. The initial sub-component parts will be produced in May and June and assembled in June and July." Plaintiff's Exhibit 199.13 at 31. The plan projected that 30,000 pairs would be sold in the model year July 1, 2008 – June 30, 2009. Plaintiff's Exhibit 1.4 at 11. Mr. Howell also describes the manufacturing plan, using a Vermont injection molder, in business for 30 years, and who "is enthusiastic about being engaged in another successful project together with Mr. Howell." Plaintiff's Exhibit 1.4 at 30.

The final Business and Financial Plan incorporated into the Investors' Rights Agreement, Plaintiff's Exhibit 1.4, revised over the months of negotiations, contained the same projection for first year sales (30,000 pairs) and the same representations regarding the manufacturing plan.

The opening sentence of the topic "Manufacturing" read as follows:

An important aspect of the KneeBinding enterprise, which cannot be overstated, is Mr. Howell's strong successful experience in new product development and manufacturing sourcing. The product itself is designed for ease of manufacture and the subcontractors that Mr. Howell will be engaging to perform the manufacturing are already well known by Mr. Howell to be reliable.

Plaintiff's Exhibit 1.4, at 30. The timing projection from the initial business and financial plan, Plaintiff's Exhibit 199.13, was repeated in the Investors' Rights Agreement, which stated that "the initial production molds will be finalized by April of 2008 and that the contractor, Progressive Plastics, "is enthusiastic about being engaged in another successful project together with Mr. Howell." Plaintiff's Exhibit 1.4 at 30.

The manufacturing section, written by Mr. Howell, turned out to be overly optimistic. As a sales pitch to an investor, it was a borderline misrepresentation. Mr. Springer-Miller understood from Mr. Howell that the computer-aided design (CAD) work had been completed for the molds and was ready to be used by Progressive Plastics to make the production molds. Mr. Howell actually had what appeared to be CAD drawings. However, the CAD work turned out to be no more than sales graphics (Plaintiff's Exhibit 183), and the engineering and CAD work was not actually in place. Consequently, the development schedule was seriously delayed because Progressive Plastics, which was to do the production mold work, was not in a position to do the CAD work itself in a timely fashion.

Early in the relationship with Progressive Plastics, there were increasing problems between the Progressive staff and Mr. Howell. Mr. Howell made excessive demands, showed up



at Progressive unannounced to argue over issues, and, on occasion, failed to timely provide the information necessary for Progressive to proceed with the design of the molds. Overall, dealings with Mr. Howell were difficult. On two occasions, Progressive balked at having to work with Mr. Howell. In December 2007, Mr. Springer-Miller had to intervene and confer with Progressive to work out the difficulties. See Plaintiff's Exhibit 175. He again intervened in January 2008. See Plaintiff's Exhibit 176. At one point, Mr. Howell and one of Progressive's production managers nearly came to blows. In fact, Progressive had been anything but "enthusiastic" about taking on another project involving Mr. Howell. Before accepting the project, they had a meeting with Mr. Howell and discussed his aggressive nature as well as the complexity of the project. Mr. Howell said he understood where they were coming from. The deadlines and the demands had to be reasonable. However, it did not turn out that way. Frustration developed. Mr. Howell blamed Progressive for not getting the work done, even though his designs were not sufficiently complete for Progressive to proceed with the tooling. The frustration increased. Meetings turned into arguments. There was a sense of relief when it appeared in the summer of 2008 that Mr. Howell might be leaving KneeBinding.

Because of all the difficulties, the work schedule fell far behind the projections in the Business and Financial Plan. Production molds that were to have been completed by January or February 2008 were not ready by that deadline, or even by summer. No bindings were ready for demonstration, and therefore no 30,000 sales orders appeared in the spring. About sixty or so orders came in. The anticipated 30,000 pairs of bindings to be made during the spring and summer never materialized. Effectively, the entire production for the skiing year 2008-2009 was lost. An email from Mr. Howell to Hank Buermann (owner of Progressive Plastics), dated June 28, 2008, acknowledges this loss, stating:

. . .we are now in very serious trouble regarding proper parts in time for testing at TUV in the last week in July in Munich, Germany.....with no real answers as to the timing. We missed this coming season regarding real orders because we did not have real bindings in time for the on-snow trade shows because the CAD process took too long. Ultimately, I will probably lose the company and my involvement because of that. Now, however, here we are today . . . . . about to lose our shipping-window for this coming season w the few orders that we do have because we MUST gain certification at this time – and if we miss this window, I will for sure lose my life’s work.

Plaintiff’s Exhibit 121 (Attachment H).

Because the molds were not complete by the end of June 2008, Mr. Howell was desperate for a binding that he could take to TUV for testing. However, the binding was not yet ready for production, and there was a serious question as to whether it would be ready for sale in the 2008-2009 ski season at all.

Although Mr. Howell was well aware of the delays and the increasing possibility that the Company would not soon be producing bindings for testing and sale to the ski shops, he was telling a different story to those on the outside. In April 2008, he wrote to a potential distributor, stating, “we have had such positive results w our prototypes that we decided to jump straight to production molds and tooling - - which means that we will have our first skiable-samples for you at the end of June.” Plaintiff’s Exhibit 198.

Mr. Howell had also been in correspondence with Bill Pennington of the *New York Times* regarding the binding. Pennington had told him, “I think for us at The Times to make it newsworthy you would have to be a little farther along.” Plaintiff’s Exhibit 177. Mr. Howell responded on April 21, 2008, “We’re in full production right now for our first shipment in the Fall!” Plaintiff’s Exhibit 177. At that time, the molds still awaited production in China. On April 23, 2008, Mr. Howell wrote another email to a Paul Engbretson, stating, “we will have



full-production bindings in mid-July that will be fully-certified by the TUV test institute (pre-tests attached) that anyone can test on any bench or snow.” Similarly, on July 8, Mr. Howell wrote to a Richard Bohr that “[t]hings are going well with the product and with sales (we are sold-out of our first-year’s production-forecast).” Plaintiff’s Exhibit 160. On August 28, 2008, Mr. sent an email to Marcel Elefant saying, “We did it!! As of today, we have our 1<sup>st</sup>-production fully-calibrated, KneeBinding ski bindings in-hand.” Plaintiff’s Exhibit 161. No production had started at that time—Mr. Howell was still modifying a prototype binding in preparation for his upcoming trip to TUV in Germany. See Exhibit 192.

Apart from losing critical production time in late 2007 and early 2008, Mr. Howell and Mr. Springer-Miller failed to patch up their differences. There was talk of finding another investor to take Mr. Springer-Miller’s place. Although discussions with another investor occurred, nothing was concluded. In light of the problems described, and with the binding not yet ready for production, Mr. Howell was removed as CEO of KneeBinding, Inc. at a board meeting on September 15, 2008.

The board meeting lasted all day. The Board terminated Mr. Howell’s management positions but offered to keep him on as an employee. After extensive negotiations, as well as consultations between Mr. Howell and his attorney, the Board and Mr. Howell reached a severance agreement. The Company would pay Mr. Howell his severance compensation as required in the Employment Agreement and he would remain for a period as a consultant. He would purchase the remainder of the lease on his company car. Plaintiff’s Exhibit 38. The lawyers were to prepare a written severance agreement “detailing the severance offer, and language of any releases to be adopted.” Plaintiff’s Exhibit 38.

The resulting Severance Agreement was a letter from John Springer-Miller to Richard J. Howell dated October 2, 2008. Plaintiff's Exhibit 39. Mr. Howell declined to sign the agreement and attempted further negotiations, which the Company rejected. The impasse continued until December 30, 2008, when Mr. Howell met in Stowe with John and Tina Springer-Miller, discussed the Severance Agreement, made several handwritten changes, and signed it. Plaintiff's Exhibit 39.

Mr. Howell resigned from the Board as a director shortly after the end of his employment and no longer had a say in the Company management, although he retained his shares of Common Stock. The Company proceeded to develop, market, and sell the binding under the management of John Springer-Miller, his wife Tina, and Steve Walkerman.

Following Mr. Howell's departure, the Company engaged other engineering assistance, made a number of changes to the binding, and returned to TUV in Germany for testing later that fall, with the result that the binding did not fail to meet United States manufacturing standards. TUV certification was not required for sales in the United States, nor was it sought. Mr. Springer-Miller understood that TUV formal certification would have cost about \$40,000, and, without a binding ready for sales throughout the world, he abandoned the idea of sales in Europe and Japan. Marketing in those countries at that time was no longer part of the Business and Financial Plan.

### ***Procedural Case History***

The procedural history of this case is convoluted. In March 2009, KneeBinding, Inc. filed a complaint against Mr. Howell in the Lamoille Superior Court, alleging that he was in violation of the Severance Agreement and certain provisions of the transaction documents at issue in this case. It sought a temporary restraining order (TRO) to enjoin Mr. Howell from



speaking out in various ways against the Company, Mr. Springer-Miller, and the ski binding itself. The Court issued a TRO on March 16, 2009. Plaintiff's Exhibit 68. Mr. Howell immediately violated the TRO by picketing in front of the courthouse with a sign saying the KneeBinding was 100% defective, (Plaintiff's Exhibit 72), prompting the Company to file a motion for contempt.

At a hearing on March 30, 2009, the parties reached an overall agreement which resulted in the Stipulation Regarding Contempt (Plaintiff's Exhibit 70, Attachment I) and the Stipulation and Order (Plaintiff's Exhibit 71, Attachment J), settling the contempt motion. The Stipulation and Order was reached in lieu of a hearing on the TRO issued on March 16, 2009. The Judge signed the Stipulation Regarding Contempt on March 30, 2009, and the Stipulation and Order on March 31, 2009, both as "So Ordered."

In mid-April 2009, Mr. Howell filed a pro se response to KneeBinding, Inc.'s initial complaint. This filing was later amended when he retained counsel. The answer included counterclaims.<sup>1</sup>

On June 21, 2012, the plaintiff filed a motion for partial summary judgment to dismiss the amended counterclaims, particularly based on the release in the Severance Agreement of December 30, 2008. Responses to the motion for summary judgment were filed on July 16 and the Court took the motion under advisement.

While this Court was considering the motion, Mr. Howell filed a third-party complaint, through counsel, on July 26, 2012, against John Springer-Miller, his wife, Tina Springer-Miller, and ACL Investments, Inc., a corporation formed to hold the Springer-Miller's Class A Preferred Stock in KneeBinding, Inc. The 87-page third-party complaint contained 214 numbered paragraphs of factual allegations and the "Causes of Action" consisted of 24 separate counts.

Because the motion for summary judgment as to the counterclaims was under advisement before the filing of the third-party complaint, the Court did not directly address the third-party claims.

The trial court decision on the partial summary judgment motion was filed on September 18, 2012. The decision settled the question of the applicability of the Severance Agreement release to the issues in the case. With three exceptions, the Court determined that the release was applicable to all causes of action Mr. Howell may have had which arose prior to December 30, 2008. The Vermont Supreme Court affirmed the decision in May 2014 in an interlocutory appeal. All of Mr. Howell's direct claims in the third-party complaint, except for defamation, that were not briefed or argued at the trial are no longer before the court for consideration.

After many delays caused by Mr. Howell being without an attorney for significant periods of time, the need to accommodate new attorneys on several occasions, as well as further discovery and depositions, the case was tried to court over 20 days starting in mid-November 2015. Afterwards, additional time was provided to obtain the trial transcript and for the attorneys to prepare their memoranda and "requests to find." The attorneys representing Mr. Howell at the trial were not the same attorneys who filed the third-party complaint, and they advised the Court at the outset that they would select the points to be briefed based upon the evidence presented at the hearing. In his post-trial briefing, Mr. Howell limited his discussion to the following: fraud in the inducement (Third-Party Complaint – Count Two), as derivative plaintiff; Vermont Securities Fraud Act violations (Third-Party Complaint - Count Twelve Derivative Claim); breach of fiduciary duties (Third-Party Complaint – Count Eleven Derivative Claim); unjust enrichment (Third-Party Complaint – Count Six Derivative Claim); and defamation (Third Party Complaint Count Thirteen Direct Claim). As stated above, much of the counterclaim was disposed of by the partial motion for summary judgment. The remaining



claims were either subsumed into the claims in the third-party complaint or abandoned following the trial. The counterclaims are not mentioned in the post-trial memoranda and are considered abandoned as requiring a separate ruling from the issues in the third-party action.

This case became ready for decision in mid-May 2016. The Court will limit its discussion here to the points raised in the post-hearing memoranda. While much of the plaintiff's evidence involves the third motion for contempt, the plaintiff addresses each of the claims in its post-trial briefing. Any claims not briefed are considered waived. All but one of Mr. Howell's direct actions claims in the third-party complaint are barred in any event by the release in the Severance Agreement Mr. Howell signed on December 30, 2008, which was the subject of the summary judgment ruling and the Supreme Court appeal. Because of the summary judgment decision, Mr. Howell, personally, no longer has viable claims remaining where the cause of action arose prior to December 30, 2008. Except for the direct action claim for defamation, all of Mr. Howell's direct actions claims in the counterclaim and third-party complaint will be dismissed.

## **FACTUAL ANALYSIS AND CONCLUSIONS OF LAW**

### **Third-Party Plaintiff's Derivative Claims**

#### ***Choice of Law***

As a preliminary matter, the Court considers the appropriate choice of law to be applied in this derivative action. Each of the transaction documents at issue contains a governing law provision. For instance, both the Series A Preferred Stock Purchase Agreement and the KneeBinding, Inc. Voting Agreement state that they are to be governed by Delaware law, while the Employment Agreement states that it is to be governed by Vermont law. Additionally, the third-party defendants advise the Court to follow the "internal affairs" doctrine. That doctrine

maintains that “the law of the state of incorporation normally determines issues relating to the internal affairs of a corporation.” *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983). “Application of that body of law achieves the need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation.” *Id.*

Notwithstanding the governing law clauses of the transaction documents or the internal affairs doctrine, where choice of law is an issue, both Delaware and Vermont follow the “most significant relationship test.” *Ligget Group Inc. v. Affiliated FM Ins. Co.*, 788 A.2d 134, 137 (Del. Super. 2001) (internal quotation omitted); see also *Pioneer Credit Corp. v. Carden*, 127 Vt. 229, 233 (1968); Restatement (Second) of Conflict of Laws § 188. Under this test, the Court considers the following factors to determine which state’s law to apply: “(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.” Restatement (Second) of Conflict of Laws § 188(2).

In arguing for the disqualification of Mr. Howell as a derivative plaintiff, the third-party defendants rely substantially on Mr. Howell’s conduct in Vermont in the seven years following his termination from KneeBinding, Inc. Similarly, the conduct of the third-party defendants complained of by the derivative plaintiff largely, if not exclusively, occurred in Vermont. Further, although in this case KneeBinding, Inc. was incorporated in Delaware, the parties negotiated, executed, and performed or otherwise conducted themselves under the transaction documents in Vermont. The subject matter of those contracts, too, is located in Vermont. Thus,



the bulk of these factors favor applying Vermont law as to the third-party defendant's motion to dismiss the third-party plaintiff, as well as to analysis of the derivative claims themselves.<sup>5</sup>

***Third-Party Request for Dismissal***

The plaintiff has moved to disqualify Mr. Howell as a derivative plaintiff, arguing that Mr. Howell has "interests in the litigation that are fatally antagonistic to those of KneeBinding, Inc. and the other shareholders." Additionally, the plaintiff contends that "Howell's individual right to assert the claims set forth in his Derivative Complaints are barred by virtue of the terms of the release contained within the [Severance Agreement]." In response, Mr. Howell argues that he "has a tremendous property interest in KBI and is entitled to adequate protection of that interest," and asserts that there are no concerns that he may "settle his own direct claims and leave the other shareholders without a representative of their interests." Mr. Howell further asserts that the derivative claims, "as actions brought on behalf of the company, necessarily fall outside the scope of claims barred by the release."

The Vermont Rules of Civil Procedure expressly provide that a derivative action may not be maintained "if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association." V.R.C.P. 23.1. In the same vein, Delaware law requires that "the plaintiff in a stockholder derivative action must be qualified to serve in a fiduciary capacity as a representative of the class of stockholders, whose interest is dependent upon the representative's adequate and fair prosecution of the action." *Youngman v. Tahmoush*, 457 A.2d 376, 379 (Del. Ch. 1983). Determination of the adequacy of representation requirement has involved an

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<sup>5</sup> Notably, Mr. Howell raises in his claim of fraud in the inducement allegations that pertain most directly to the provisions of the Employment Agreement, which describes his title as employee of KBI and the duties and responsibilities involved with his position. Thus, the governing law provision of the Employment Agreement itself, too, supports application of Vermont law to this claim.

examination of extrinsic factors which “make it likely that the interests of the other stockholders will be disregarded in the prosecution of the suit.” *Id.* Such factors include:

economic antagonisms between representative and class; the remedy sought by the plaintiff in the derivative action; indications that the named plaintiff was the not the driving force behind the litigation; plaintiff’s unfamiliarity with the litigation; other litigation pending between the plaintiff and defendants; the relative magnitude of plaintiff’s personal interests as compared to his interest in the derivative action itself; plaintiff’s vindictiveness toward the defendants and, finally, the degree of support plaintiff was receiving from the shareholders he purported to represent.

*Id.*

The thrust of the analysis is that before an individual can be disqualified as a derivative plaintiff, “a defendant must show that a serious conflict of interest exists, by virtue of one factor or a combination of factors, and that the plaintiff cannot be expected to act in the interests of others because doing so would harm his other interests.” *Id.* at 381 (citing Wright & Miller, 7A, § 1833)). In other words, the defendant “must show a substantial likelihood that the derivative action is not being used as a device for the benefit of all the stockholders.” *Id.*

At first blush, consideration of the above extrinsic factors would lead this Court to conclude that Mr. Howell adequately represents the interests of the minority shareholders. He is the driving force behind the litigation and his proposed remedies are consistent with the substance of his claims. He is familiar with the substance of the dispute. There is no other litigation pending between him and the Springer-Millers or the Corporation. His personal interests are aligned with his interest in the derivative action. He has the support of two of the



three minority shareholders, although not of a majority of the minority shares.<sup>6</sup> Each of these factors favors Mr. Howell as a derivative plaintiff.

On the other hand, Mr. Howell's vindictiveness toward the Springer-Millers, apparent in subsequent findings, is a serious argument against his qualifications as a derivative plaintiff. Certainly some of his statements and threatening behavior reveal excessive animosity toward them. See *infra* text accompanying Findings Relevant to Plaintiff's Claims. Nevertheless, that the animosity has arisen from relationships established during the Springer-Millers' association with KneeBinding, Inc. and not from some outside historical source or relationship, abates the weight of this factor somewhat.

The third-party defendants also point out that the interests of Mr. Howell and Steve Walkerman, a minority shareholder and employee of the Company, are divergent. Walkerman has renounced Mr. Howell's derivative claims and opposes his standing as a derivative claimant. Given that there are only five shareholders, Walkerman's opposition, in addition to that of Mr. Springer-Miller, is not insignificant.

The third-party defendants have further argued that if Mr. Howell prevails in this case with rescission as the remedy, Arnold, Boehme and Walkerman automatically would be divested of their shares because they received them in the course of the reorganization. Mr. Howell responds that before the date of closing as of November 1, 2007, and specifically on October 26, 2007, sole shareholder (Howell) and the two directors (Howell and Arnold) signed the Written Action Directors in Lieu of a Meeting. Plaintiff's Exhibit 1.2 at Howell 0057. Thus, he argues,

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<sup>6</sup> Three of the four KneeBinding, Inc. Common Shareholders, Arnold, Boehme, and Walkerman received their shares pursuant to the Written Action Directors in Lieu of a Meeting. See Plaintiff's Exhibit 1.2 at Howell 0057-58. It is signed by the two KneeBinding, Inc. directors, Richard Howell and David Arnold, and dated October 27, 2007, before the date of the closing. With 37,735 shares, Walkerman is a significant shareholder, having far more shares than the combined shares of both Arnold and Boehme, the two shareholders who have sided with Mr. Howell.

through this document Arnold, Boehme and Walkerman received their shares before the closing, and they would not be divested of their shares in the event of a rescission. See Plaintiff's Exhibit 1.2 at Howell 0058.

Mr. Howell's argument overlooks the fact that the Written Action document does not itself perform the action of the Corporation in issuing the shares, rather, it authorizes a future action. In fact, it also authorizes the corporation to "issue and sell to the Purchasers named therein [Mr. Springer-Miller]," the Series A Preferred Stock shares that would be subject to the rescission if the Court were to grant the relief requested. Thus, once authorized, the shareholders had the right to their shares only upon completion of the transaction. Mr. Howell appears to also overlook the requirement of rescission that the parties to the contract at issue be placed in the same position as they were in before the closing. See *Smith v. Munro*, 134 Vt. 417, 420 (1976) (citing *Hammond v. Buckmaster*, 22 Vt. 375, 380 (1850)). Mr. Howell, as the derivative plaintiff seeking rescission, "must act affirmatively to restore both parties to their condition before the contract." *Id.* Unless he also received a significant damages award, Mr. Howell presumably would be required to pay Mr. Springer-Miller \$1,065,000.00, and the remaining shareholders would be dispossessed of their stock interests in KneeBinding, Inc., as the third-party defendants assert. In this regard, a successful rescission outcome for Mr. Howell might not be to the advantage of the minority shareholders.

On balance, the Court concludes that Mr. Howell's derivative claims, to the extent they have substance, may not be fairly and adequately representative of the interests of the shareholders situated similarly with him in enforcing the alleged rights of the corporation. Notwithstanding this conclusion, because it is a close call, the Court proceeds with analysis of each of Mr. Howell's derivative claims.



*Fraud in the Inducement*

It seems most logical to begin with Mr. Howell's derivative case for fraud in the inducement. Central to all his allegations is his claim that John Springer-Miller from the beginning set out to remove Mr. Howell from control and take over the technology and the company assets. Mr. Springer-Miller's alleged fraud in this case was to induce Mr. Howell, KneeBinding, Inc.'s sole shareholder and co-director with Dave Arnold, to accept Mr. Springer-Miller as the investor and to sign over majority control of the technology and the Company by promising Mr. Howell that he alone would manage the Company to develop the KneeBinding and bring it to market. Mr. Howell argues the evidence proves that before he signed the transaction documents, Mr. Springer-Miller promised him full control of the Company in writing, yet in early November 2007, immediately following the completion and signing of the documents, Mr. Springer-Miller began to interfere with daily operations. Thereafter, he forced out Mr. Howell and achieved complete control of the Company, as he had always intended.

Mr. Howell's preferred remedy for this alleged fraud is rescission. He asks the Court to rescind the entire transaction of November 1, 2007, leaving Mr. Howell again the sole Company shareholder, presumably with sufficient damages from the Springer-Millers to enable him to fund the Company's continued existence. If he successfully makes his case, the plaintiff's claims would largely collapse. It is therefore more practical to consider first the claim for fraudulent inducement.

Here, Mr. Howell asks the Court to find the following:

KBI negotiated for Investment in a comprehensive business and financial plan to be brought to fruition under the leadership and management of Rick Howell.

John Springer-Miller represented that he was interested in investing in the plans of the company as presented in its business and financial plan under the leadership and management of Rick Howell.



Prior to closing, John Springer-Miller actually believed the transaction was primarily an IP deal and that Rick Howell was not capable of managing or executing the business and financial plan.

Prior to closing, John Springer-Miller represented that he supported Rick Howell's leadership and management of the company, in part, by disclaiming any interest in running or managing the business.

The transactional documents expressly corroborated the promises and representations made to KBI to induce it to agree to sell its shares to John Springer-Miller.

After closing, John Springer-Miller assumed management control of the company and reneged on his promises.

Defendant's Requests to Find at 11 – 14.

Although the testimony of Mr. Howell and Mr. Springer-Miller during the twenty-day hearing touched on each of the above points, and there is testimony that if found persuasive would probably support each of them, the Court is inclined to look first at the record of events as recorded in the correspondence, transaction documents, and other tangible evidence. The subject matter of this litigation has been exceptionally emotional for both of the principal individual parties here, and for Mr. Howell, the KneeBinding and his dreams for the Company have been very close to his heart as well as his livelihood. It was obviously, and understandably, difficult for both Mr. Howell and Mr. Springer-Miller to testify dispassionately. This Court has had long experience with litigation of many kinds in which individuals have been emotionally distraught by the events that have brought them to court. Under such circumstances, often much that has been said and done over extended periods has inflicted considerable emotional damage. Perspective frequently is compromised. To best understand what transpired between the parties, it may be wise for the trier of fact initially to search out the most objective and concrete sources of information available, which are often documents that report events as they happened. It is a difficult task indeed to determine accurately what happened on the testimony of individuals who

have endured the experience of unfortunate events, especially where each seriously and quite honestly disputes deeply the other's version of events. The exhibits admitted here deserve careful attention and analysis. Our factual inquiry and analysis will largely, although not entirely, focus on the exhibits and the transaction documents.

In Vermont, “[a]n action for fraud or deceit will lie upon an intentional misrepresentation of existing fact, affecting the essence of the transaction, so long as the misrepresentation was false when made and known to be false by the maker, was not open to the defrauded party’s knowledge, and was relied on by the defrauded party to his damage.” *Bennington Housing Authority v. Bush*, 2007 VT 60, ¶ 8, 182 Vt. 133, 136 (quoting *Union Bank v. Jones*, 138 Vt. 115, 121 (1980) (defining fraud in the inducement)).<sup>7</sup> When a party can show fraud or misrepresentation that induced him into entering a contract, he may rescind the contract and avoid liability for its breach. See *Sarvis v. Vermont State Colleges*, 172 Vt. 76, 80 (2001) (citing *Negyessy v. Strong*, 136 Vt. 193, 194 (1978)) (per curiam).

A misrepresentation of fact may include silence where there is a duty to speak. *Cheever v. Albro*, 138 Vt. 566, 571 (1980). A duty to speak arises “from the relations of the parties, such as that of trust or confidence, or superior knowledge or means of knowledge.” *Id.* (quoting *Newell Brothers v. Hanson*, 97 Vt. 297, 303-04, 123 A. 208, 210 (1924)). “[The] failure to disclose a material fact with the intention to mislead or defraud is equivalent to a *fraudulent concealment* of the fact and stands no better than the affirmation of a material

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<sup>7</sup> The Vermont Supreme Court has treated the elements of common law fraud and fraud in the inducement or fraudulent inducement to contract as the same. See *Lewis v. Cohen*, 157 Vt. 564, 568 (1991) (citing *Silva v. Stevens*, 156 Vt. 94, 102 (1991) (quoting *Union Bank*, 138 Vt. at 121)). By contrast, the defense of fraud in the factum involves excusable ignorance of the contents of the writing signed, with no reasonable opportunity to obtain knowledge. See 9A V.S.A. § 3-305, Editors’ Notes. For example, such defense would apply if a person is tricked into signing a prenuptial agreement upon belief that it is merely a receipt for furniture delivery. Cf. *id.* Because in this case Mr. Howell knew that he was negotiating an employment agreement and the investment in KneeBinding, Inc., fraud in the factum is inapplicable.



misrepresentation.” *Id.* (emphasis added). In this vein, one who partially discloses information possessed in full, with words or conduct intended to deceive, “is guilty of fraud against which equity will relieve, if his words and conduct in consequence of reliance upon them bring about the result which he desires.” *Cushman v. Kirby*, 148 Vt. 571, 574 (1987) (quoting *Crompton v. Beedle*, 83 Vt. 287, 298, 75 A. 331, 334-35 (1910)). Unlike in a tort action, the party seeking rescission does not need to prove his case by clear and convincing evidence. *Sarvis*, 172 Vt. at 80 (citing *Union Bank*, 138 Vt. at 121).

To begin, Mr. Howell argues that the transaction documents themselves confirm that Mr. Howell was to be given full management and operational control in return for Mr. Springer-Miller receiving a majority interest and the power to select a majority of the Board of Directors. Defendant’s Requests to Find at 8. The Court agrees that the documents do provide that Mr. Howell would be CEO and that Mr. Springer-Miller would be the majority shareholder, with the right to appoint the majority of the Board. See Plaintiff’s Exhibit 1.2 at 6; see also Plaintiff’s Exhibit 1.15 at ¶ 2. In this sense, the Court agrees with Mr. Howell that KneeBinding, Inc. “negotiated for investment in a comprehensive business and financial plan,” and that Mr. Springer-Miller “represented that he was interested in investing in the plans of the company as presented in its business and financial plan” under the management of Rick Howell. Indeed, the email correspondence between Mr. Howell and Mr. Springer-Miller reflect their protracted negotiations from the spring until the fall of 2007.

Notwithstanding the parties’ efforts to negotiate, Mr. Springer-Miller clearly expresses his concerns regarding the investment in his October 13, 2007 email to Mr. Howell. See Plaintiff’s Exhibit 251 (Attachment A). Mr. Springer-Miller’s email attempts to distinguish between the success of a product, on one hand, and the financial success of a business for the



owners, on another. He was not interested in putting money in a business that would have little potential for a significant financial return. Nor was he interested in the day-to-day operation of a business. It was clear at that point, that Mr. Springer-Miller envisioned that: (1) Mr. Howell would have the daily operations of the Company under his control, including the development and marketing of the KneeBinding; (2) an agreement would hinge upon there being in place a business financial plan satisfactory to Mr. Springer-Miller that Mr. Howell would be ready, willing, and able to follow; and (3) the point of the business plan was to make “a significant amount of money five years from now.” See Plaintiff’s Exhibit 251 (Attachment A). As such, Mr. Springer-Miller’s expressed interest in having Mr. Howell run the Company was not a misrepresentation. Rather, it was part of the picture; not the whole picture.

Mr. Springer-Miller’s plan for Mr. Howell to oversee this aspect of the Company’s operations was with reservations and conditions—he was uncertain whether Mr. Howell would succeed in his role as CEO, and to protect his investment, he required that Mr. Howell follow the Business and Financial Plan. Ultimately, Mr. Springer-Miller’s goal was to realize significant profits. The record is devoid of evidence that Mr. Springer-Miller intended all operations of the Company be solely under Mr. Howell’s leadership, with no strings attached. In this regard, the Court cannot find that Mr. Springer-Miller foreswore any involvement himself prior to signing the transaction documents, or that he confidently anticipated that the Business and Financial Plan would be “brought to fruition” entirely under Mr. Howell’s leadership and management.

To the contrary, rather than manifesting an intent to place Mr. Howell alone at the helm of the Company, the fact that the Amended and Restated Certificate of Incorporation authorized Mr. Springer-Miller to elect three (the majority of) directors of the Corporation, is illustrative of a safeguard providing Mr. Springer-Miller some assurance that he would retain ultimate control

of his investment. Mr. Howell's employment "on an at-will basis" further protected Mr. Springer-Miller's investment. Although Mr. Howell states that "KBI's business plan provided that Howell would run the company for at least five years, the Court has found no such provision in the Business and Financial Plan, and Mr. Howell has not provided a citation to one. See Defendant/Third-Party Plaintiff's Reply, dated May 17, 2016 at 5. While there were projection figures for Mr. Howell's salary out to 2012, the Court can find no employment statement or other obligation stated in the plan which would read as an employment contract or policy. Mr. Howell was a salaried employee, an owner, and an officer of the corporation. We have been made aware of no employee policy document or employee manual that would bind the Company to a term of employment for Mr. Howell. The defendant has referenced no public policy exceptions to the enforceability of at-will contracts for salaried owners/officers of a corporation. The only finding that the Court can make regarding a term of employment for Mr. Howell is that it was terminable at will, provided the Company paid the compensation upon termination specified in paragraph 5 of the Employment Agreement. See Plaintiff's Exhibit 1.15. The Company complied with this provision.

Further, irrespective of whether Mr. Springer-Miller regarded the transaction as primarily an "IP deal," the emails exchanged from October 9, 2007 through October 17, 2007, referenced above, make plain his uncertainty about Mr. Howell's ability to execute the Business and Financial Plan. For his part, Rick Howell wanted to be sure that he would not lose his invention to the investor and that he would remain fully in charge of bringing the KneeBinding to market. Mr. Springer-Miller was fully aware of his concern. Mr. Springer-Miller, in turn, was equally clear that he did not want to see his million-dollar investment go down the drain. He liked Mr. Howell's idea for the new binding and thought it had promise. Indeed, he said he was "confident



that [Mr. Howell could] get the product off the ground, market it, create sales for it – and so on.” Defendant’s Exhibit 251 (Attachment A). However, in the same paragraph, Mr. Springer-Miller also said, “I admit that I have always had concerns about your ability to achieve the plan.” And it was clear that the “plan” was creating “something that ‘flips’ for a significant amount of money five years from now,” which was not the same thing as building a business, like a corner grocery store, that could generate no more than a return sufficient to keep itself in business and pay the operators a living wage.

John Springer-Miller was an investor, and his primary interest was to achieve a significant return on invested capital. He was not interested otherwise, and he did not see Rick Howell as the man to achieve that financial goal on his own. That Mr. Springer-Miller had doubts about Mr. Howell’s ability to succeed is patently evident in his email exchange with Mr. Howell in October 2007. See Defendant’s Exhibit 251 (Attachment A). Thus, to the extent that Mr. Howell now contends Mr. Springer-Miller breached a duty to disclose his lack of confidence in Mr. Howell prior to the November 1, 2007 closing, the Court finds insufficient evidence of such concealment.

In light of Mr. Springer-Miller’s reservations, it is clear that something changed to encourage Mr. Springer-Miller to invest in the business. There are no more emails or any other record of the understanding between Mr. Howell and Mr. Springer-Miller after October 17, 2007 and prior to the point when they signed the documents as of November 1, 2007. The logical conclusion is that the transaction documents were written with sufficient control over all essential aspects of the business that Mr. Springer-Miller felt assured his investment would be protected should Rick Howell fail to perform as hoped according to the Business and Financial Plan. Similarly, the Court must conclude that the transaction documents addressed Mr. Howell’s



concerns to his satisfaction. He elected to sign them on behalf of KneeBinding, Inc., which was represented by counsel during the closing. In this narrow respect, the Court agrees with Mr. Howell that the transaction documents “corroborated the promises and representations made to KBI to induce it to agree to sell its shares to John Springer-Miller.”

After both Mr. Springer-Miller and Mr. Howell went forward with the investment transaction, as detailed in this Court’s findings, Mr. Howell was eventually terminated when it became apparent that the binding would not be ready for sale by the 2008-2009 ski season. Although Mr. Howell would like the Court to find that Mr. Springer-Miller reneged on his promises to Mr. Howell, the Court is unable to make that finding.

Ultimately, as determined above, Mr. Howell was an “at-will” employee. In addition, the facts in this case reflect that Mr. Howell’s termination resulted, at least in part, from a failure to timely execute the Business and Financial Plan. Most critically, the engineering and computer-aided design work was not ready, as Mr. Howell had represented to Mr. Springer-Miller as part of the Business and Financial Plan. Whether Mr. Howell should have been aware that the CAD drafting was insufficient to produce the design for the production molds, is a point difficult to resolve. Mr. Howell claims he was “tricked” by his CAD drafting person into believing the CAD files were ready. See Plaintiff’s Exhibit 183. True or not, Mr. Howell made the decision to assure Mr. Springer-Miller that the engineering was ready for the mold work before he confirmed that it was indeed ready to go. In so doing, he created unrealistic expectations as to when the production molds would be completed, rendering the 30,000 sales orders projected for the spring of 2008 unfeasible. Mr. Howell was well aware of the potential consequences of not performing to expectations, describing the situation as “serious trouble” and predicting that he would “probably lose the company.” Plaintiff’s Exhibit 121.

While Mr. Springer-Miller's decision to terminate Mr. Howell under these circumstances was characterized as "breaking his promise" that Mr. Howell would run the Company, there is no evidence that Mr. Springer-Miller did not intend for Mr. Howell to run the Company (i.e., oversee the development and marketing of the KneeBinding) when he allegedly first made the "promise." As noted above, Mr. Springer-Miller had a clear vision of Mr. Howell's role as CEO at KneeBinding, Inc., and had articulated his reservations about Mr. Howell's capabilities throughout their personal correspondence prior to signing the documents dated as of November 1, 2007. To the extent that Mr. Springer-Miller promised to let Mr. Howell develop and market the binding and generally run the Company, he kept his promise. Mr. Howell became CEO, President, Secretary, and Treasurer. He was in control of all daily operations. Mr. Springer-Miller did not promise that Mr. Howell could continue to run the Company if he failed to perform. There was no promise to prevent Mr. Springer-Miller from stepping in and either saying something or taking action whenever he thought Mr. Howell was not performing as he should. It is therefore not surprising that Mr. Springer-Miller would take measures to remove Mr. Howell when the expectations were not met.

Although Mr. Springer-Miller ultimately decided to remove Mr. Howell as an officer of the Company, it does not constitute fraud. As the Court has previously concluded, there has been no misrepresentation and no omission of a material fact. Moreover, "[i]f every broken promise were to constitute fraud and allow rescission of a partnership or other agreement, the resultant instability would severely impair the conduct of business." *Union Bank*, 138 Vt. at 122. Accordingly, Mr. Howell's claim for fraud in the inducement must fail.



***Vermont Securities Fraud Act***

Mr. Howell alleges a violation of the Vermont Securities Fraud Act. As he agrees in his memorandum of March 31, 2016, this claim is dependent upon the findings in the fraud in the inducement claim. Memo page 31. Accordingly, the Court's findings do not support the conclusion that the third-party defendants have breached the Vermont Securities Fraud Act.

***Breach of Fiduciary Duties***

Mr. Howell alleges that the Springer-Millers, being fiduciaries, engaged in a lengthy list of actions or failures to act that constitute a breach of fiduciary duty to the Corporation and the minority shareholders. He alleges, amongst other infractions, that one or both of the Springer-Millers failed to provide the minority shareholders with financial information, failed to hold monthly directors' meetings, failed to hold annual meetings, failed to appoint an independent director pursuant to the provisions of the transaction documents, failed to provide a guarantee for debt financing, failed to follow the business plan, failed to pursue an opportunity for a prospective investor to buy them out, wrongfully terminated the Company's only employee capable of designing, developing, and marketing the binding, and, following Howell's employment termination, failed to find a suitable replacement. The result, Mr. Howell asserts, was that the KneeBinding failed to enter the European market envisioned by the financial plan, and subjected skiers to danger from a defective binding placed on the market with false advertising.

To establish a claim for breach of fiduciary duties, the burden is on the plaintiff to show that the director owed the corporation a fiduciary duty, that such duty required the defendant to act in good faith and with loyalty for the advancement of the corporation's interest, and that the



defendant breached this duty. See *J.A. Morrissey, Inc. v. Smejkal*, 2010 VT 66, ¶¶ 10-12, 188 Vt. 245, 252 (quoting 11A V.S.A. § 8.30(a)(1)-(3)).

The third-party defendants suggest that the Court review the breach of fiduciary duties claim under the “business judgment rule.” While the Vermont Supreme Court has not expressly invoked this rule, the general standards for directors of Vermont business corporations raise similar elements. Specifically, in Vermont, a corporate director is required to discharge his or her duties: “(1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner the director reasonably believes to be in the best interests of the corporation.” *J.A. Morrissey*, 2010 VT 66, ¶ 10, 188 Vt. at 252 (quoting 11A V.S.A. § 8.30(a)(1)-(3)). “The duties of good faith and loyalty require that a director must not allow personal interests to interfere with or supersede the interests of the corporation.” *Id.* By comparison, under the business judgment standard, Delaware law presumes that “‘in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company.’” *In re Walt Disney Co. Derivative Litigation*, 906 A.2d 27, 52 (Del. 2006) (citing *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)).

Importantly, where Vermont law has placed certain requirements on the corporate director, Delaware law embraces a rebuttable presumption that those same requirements have been met. Nonetheless, whether proceeding under Vermont law or Delaware law in a breach of fiduciary duties claim, the plaintiff’s burden remains the same. Compare *J.A. Morrissey, Inc.*, 2010 VT 66, ¶¶ 10-12, 188 Vt. at 252 with *Walt Disney Co.*, 906 A.2d at 52 (emphasizing that the business judgment rule presumptions “can be rebutted if the plaintiff shows that the directors

breached their fiduciary duty of care or of loyalty or acted in bad faith”). Thus, the Court finds application of the business judgment standard in this case to be of little consequence.

John Springer-Miller and Tina Springer-Miller were on the Board of Directors at KneeBinding, Inc., and John Springer-Miller was its CFO. Because he is “one of the key managerial personnel” of the Company, he therefore owed it fiduciary duties. Cf. *Beard Research*, 8 A.3d at 601. No one disputes that all three individuals involved in this litigation owed a fiduciary duty to the Corporation. All the officers and directors were fiduciaries, Mr. Howell included. We turn now to the specific allegations.

### ***Debt Financing***

Mr. Howell contends that Mr. Springer-Miller failed to honor his commitment in the documents to guarantee \$500,000 in additional financing and that without such commitment, Mr. Howell and KBI would not have agreed to Mr. Springer-Miller as investor. Mr. Howell asserts that Mr. Springer-Miller’s refusal to provide this debt financing “during a critical stage of development demonstrated that he was making decisions lacking both in good faith and due care.” Defendant’s Requests to Find at 50-51. Mr. Springer-Miller agrees that the Series A Preferred Stock Purchase Agreement contains a guarantee for an additional \$500,000, but that this guarantee was always conditional.

Section 4.12 of the Series A Preferred Stock Purchase Agreement reads in full as follows:

4.12 Additional debt financing. The Purchaser acknowledges that the Company may require additional debt financing of up to \$500,000 within the first year of operations (the “Debt Financing”), and that potential lenders may require a personal guaranty. If such a guarantee is required as a condition to obtaining the Debt Financing, the Purchaser agrees to serve as guarantor of the Debt Financing, *on such terms as are approved by the Purchaser and the Board of Directors of the Company.*



Plaintiff's Exhibit 1.1, Sec. 4.12 (emphasis added). Section 4.12 is quite clear. Mr. Springer-Miller would agree to guarantee such debt, but only on such terms that were satisfactory to him and the Board of Directors, of which two of the three members included himself and his wife. Further, section 8.15 states:

8.15 No Commitment for Additional Financing. The Company acknowledges and agrees that no Purchaser has made any representation, undertaking, commitment or agreement to provide or assist the Company in obtaining any financing, investment or other assistance, other than the purchase of the Shares as set forth herein and subject to the conditions set forth herein. In addition, the Company acknowledges and agrees that (i) no statements, whether written or oral, made by any Purchaser or its representatives on or after the date of this Agreement shall create an obligation, commitment or agreement to provide or assist the Company in obtaining any financing or investment, (ii) the Company shall not rely on any such statement by any Purchaser or its representatives, and (iii) an obligation, commitment or agreement to provide or assist the Company in obtaining any financing or investment may only be created by a written agreement, signed by such Purchaser and the Company, setting forth the terms and conditions of such financing or investment and stating that the parties intend for such writing to be a binding obligation or agreement. Each Purchaser shall have the right, in it (sic) sole and absolute discretion, to refuse or decline to participate in any other financing of or investment in the Company, and shall have no obligation to assist or cooperate with the Company in obtaining any financing, investment or other assistance.

This entire section, captioned "No Commitment for Additional Financing," is replete with statements putting KneeBinding, Inc. on notice that Mr. Springer-Miller was not committing to additional financing. In the face of such clear language, any argument that Mr. Springer-Miller had guaranteed such financing is unavailing.

Mr. Howell accepted these provisions. He signed the Series A Preferred Stock Purchase Agreement on behalf of the Company, also personally as a "Founder." Mr. Springer-Miller signed on his own behalf. Exhibit A to the document lists Mr. Springer-Miller as the single



purchaser. Exhibit C, the Disclosure Schedule, lists the Common Stock shareholders, of which Mr. Howell was the largest at 642,672 shares.<sup>8</sup>

In response to Mr. Howell's assertion that Mr. Springer-Miller made a solid commitment in the Series A Preferred Stock Purchase Agreement to guarantee the additional financing, the plaintiff cites both sections 4.12 and 8.15 to show that there was no such firm obligation. Mr. Howell counters by arguing that Section 8.15 was said by the plaintiff to have been an example of a change required by Mr. Springer-Miller to ensure that he maintained control following his realization in September 2007 that Mr. Howell was probably not the person capable of building a successful company. See Defendant's Third-Party Plaintiff's Reply, dated May 2, 2016 at 19, n. 31. Mr. Howell points out that Section 8.15 appears at the end of the agreement in the "Miscellaneous" section, and itself is subject to the earlier Section 4.12.

While it is certainly reasonable to argue that Section 8.15 does not withdraw obligations created by Section 4.12, neither does Section 8.15 withdraw any safeguards for Mr. Springer-Miller. The guarantee remained subject to Mr. Springer-Miller's approval of the terms of the loan. Moreover, Section 8.15 makes it clear that Mr. Springer-Miller at the time of the closing had made no "representation, undertaking, commitment or agreement to provide or assist" the company in obtaining financing. Nor would he be said to do so in the future unless in writing, "and stating that the parties intend for such writing to be a binding obligation or agreement."

Based on the above-cited provisions in the transaction documents, the Court cannot find that Mr. Springer-Miller breached any commitment to guarantee additional financing for the

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<sup>8</sup> The Series A Preferred Stock Purchase Agreement was signed on behalf of the Company by Mr. Howell, dated as of November 1, 2007, as well as by Mr. Howell, personally, as a "Founder." Mr. Springer-Miller signed on his own behalf. Exhibit A to the document lists Mr. Springer-Miller as the single purchaser. Exhibit C, the Disclosure Schedule, lists the Common Stock shareholders, of which Mr. Howell was the largest at 642,672 shares.

Company. Likewise, to the extent that the defendant argues that he was fraudulently induced to sign the transaction documents based on the understanding that Mr. Springer-Miller had committed to \$500,000 in additional debt financing, that assertion is not supported by the evidence. If Mr. Springer-Miller was not legally committed to provide a debt guarantee for \$500,000, and if he did not fraudulently induce the Company to enter into the transaction agreements on the promise of such a guarantee, it is difficult to see how his failure to provide the guarantee was a breach of fiduciary duty.

Moreover, Mr. Springer-Miller's only agreement as to the guarantee was the following: "If such a guarantee is required as a condition to obtaining the Debt Financing, the Purchaser agrees to serve as guarantor of the Debt Financing, on such terms as are approved by the Purchaser and the Board of Directors of the Company." The plain language of the agreement reflects that Mr. Springer-Miller was neither required to arrange for the financing, nor to sign unless "such a guarantee was required." There is no evidence that Mr. Howell, as CEO or President ever arranged for a loan or that he presented a loan agreement to Mr. Springer-Miller that required a guarantee. Consequently, there is no evidence that he refused a guarantee presented to him for signature and no evidence that he breached his fiduciary duties with respect to the debt financing provisions of the Series A Preferred Stock Purchase Agreement.

#### ***Election of Directors***

Mr. Howell claims that Mr. Springer-Miller breached both his fiduciary duties and the KneeBinding, Inc. Voting Agreement by failing to appoint a five-person Board of Directors. The Board was to include an independent director with engineering and ski industry experience in order to furnish the Board with industry knowledge. The argument is that such a director



would protect Mr. Howell by preventing the Company from being run entirely by Mr. Springer-Miller, who lacked any experience in the ski industry or with the manufacture of ski bindings.

Initially, the Series A Preferred Stock Purchase Agreement, provided simply that:

As of the Closing, the authorized size of the Board shall be five (5), and the Board shall comprise the following members: Rick Howell, John Springer-Miller and Tina Springer-Miller.

Plaintiff's Exhibit 1.1, dated November 1, 2007, Section 4.6. However, the Amended and Restated Certificate of Incorporation of KneeBinding, Inc., Section 3.2 further provides in pertinent part:

3.2. Election of Directors. The Board of Directors of the Corporation shall consist of five (5) members. The holders of record of the shares of Series A Preferred Stock, exclusively and as a separate class, shall be entitled to elect three (3) directors of the Corporation (the "Series A Directors") and the holders of record of the shares of Common Stock and the Series A Preferred Stock, voting together, shall be entitled to elect two (2) directors of the Corporation. . . . If the holders of shares of Series A Preferred Stock or the holders of shares of Series A Preferred Stock and Common Stock, as the case may be, *fail to elect a sufficient number of directors to fill all directorships for which they are entitled to elect directors, voting exclusively and as a separate class, or voting together, as the case may be, pursuant to the first sentence of this Subsection 3.2, then any directorship not so filled shall remain vacant* until such time as the holders of the Series A Preferred Stock or the holders of shares of Series A Preferred Stock and Common Stock, as the case may be, elect a person to fill such directorship by vote or written consent in lieu of a meeting; and no such directorship may be filled by stockholders of the Corporation other than by the stockholders of the Corporation that are entitled to elect a person to fill such directorship voting exclusively and as a separate class or voting together, as the case may be.

Plaintiff's Exhibit 1.20 (emphasis added). This language was never changed and remains the language of the Amended and Restated Certificate of Incorporation. In contrast to the Amended and Restated Certificate, the KneeBinding, Inc. Voting Agreement (Plaintiff's Exhibit 4)



expressly addresses the composition of the Board. Section 1.2 (a) provides that the Series A stockholders were entitled to elect three directors, John and Tina Springer-Miller being the initial two, “with the third individual yet to be designated.” Section 1.2 (b) provides that the “Founder(s) would be entitled to one directorship, “which individual shall initially be Rick Howell.” Section 1.2 (c) then provides that one individual would be appointed by the Series A Directors and the “holders of a majority of the then-outstanding Common Stock,” each voting as a separate class, as provided in the Restated Certificate. But, this fifth individual would have “substantial business experience relevant to the Company’s business and [would be] independent of the Company.” The only change of any substance provided by the Voting Agreement was the qualification that the fifth director would be independent and would have business experience relevant to the business of the Company.

The Court interprets Section 1.2, the Board Composition, to mean that John Springer-Miller had the authority to appoint three directors: himself and Tina initially, and a third of his own choosing. Mr. Howell would be himself on the Board as a founding director. They would jointly appoint the fifth director, someone independent of the Company and with appropriate industry experience.

Regarding any consequences for failure to fill out the Board to five members, the Court can find only that “any directorship not so filled shall remain vacant.” Plaintiff’s Exhibit 1.20. Sec. 3.2 at 7. Thus, the Amended and Restated Certificate clearly contemplated that there might not be five members on the Board, with no express or implied repercussions.

The record reflects some lack of diligence on the part of both Mr. Springer-Miller and Mr. Howell in identifying and pursuing suitable candidates for the position of independent director, and to otherwise fill the Board vacancies. However, Mr. Howell fails to explain how

this lack of diligence could amount to a breach of fiduciary duty when none of the transaction documents include a deadline for filling an independent directorship vacancy or any consequences for the failure to make Board appointments.

Finally, it is not clear just how filling the vacancy for an independent director necessarily would have led to a material difference in the operations of the Company. A full Board of Directors would have consisted of five directors, three of whom were appointments made solely by the Series A Preferred Shareholders. Even if the independent director had sided with Mr. Howell on any given vote, Mr. Springer-Miller, his wife Tina, and their third appointee would have prevailed. The Court concludes that these circumstances do not form an adequate basis for finding a breach of fiduciary duty. Cf. *In re Aquila Inc.*, 805 A.2d 184, 191 (Del. Ch. 2002).

***Failure to Follow the Business and Financial Plan***

Mr. Howell asserts that John and Tina Springer-Miller have breached their fiduciary duty by operating the Company without conforming to its Business and Financial Plan. In so doing, Mr. Howell emphasizes that the Investors' Rights Agreement, section 5.5(b) provides that "The Company shall use commercially reasonable efforts" to conform to it. See Plaintiff's Exhibit 1.4 at Howell 00109. The entire section reads as follows:

The Company shall use commercially reasonable efforts to conduct business in a way that is substantially in conformity with the Company business plan and financial plan, as it may be amended from time to time with the approval of at least one Series A Director (respectively, the "Company Business Plan" and the "Company Financial Plan" and collectively, "Business and Financial Plan") a copy of the currently agreed to version of each of which is attached hereto as Exhibit C; provided, however, that such Business and Financial Plan shall in no way serve to limit the Investors' rights. The Company shall use commercially reasonable efforts to achieve conformity with the Business and Financial Plan forecast that at least \$300,000 remain in the Investment Account as of April 30, 2008. So long as at least 25% of the originally issued Series A Shares are outstanding, if, and as of April 20, 2008,



either: (i) Company expenses to date have exceeded the Business and Financial Plan budget by more than ten (10) percent (except to the extent such expenses have been approved by at least one Series A Director), or (ii) pre-season ski binding orders placed by April 30, 2008 (as measured in terms of the US dollar value and ordered quantities) are below the Budget and Financial Plan forecast by more than ten (10) percent, then no further transfers of the Series A Invested Capital may be made from the Investment Account to the Operating Account without the written consent of at least one Series A Director, except to the extent necessary for the payment of expenses previously incurred with the approval of at least one Series A Director (including by virtue of the approval of the business and Financial Plan). In the event there is a conflict between the Company Business Plan and the company Financial Plan, the Company Financial Plan shall take precedence.

The section must be read slowly and carefully to discern its meaning, but in the end it confirms that product development must stay on time and on budget to meet the requirements of the Business and Financial Plan, and that those in charge of product development and production get it done. From November 2007 to mid-September 2008, Mr. Howell was the CEO, President, and Treasurer. Until March 2008, when Steve Walkerman took over, he was the Secretary. Development and production nowhere near achieved the goals in the Business and Financial Plan, and unless they did, Mr. Howell had no legitimate claim to additional money from the Investment Account. In sum, the Court finds no basis for a breach of fiduciary duties claim based on the Springer-Millers' failure to follow the Business and Financial plan, where Mr. Howell was the person in charge of seeing it to fruition.

#### ***Wrongful Termination***

Mr. Howell challenges his termination by the vote of John and Tina Springer-Miller alone. However, as highlighted above, the Amended and Restated Certificate contemplated vacancies on the Board, with no accompanying repercussions. Two votes were a majority of the Board.



Moreover, by September 2008, it was clear that Mr. Howell's efforts to develop and produce the binding were unable to meet the goals of the Business and Financial Plan. Prospects for bringing the binding to market for the 2008-2009 ski season were essentially lost. The binding was untested for meeting industry standards. No actual production model was in existence. Mr. Springer-Miller had long since lost confidence in Mr. Howell, and Mr. Howell was unable to work with Mr. Springer-Miller in any sort of productive fashion. The Company consisted of few people, and those there had to work together to get anything done. Mr. Howell had just returned from TUV testing in Germany without satisfactory results. These conditions signaled that it was time for a management change.

Mr. Springer-Miller had all the Board of Directors authority required to remove Mr. Howell as CEO and President. The Court cannot find it was a breach of the duty of care, loyalty to the Corporation or that it was bad faith for him to do so under these circumstances.

***Failure to Replace Mr. Howell***

The Court concludes that under all the circumstances that existed in the late summer and early fall of 2008, Mr. Springer-Miller, and his wife Tina, were not disloyal to the Corporation, and did not breach their duty of care or loyalty. While the management did not replace Mr. Howell with another person of similar background and experience, the Springer-Millers obtained outside engineering assistance, support that Mr. Howell had previously indicated through counsel was needed, despite the implication that he alone possessed all the skills and experience necessary to successfully implement the Business and Financial Plan. Because the third-party defendants had other "Key Employees" in place, took steps to obtain engineering support, modified the binding so that it met manufacturing standards, and amended the countries where

the binding would be marketed, the Springer-Millers did not breach their fiduciary duties to the Company.

***Other Alleged Failures***

Other actions or failures to act alleged do not rise to the level of bad faith, disloyalty, or a breach of a duty of care. There were several meetings of the Board of Directors between November 1, 2007 and September 15, 2008, although they were not held monthly. Mr. Howell could have called a board meeting any time he wished. All board members worked in the same building and were readily available for consultation. Not to have a formal board meeting on a monthly or other regular basis would be quite common for a corporation of this size with so few personnel. At the March 13, 2008 meeting of the Board, there was a discussion of the “need to reopen lines of communication. . . .” From the minutes of the meeting (Plaintiff’s Exhibit 35): “Tina Springer-Miller moved to establish a weekly meeting of all shareholders. Directors are also invited to attend. Steve Walkerman will be responsible for coordinating these meetings. Motion was seconded by Rick Howell and passed by a unanimous vote by the board.” Tina Springer-Miller would have been the only non-shareholder, but she was included in the resolution. Arnold and Boehme could have attended, if available. There was not much reason to have monthly board meetings.

By September 14, 2008, there had been no annual meeting, but only 10 months had passed since the transaction documents had been signed. Again, this was a company with few shareholders and the principal ones were nearby. This claim does not rise to the level of a breach of fiduciary duty, especially in the absence of a request for a meeting from the CEO and President.



With respect to Mr. Howell's claim that the third-party defendants have refused to provide financial information, the evidence at the hearing was unclear as to what financial data Mr. Howell did not already have access to. While there is an Investment Account, both Mr. Springer-Miller and Mr. Howell had knowledge of its contents. Mr. Howell himself would not have needed a report to know what had been withdrawn for the Operating Account because he was in full control of that account, and, as President and Treasurer, he would have known full well the current financial status of the Corporation daily financial operations. The approval of both the president (Howell) and someone appointed by Series A Director (Springer-Miller) was required to move money from the Investment Account to the Operating Account. (Section 5.5 Cash Management, Investors' Rights Agreement, Plaintiff's Exhibit 1.4). Mr. Howell would have been aware of all funds moved. If there was any failure to provide information, it was that the Springer-Millers were not fully aware of all aspects of daily operations.

Based on the foregoing, the Court concludes that the Springer-Millers did not breach their fiduciary duties to the Corporation or its minority shareholders.<sup>9</sup>

### ***Unjust Enrichment***

"Under the doctrine of unjust enrichment, a party who receives a benefit must return the [benefit] if retention would be inequitable. Unjust enrichment applies if in light of the totality of the circumstances, equity and good conscience demand that the benefitted party return that which was given." *Kellogg v. Shushereba*, 2013 VT 76, ¶ 22, 194 Vt. 446, 448 (quoting *Gallipo v. City*

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<sup>9</sup> Notably, article Ninth of the Amended and Restated Certificate of Incorporation states, in part, "To the fullest extent permitted by law, a director of the Corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director." Plaintiff's Exhibit 1.20 at Howell 0405. As such, this provision raises some question as to the third-party plaintiff's ability to bring a breach of fiduciary duties claim against the Springer-Millers in the first instance. However, because the parties do not raise this provision, and, in light of the Court's conclusions regarding this claim, the Court need not address this issue.



of *Rutland*, 2005 VT 83, ¶ 41, 178 Vt. 244) (internal quotation marks omitted). The elements of unjust enrichment are: (1) a benefit conferred on the defendant; (2) the defendant accepted the benefit; and (3) the defendant retained the benefit under such circumstances that it would be inequitable for the defendant not to compensate the plaintiff for its value. *Reed v. Zurn*, 2010 VT 14, ¶ 11, 187 Vt. 613, 616.

Mr. Howell, as the third-party plaintiff, asserts that the third-party defendants have been “unjustly enriched at the expense of KBI and its shareholders by the net profit attributable to their tortious conduct.” Specifically, Mr. Howell argues that he was “induced into assigning valuable intellectual property assets” and other “assets,” thereby being “deprived of the benefits of ownership.” Additionally, Mr. Howell cites *In re Galena Biopharma, Inc. Derivative Litigation*, for the proposition that the “impoverishment” element of an unjust enrichment claim does not require that he suffer an actual financial loss. 83 F.Supp.3d 1047, 1067-68 (D. Or. 2015) (citing *Metcap Securities LLC v. Pearl Senior Care, Inc.*, No. 2129-VCN, 2009 WL 513756, slip op. at n. 26 (Del. Ch. Feb. 27, 2009) (unpub. mem.)).

Because the Court has concluded that Mr. Howell’s fraudulent inducement claim is not sustainable, he is unable to show that the retention of a benefit to the defendants in taking over management of KneeBinding, Inc. or in acquiring the intellectual property behind the KneeBinding, was “unjust.”

### **Defendant’s Direct Claim**

#### **Defamation**

The elements of an action for defamation are:

- (1) a false and defamatory statement concerning another; (2) some negligence, or greater fault, in publishing the statement; (3) publication to at least one third person; (4) lack of privilege in the

publication; (5) special damages, unless actionable per se; and (6) some actual harm so as to warrant compensatory damages.

*Lent v. Huntoon*, 143 Vt. 539, 547-47 (1983). “A defamatory statement is one that tends to ‘blacken the reputation of the plaintiff and expose her to public hatred, contempt or ridicule.’” *Davis v. American Legion, Dept. of Vermont*, 2014 VT 134, ¶ 22, 198 Vt. 204, 213 (quoting *Kinsley v. Herald & Globe Ass’n*, 113 Vt. 272, 276 (1943)). The plaintiff must be able to show harm, which may include “impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.” *Id.* (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

Truth and privilege are defenses to defamation. Truth is a complete defense to defamation and defeats the action. *Lent*, 143 Vt. at 548. Generally, it is not necessary to prove the literal truth of the allegation in every detail; “it is sufficient to show that the imputation is substantially true.” *Russin v. Wesson*, 2008 VT 22, ¶ 8, 183 Vt. 301, 304 (quoting *Weisburgh v. Mahady*, 147 Vt. 70, 73 (1986). In other words, “it is sufficient if the substance, the gist, the sting, of the matter is true.” *Id.* (quoting 4 J. Lee & B. Lindahl, *Modern Tort Law: Liability & Litigation* 36:23, at 36-37 (2003).

Mr. Howell has pursued one direct claim for defamation, alleging that Mr. Springer-Miller made a false statement in a blog post on the Epic Ski Forum, a forum for skiers and other industry interested participants. The full text of the statement is as follows:

JSM 9/2[2011]

Just a reminder for all – KneeBinding had appropriate and compelling reasons that made it necessary to terminate Mr. Howell’s employment in 2008. For obvious reasons, we will not discuss the various legal actions that are pending against Mr. Howell, but it is appropriate to state here that the unfortunate rantings of this highly-disgruntled, long-former employee do not have any relevance to the ongoing operations of the company, nor in the development of its’ (sic) products and markets. We do not



see any scenario by which Mr. Howell could ever become more than a minority shareholder, or be permitted to play any active role at KneeBinding, ever again. Anyone who perceives this to be unfortunate, or voices sympathy for him, obviously doesn't know Mr. Howell and/or is not aware of the circumstances that necessitated his termination three years ago.  
John

Defendant's Exhibit 322.

The blog posting reflects that there was clearly publication to at least one third person, as required by element (3) and that the publication was intentional. If the publication was false, there is greater fault under element (2). See *Lent*, 143 Vt. at 547-47. The essential question is whether the statement was "a false and defamatory statement concerning" Mr. Howell. In other words, was it a false statement for Mr. Springer-Miller to say, "KneeBinding had appropriate and compelling reasons that made it necessary to terminate Mr. Howells employment in 2008"?<sup>10</sup>

While there is no claim here of wrongful termination, Mr. Howell has asserted as much in his direct action count for defamation. However, he cannot claim wrongful termination by the terms of his Employment Agreement because, as established above, his was an employment terminable at-will. If Mr. Howell is contending that Mr. Springer-Miller wrongfully deprived him of his employment by inducing him to transfer over the complete financial and operational control of the Company by promising that Howell would remain in full and sole control of all production, marketing, and management, that claim is untrue, as the Court has previously determined.

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<sup>10</sup> Notably, Mr. Springer-Miller's blog post was not gratuitous, but published in response to a number of Mr. Howell's emails or blog posts regarding the KneeBinding, the Company, and Mr. Springer-Miller individually, all of which will be discussed elsewhere in this opinion.



It is clear that Mr. Howell was not terminated for cause, and it may be quite evident that his case does not fall within the definition of termination for cause in the transaction documents, where “cause” means:

(a) that the Employee has engaged in dishonesty, gross negligence or willful misconduct, or (b) the conviction of the Employee of, or the entry of a pleading of guilty or nolo contendere by the employee to, any crime involving moral turpitude or any felony.

Plaintiff’s Exhibit 1.15, Employment Agreement at Section 5.

On the other hand, one could argue the “dishonesty” of Mr. Howell’s assertion to the *New York Times* that “We’re in full production right now for our first shipment in the Fall!” (Plaintiff’s Exhibit 177), or his email to Marcel Elefant stating, “We did it!! As of today, we have our 1st-production fully-calibrated, KneeBinding ski bindings in-hand.” Plaintiff’s Exhibit 161. Too, Mr. Howell’s failure to keep Mr. Springer-Miller informed about company operations could be said to lack forthrightness. Nevertheless, the Company chose to take the route of termination at-will. That the Company did so is not an admission that there was no justification for Mr. Howell’s termination. The parties negotiated the termination agreement over a long day on September 15, 2008. See Plaintiff’s Exhibit 38. The predominant weight of the evidence supports the conclusion that Mr. Howell’s removal as President and CEO was because Mr. Springer-Miller had lost confidence in him as the president. The reality was that the KneeBinding was still not ready for production, the two main principals in the Company were not able to communicate effectively, and Mr. Springer-Miller had decided to act on what he had feared from the beginning—that Mr. Howell would not be able to build company value as Mr. Springer-Miller had hoped.

The events leading up to September 15, 2008 demonstrate that Mr. Springer-Miller had “appropriate and compelling reasons” to terminate Mr. Howell. His public statement was

grounded in truth. Thus, in view of our findings regarding the fraud in the inducement claim, the Court cannot find by a preponderance of the evidence that the statements in Mr. Springer-Miller's Epic Ski Forum blog post are false and defamatory. See *Lent*, 143 Vt. at 548.<sup>11</sup>

## FINDINGS RELEVANT TO PLAINTIFF'S CLAIMS

### *Problems with the KneeBinding*

From shortly after the signing of the severance agreement at the end of December 2007 through the final hearing, Mr. Howell has claimed from time to time that the KneeBinding was defective. We now examine the substance of his assertions.

The first production run KneeBinding in 2008 and 2009 had several defects: (1) the anti-friction devices (ADF) came off in approximately a dozen or fewer instances in the first year; (2) some calibration numbers faded and could no longer be read; (3) on some installations, the runaway ski brakes did not function properly; and (4) the bindings were hard to step into in a couple of instances. Later, in his complaint to the CPSC, Mr. Howell documented numerous other problems. But the above four were main concerns in his testimony at the final hearing.

As to the anti-friction devices, if a skier continued to ski without the anti-friction pad, a boot could become misaligned in the binding, potentially causing a pre-release. The binding still worked largely as intended, but not as reliably. The worst possible outcome of such a pre-release is that a skier falls and hits his or her head on a tree or other object with such force that he or she is seriously injured or killed. But this outcome is merely possible, not probable. Antifriction devices have long been used with ski bindings to minimize friction between the boot and the ski

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<sup>11</sup> Because the Court finds the derivative claims brought by Mr. Howell to be unavailing, it does not reach his arguments regarding available remedies.



and so help maintain the reliability of release settings. They make ski releases more reliably conform to the release settings entered by the ski shop personnel.

Since defects or other problems are not uncommon with ski bindings, the literature with the KneeBinding contained clear warnings that one was not to ski on the bindings after discovering a defect or other problem, but to return the ski and binding to the ski shop for adjustment or binding replacement. There were no reported injuries on the KneeBindings resulting from the loss of anti-friction devices. A skier should be aware of a missing antifriction device when stepping into the binding. Its absence is obvious. Should a skier become aware of a missing antifriction device while up on the mountain, it would not be particularly dangerous to ski down slowly and carefully in open territory while giving an appropriate birth to trees or other solid objects.

If the calibration numbers were faded and no longer legible, the binding could not be properly adjusted. There is simply no visible number to set the binding to. Moreover, the binding literature warned the customers not to adjust the bindings themselves. All setting adjustments were to me made by ski shop personnel. Any adjustment to the settings required a trip to the ski shop. A normal adjustment procedure would be for the ski shop attendant to adjust the binding according to established written procedures employed by knowledgeable ski shop personnel. First, if an inspection revealed no other problems, the attendant would set the binding to the appropriate release number on the ski for the skier's experience and physical characteristics. Then the attendant would test the binding with special shop testing equipment to ensure that the release characteristics conformed to the set numbers. Where the numbers on the binding were illegible, a properly trained ski shop attendant would refuse to attempt the initial adjustment and instead would send in a warranty claim. While it was certainly a defect for the



numbers to fade in moist conditions, it was hardly a defect likely to cause immediate injuries. A warranty claim should have covered any problem with fading numbers.

The Company modified the bindings for the second production run, and the anti-friction pads no longer were a problem. The issue with faded numbers was resolved using different marking materials. The difficulty stepping into the bindings was likely because of damage to the bindings and was unrelated to production. Problems with the brakes were resolved with better installation, and no injuries were reported.

The Court cannot agree that the bindings were anywhere near “100% defective” or likely to cause serious bodily injury or death, as Mr. Howell has claimed. In view of the limited production and sales the first year, and the prompt remedies taken in the second production run, Mr. Howell’s statements to the public and other individuals were wide of the mark. As will be seen from their wording and context, they were intended more for retaliation against the Company and the Springer-Millers than to save the skiers from injuries. As a shareholder in the Company, and one presumably hoping for the Company to succeed, it made no sense to disparage the Company, its products, and its management. That is, unless there were other interests involved.

#### *The Injunction & Ensuing Motions for Contempt*

The transaction documents signed by the parties as of November 1, 2007 contained non-compete and non-disclosure provisions. Those provisions were repeated in the Severance Agreement signed by Mr. Howell as of December 30, 2008, which also added a non-disparagement provision. Acting on those agreements, KneeBinding, Inc. commenced the instant lawsuit in March 2009, seeking a temporary restraining order (“TRO”), preliminary and permanent injunction.

On March 16, 2009, the Court issued an ex-parte TRO against Mr. Howell, requiring him to cease certain activities and communications regarding the Company and the KneeBinding. Within the body of the TRO, the Court explains that Mr. Howell is the former president and CEO of KneeBinding, Inc., as well as party to an Invention and Non-Disclosure Agreement, a Non-Competition and Non-Solicitation Agreement, and Severance Agreement. Based on the verified complaint and *ex parte* motion for a TRO, the Court found that: Kneebinding had “proffered evidence that Mr. Howell is in violation of his agreements with Kneebinding” and had “revealed confidential, proprietary information regarding KneeBinding and its products in the context of disparaging comments and web postings that are likely to reach Kneebinding’s existing and potential clients, vendors and investors.” The Court found that Plaintiff had suffered and would continue to suffer immediate reputational damages as a result of Mr. Howell’s conduct. Hence, the Court issued the TRO. Plaintiff’s Exhibit 68.

As stated earlier, immediately after the TRO issued, Mr. Howell posted a blog about the court case and picketed in front of the Hyde Park Superior Courthouse. Plaintiff’s Exhibit 72. The Company filed a motion for contempt, which was scheduled for hearing at the end of the month. In lieu of a hearing, the parties reached a Stipulation regarding Contempt on March 30, 2009. Plaintiff’s Exhibit 70. (Attachment I) Although it did not settle any of the allegations of the complaint, it did resolve the contempt motion. Judge Rainville signed the handwritten stipulation “So ordered” on the same day.

Also on March 30, 2009, the parties signed a Stipulated Agreement and Order, this time typewritten, that states in the last of several “WHEREAS” clauses that: “Richard J. Howell agrees to the entry of a permanent injunction,” and to a finding that he was in contempt of the Temporary Restraining Order. Plaintiff’s Exhibit 71. (Attachment J) The permanent injunction



tracked the language of the TRO, enjoining Mr. Howell from, *inter alia*, publishing or causing to be published “any communication, oral or written, that relates to KneeBinding, its products, or John or Tina Springer-Miller or any of its other principals to any current or potential customer, client, investor or vendor.”

On April 23, 2009, in response to a motion that Mr. Howell filed *pro se* to modify the injunction, the Court held a hearing to determine whether or not Mr. Howell would be permitted to make a presentation at a conference in Germany in view of the stipulated agreement.<sup>12</sup> The Court allowed Mr. Howell to attend the conference, but required him to record any presentations made by him and enjoined him from discussing the topic of ski bindings.

#### ***Howell’s Communications to Third Parties***

Despite the injunction, on April 20, 2009, prior to the above hearing, Mr. Howell filed a twenty-eight-page complaint with the U.S. Consumer Products Safety Commission (CPSC) alleging that the KneeBinding was defective. See Plaintiff’s Exhibit 146. Mr. Howell filed additional comments with the CPSC on May 5, 2009, describing numerous problems with the bindings and saying they could cause serious bodily injury or death. See Plaintiff’s Exhibit 146.

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<sup>12</sup> In his motion filed on April 2, 2009, Mr. Howell described his various complaints with the Company, specifically, that it: perpetrated a fraud because the bindings were not TUV-approved and were therefore unsafe; and stated in advertising that the bindings were safer, when in fact they were unsafe for skiers, “who are now, today, in eminent danger of serious injury, including paralysis, or death.” Plaintiff’s Exhibit 164. Mr. Howell described himself as a “life-long ski-binding engineer” and recounted his experience in the ski industry. He also asserted that the “officers and directors of the plaintiff have zero prior relevant experience in any form of consumer products, let alone ski-bindings.” He described how the “investor” “fraudulently” took the Company’s technology and squeezed him out, and prevented him from “preventing skiers from being harmed by the unsafe bindings through the deceitful trickery that he has put forth to the Lamoille County Superior Court, . . . and while continuing to make, use, sell and induce others to sell known-100% defective ski-bindings.” Mr. Howell sought an emergency hearing to reverse the injunction so that he could make his “critical public safety presentation concerning the ongoing development of this ski-binding technology” at a skiing safety conference that was to be held in Germany the following week. Furthermore, Mr. Howell characterized his request as an “emergency” because skiers were “at risk of serious injury or death at this moment through their unsuspecting use of these 100%-defective ski bindings.” Plaintiff’s Exhibit 164.



Mr. Howell continued to contact the CPSC, providing the agency with parts from a KneeBinding ski binding in July 2009. See Plaintiff's Exhibit 45.

Later that fall, on October 25, 2009, Mr. Howell sent an email to the CPSC saying that the Company was continuing to ship defective ski bindings, putting the public "at a bona fide risk of fatality with the newest version of KneeBinding brand ski bindings." He included a list of problems with the bindings. See Plaintiff's Exhibit 49.

In June 2009, David Sullivan, a resident of Stowe, Vermont, encountered Mr. Howell, an acquaintance, while conducting business at the UPS store on Main Street. When Mr. Sullivan brought up the subject of the ski binding business, Mr. Howell revealed that it was not going well with his partner, Mr. Springer-Miller, referring to him and his wife as "evil." Mr. Howell also mentioned that he was in court with the Springer-Millers and that if the case did not go in his favor, Mr. Howell would "kill him and his family."

In due course, when Mr. Howell continued to write emails and post blogs critical of the company, Mr. Springer-Miller, and the ski binding, the Company filed another contempt petition, followed by a third petition much later.

On November 11, 2010, Mr. Howell sent out a lengthy, three-and-a-half-page communication that included a notice that he was seeking an emergency injunction to stop John Springer-Miller and Tina Springer-Miller from shipping a "wrongly modified" KneeBinding with a defective brake system. In addition, Mr. Howell was also requesting that the Court grant him "full control of KneeBinding, Inc.," as well as the patents, plus \$5,000,000. The communication was sent to Robert Hemley, attorney for KneeBinding, Inc., with copies to numerous other recipients, including Progressive Plastics' owner Hank Buermann at Progressive Plastics, a vendor, and others in the ski industry. See Plaintiff's Exhibit 132. Mr. Howell did not

follow through with filing a request for an injunction. But, at Progressive Plastics, they were concerned about the threats of litigation and their continued relationship with KneeBinding, Inc.

As the lawsuit continued, Mr. Howell again posted to the EpicSki Forum on March 31, 2013, stating to someone who reported a knee injury while skiing, "I am the original designer of KneeBinding brand ski bindings . . . and the intention of the design is not what is being stated here in several posts." A lengthy discussion follows of the forces involved in certain falls while skiing and how the binding technology may or may not address them. Mr. Howell then commented, "I take full responsibility for your injury because I should never have allowed the so-called investor to be the purported investor: KneeBinding wrongfully modified my design and has harmed the valuation of my original company, KneeBinding, Inc." See Plaintiff's Exhibit 75.13, March 31, 2013 Post to the EpicSki Forum (Attachment K).

On April 1, 2013, Mr. Howell further commented on the EpicSki Forum as follows:

As most of you already know, I will NEVER abandon you as MY customers and I will not let you be exposed to the fraud and safety issues that are transpiring within the ski market by the hijackers of my product and my company . . . and I will do everything possible to protect you via the information that I have posted here on Epic.

Plaintiff's Exhibit 75.17, April 1, 2013 Post to the EpicSki Forum.

Then, on December 13, 2013, Mr. Howell posted the following statements:

[One] must gain recourse for the train wreck that was caused by the parties with wrongful control who willingly and knowingly shipped the non-compliant safety-product in the consumer market . . . Knowingly creating fraudulent inducement around a safety-product is totally unacceptable: 5-years is too long to wait during a "spoiled brat / multi-millionaire's game" that's purely about financial attrition to point me into the ground to make me go away. I will not go away. "And market factors will prevail."

Plaintiff's Exhibit 75.18, December 13, 2013 Post to EpicSki Forum.

On January 22, 2014, in referring to the instant litigation, Mr. Howell stated:



Some of you have asked why it will take so long for me to come to market with my new Howell Ski Binding. Now you have your answer. . . For the record: I will NEVER conform to the bogus injunction that's based on fraud on the court: Just like Martin Luther King – I am willing to go to jail over this issue of injustice.

Plaintiff's Exhibit 75.11, January 22, 2014 Post to the EpicSki Forum. And, in answer to a posting by someone questioning his motives, Mr. Howell stated:

You're a liar, again. I am not hardly on the "losing-end" of a lawsuit with KneeBinding, Inc. It is my duty as a citizen, engineer, ski binding expert, founder of KneeBinding, original inventor and designer of KneeBinding, original developer of KneeBinding ski bindings, shareholder and original-owner of KneeBinding to NOT allow binding with my reputation all over them to be wrongly sold into the open market while not having certification of having passed the minimum international (ISO) standards while at the same time my friends and fellow skiers are being injured on them.

Under the U.S. Constitution, I am free to earn a living and to compete appropriately under the rule of law with whom ever I want. I'm not competing with KneeBinding because it's not an alpine ski binding: it has never passed the minimum international standards that – BY *international consensus* – define what an alpine binding is.

Your acts to consistently post such false and misleading lies also shows a pattern of malicious intent.

*Id.*

Apart from his recurrent postings on EpicSki Forum, Mr. Howell also indicated on LinkedIn.com that he was President and CEO of KneeBinding, Inc., for which he had "invented IP, developed product, founded company formed around an alpine ski-binding that reduces knee injuries." Plaintiff's Exhibit 75.23, May 4, 2015 Post to Linkendin.com. He again referenced the ongoing litigation and intent to "regain the assets of KneeBinding, Inc.," remarking as follows:

Upon winning, I will recall all KneeBinding brand ski bindings that have been shipped (they are 100% defective because they have never met minimum international safety standards, ISO 9462,



9465, and 11087 as tested by the only independent ski-binding testing lab in the world, TUV, in Munich, Germany AND they have not met 'Standard Industry Practice' for durability and anti-prelease). In time, I will then ship properly-functioning replacement bindings to all presently-existing customers.

Meanwhile, I apologize to all of my career-long customers for this heinous interruption and the numerous fraudulent advertising claims that I assert are being put forth by the present entity – such false claims include but are not limited to the 'scare-tactics' deployed in the present copy-platform of the company's advertising campaign. "Very, very sorry I allowed the present (purported) investors to become involved in this company.

I'm working as hard and smart as possible to resolve this long-standing situation as quickly as possible.

*Id.*

On May 6, 2015, Mr. Howell wrote an email to Peter Anderson, with copies to three people, one of whom was Hank Buermann at Progressive Plastics. He asserted that in view of his pending derivative counterclaims as KneeBinding, Inc., he was "100% owner of KneeBinding, Inc." and had "sole ownership" of the KneeBinding patents. He stated that anyone who was making, using, or selling products under the patents were "infringing" on his ownership, and that "all parties noted above must immediately cease and desist from making, using [sic] selling" such products. Plaintiff's Exhibit 75.32 (Attachment L). Progressive was in the process of making parts for KneeBinding, Inc., and the message caused them concern. They halted production for a couple of days and conferred with Steve Walkerman at KneeBinding, Inc. before resuming production.

## PLAINTIFF'S CLAIMS

### *Motion for Contempt of the March 30, 2009 Injunction*

“It is fundamental to our legal system that all orders and judgments of courts must be complied with promptly.” *State v. Austin*, 165 Vt. 389, 401 (1996) (internal citations and quotation marks omitted). The collateral bar rule provides that individuals cannot challenge the validity of a court order by violating the order. *In re Duckman*, 2006 VT 23, ¶ 10, 179 Vt. 467, 475 (2006). If the individual enjoined under court order believes it to be incorrect, he or she must nonetheless comply with the order, absent a stay, and appeal the matter. See *id.* (citing *Maness v. Meyers*, 419 U.S. 449, 458 (1975) (“Generally, attorneys must comply with a court’s ruling regardless of whether the ruling has legal support.”); see also *Austin*, 165 Vt. at 401 (internal citations omitted). The purpose of this rule is to “protect the efficient administration of justice and to encourage litigants to follow court orders.” *Duckman*, 2006 VT 23, ¶ 10. In general, the power to punish for contempt of a court order lies within the court’s discretion. *Spabile v. Hunt*, 134 Vt. 332, 334-35 (1976). “It is, of course, fitting for the lower court to take into account *all factors* relating to the particular nature of the contemnor’s disobedience in determining what action on the court’s behalf is required.” *Id.* (citing *LaVoice v. LaVoice*, 125 Vt. 236, 239 (1965)) (emphasis added).

Here, paragraph 1 of the permanent injunction enjoins Mr. Howell from publishing or causing to publish “any communication, oral or written, that relates to KneeBinding, its products, or John or Tina Springer-Miller or any of its other principals to any current or potential customer, client, investor or vendor.” Mr. Howell contends that the injunction is unconstitutionally overbroad and, in any event, expired as of March 1, 2010 under the Non-Competition and Non-Solicitation Agreement.