



46506. Further, Defendant has availed itself of the privileges, rights and benefits of the laws of the State of Indiana and this District, and has committed acts within this District giving rise to these claims, including by one or more of manufacturing, importing, selling, or offering to sell its Westbury Verticable aluminum railing (“Infringing Product”) that infringes the asserted patent.

5. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b), 1391(c), and 1400(b) because Defendant resides in this District and/or has a regular and established place of business in this District and has committed and is committing acts of infringement in this District.

### **Background**

6. Fortress has over 15 years of experience in designing and manufacturing unique and innovative, high-quality building products including a variety of types of metal railing products used in outdoor construction. One of Fortress’s break-through building solutions is the FortressCable V-Series steel cable railing.

7. Understanding the value of its innovation, Fortress sought and obtained patent protection for the FortressCable V-Series steel cable railing. Thus, Fortress is the owner by assignment of U.S. Patent No. 10,883,290 (the “’290 Patent”), which was duly and legally issued by the United States Patent & Trademark Office on January 5, 2021. A true and correct copy of the ’290 Patent is attached as Exhibit A hereto.

8. Defendant Digger is a direct competitor of Fortress who also produces building products used in outdoor construction. Digger has been engaging in one or more of manufacturing, importing, selling, or offering to sell the Infringing Product since at least 2018 and continues to offer to sell and sell that product today.

### **Count One – Infringement of U.S. Patent No. 10,883,290**

9. Fortress realleges and incorporates by reference the foregoing paragraphs as if fully set forth herein.

10. Fortress is the owner by assignment of the ’290 Patent, which was duly and legally issued by the U.S. Patent and Trademark Office on January 5, 2021. The ’290 Patent is

valid and enforceable.

11. The '290 Patent is a continuation of U.S. Patent No. 9,790,707, filed on April 13, 2015, which claims priority to U.S. Provisional Application for Patent No. 61/979,055 filed on April 14, 2014.

12. Digger infringes and continues to infringe the '290 Patent by one or more of manufacturing, importing, offering for sale, or selling in the United States the Infringing Product that embodies one or more of the inventions claimed in the '290 Patent.

13. Digger directly infringes and continues to infringe at least Claim 1 of the '290 Patent. A claim chart comparing the Infringing Product to Claim 1 of the '290 Patent is attached as Exhibit B.

14. The Infringing Product is a barrier.

15. The Infringing Product includes a top rail that includes a top web portion and a pair of top leg portions extending from the top web portion.

16. The top web portion of the Infringing Product defines a plurality of top through holes spaced apart along the top web portion.

17. The Infringing Product includes a bottom rail that includes a bottom web portion and a pair of bottom leg portions.

18. The bottom web portion of the Infringing Product defines a plurality of bottom through holes that are spaced apart along the bottom web portion and aligned with the top through holes.

19. The Infringing Product includes a rigid support member that extends vertically between the top rail and the bottom rail.

20. The Infringing Product includes a first vertical cable that is disposed adjacent to the rigid support member.

21. A top end of the first vertical cable of the Infringing Product is received in and directly attached to a hollow tubular shank of a first top swage fitting, and a bottom end of the first vertical cable is received in and directly attached to a hollow tubular shank of a first bottom

swage fitting.

22. The top end of the first vertical cable of the Infringing Product extends through one of the plurality of top through holes, and the bottom end of the first vertical cable extends through one of the bottom through holes that is disposed in vertical alignment with the one top through hole.

23. The Infringing Product includes a second vertical cable that is disposed adjacent the rigid support member.

24. A top end of the second vertical cable of the Infringing Product is received in and directly attached to a hollow tubular shank of a second top swage fitting, and a bottom end of the second vertical cable is received in and directly attached to a hollow tubular shank of a second bottom swage fitting.

25. The top end of the second vertical cable of the Infringing Product extends through another of the plurality of top through holes, and the bottom end of the second vertical cable extends through another of the bottom through holes disposed in vertical alignment with the another top through hole.

26. The first and second bottom swage fittings of the Infringing Product are each coupled to a respective adjustable end member, and each one of the pair of bottom leg portions extends beyond and conceals the adjustable end members therebetween.

27. Adjusting the adjustable end member of the Infringing Product adjusts a tension in the respective first and second vertical cables.

28. Accordingly, Digger infringes and continues to infringe at least Claim 1 of the '290 Patent under 35 U.S.C. § 271(a), (b), and (c).

29. By directly infringing, Digger has injured Fortress and is liable for monetary damages, interest, and costs pursuant to 35 U.S.C. § 284 in an amount adequate to compensate Fortress for Digger's infringement, including without limitation, any profits lost by Fortress as a result.

30. At least since Digger has been provided this Complaint, Digger has known about

the '290 Patent and that Digger's continued actions constitute infringement of the '290 Patent.

31. Unless restrained by the Court, Digger's actions will cause ongoing harm to Fortress for which it has no adequate remedy at law and for which it seeks injunctive relief under 35 U.S.C. § 283.

### **Jury Demand**

32. Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Fortress demands a trial by jury on all issues so triable.

### **Relief Requested**

33. Fortress respectfully requests that judgment be entered in its favor and against Digger as follows:

- A. A judgment that Digger has infringed, either literally or under the doctrine of equivalents, the '290 Patent;
- B. A judgment and order that Digger pay Fortress its damages, costs, expenses, pre-judgment and post-judgment interest for its infringement of the '290 Patent;
- C. A judgment and order finding that this is an exceptional case under 35 U.S.C. § 285 and awarding Fortress its reasonable attorneys' fees;
- D. An order enjoining Digger, its officers, agents, employees, contractors, affiliates, successors and assigns, and all those controlled by, acting on behalf of, in privity with, or acting in concert or active participation with Digger from:
  1. Infringing the '290 Patent, including but not limited to, by making, using, offering to sell, selling, or importing the Infringing Product in or into the United States;
- E. An order that Digger destroy any Infringing Products and any other products that infringe the '290 Patent that it has in inventory and cancel all outstanding orders for any such products; and

**F.** Any and all other relief that the Court deems appropriate.

Dated: January 8, 2021

**FOLEY & LARDNER LLP**

s/ Jonathan W. Garlough  
JONATHAN W. GARLOUGH (IN Bar No. 3032945)

**Foley & Lardner LLP**

321 N. Clark Street, Suite 3000

Chicago, IL 60654-4762

Tel: (312) 832-4500

Fax: (312) 832-4700

Email: jgarlough@foley.com

PAUL V. STORM (*Pro Hac Vice* to be filed)

JOHN J. MAY (*Pro Hac Vice* to be filed)

**Foley & Lardner LLP**

*Attorneys for Plaintiff Fortress Iron L.P.*