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Attorneys for Plaintiff KIHOMAC, Inc.

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

KIHOMAC, INC.,

Plaintiff,

v.

MEOSPHERE, LLC DBA LIGHTNING
KITE, EMERGENT 3, INC., and
PRESTON KELLER,

Defendants.

COMPLAINT

JURY TRIAL DEMANDED

Case No. 1:22-cv-00160-DBP

Magistrate Judge Dustin B. Pead

Plaintiff KIHOMAC, Inc. (“KIHOMAC,” “the Company,” or “Plaintiff”), through its undersigned counsel, brings this action against Defendants Meosphere, LLC DBA Lightning Kite (“Lightning Kite”), Emergent 3, Inc. (“Emergent 3”), and Preston Keller (“Keller”) (collectively, “Defendants”). In support of this Complaint, Plaintiff alleges as follows:

INTRODUCTION AND NATURE OF ACTION

1. KIHOMAC is a veteran-owned small business with nationwide offices designed to service an array of capabilities. The Company's leadership is comprised of seasoned military and business professionals who bring together sound business practices and leading-edge innovation.

2. In December 2017, KIHOMAC acquired Tresit Group, LLC ("Tresit Group"). As part of the acquisition, Tresit Group assigned KIHOMAC all inventions and all patents and patent applications, including the applications leading to U.S. Patent No. 10,194,280 (the "280 Patent").

3. Shortly after its acquisition of Tresit Group, KIHOMAC began investing resources in improvements related to Tresit Group's Disaster Incident Report and Security ("DIR-S") product. DIR-S is a safety and emergency management platform that is fully customizable, allowing organizations to manage emergencies on any device. DIR-S users can communicate with authorities and view interactive floor plans and maps to make informed decisions during an emergency. First responders can use the information from DIR-S users to respond efficiently and allocate resources to areas of need. The DIR-S product is based upon the technology described in the 280 Patent.

4. Tresit Group had collaborated with Lightning Kite in the development of the DIR-S product since January 2016.

5. In January 2018, Preston Keller joined KIHOMAC as a marketing intern. As a condition of his employment, he signed various noncompete, nondisclosure, and intellectual property agreements. By January 2020, Keller had been promoted to DIR-S lead.

6. In January of 2018, KIHOMAC engaged Lightning Kite to continue to provide software development services related to the DIR-S product. As a condition of providing services to KIHOMAC, Lightning Kite signed a non-compete and non-disclosure agreement that remains in effect today.

7. Keller resigned from KIHOMAC on June 24, 2021.

8. On September 23, 2021, Lightning Kite notified KIHOMAC that it intended to terminate its service agreement with KIHOMAC, and the Agreement was ultimately terminated two months later.

9. Shortly after his resignation from KIHOMAC, Keller formed Emergent 3, Inc. in August 2021.

10. In October 2022, KIHOMAC learned that despite its non-compete agreement, Lightning Kite had begun working with Emergent 3 to create an emergency management software application.

11. This Emergent 3 product, the “E3” application, infringes on patents owned by KIHOMAC related to the DIR-S product.

12. Further, the actions taken by Lightning Kite and Keller to develop this product violate the noncompete, nondisclosure, and other covenants they made to KIHOMAC. As a result, KIHOMAC brings this suit against Lightning Kite, Emergent 3, and Keller seeking relief for their patent infringement, breaches of contractual obligations, and tortious conduct towards KIHOMAC.

THE PARTIES

13. KIHOMAC, Inc. is a Virginia corporation with its principal place of business at 12030 Sunrise Valley Drive, Suite 320, Reston, Virginia 20191.

14. Upon information and belief, Meosphere, LLC is a Utah limited liability company doing business as Lightning Kite, a registered Utah DBA, with its principal place of business at 225 South 300 West, Logan, Utah 84321.

15. Upon information and belief, Emergent 3, Inc. is a Utah corporation with its principal place of business at 2055 North 1250 East, North Logan, Utah 84341.

16. Upon information and belief, Preston Keller is a Utah citizen residing at 2055 North 1250 East in North Logan, Utah 84341.

JURISDICTION AND VENUE

17. This Court has subject matter jurisdiction over the patent claims pursuant to 28 U.S.C. §§ 1331 and 1338(a). This Court has subject matter jurisdiction over the non-patent claims pursuant to 28 U.S.C. § 1367(a).

18. In the alternative, the Court has subject matter jurisdiction over the non-patent claims through diversity jurisdiction pursuant to 28 U.S.C. § 1332. There is complete diversity among the parties, and the amount in controversy exceeds \$75,000.

19. Venue over the patent claims is proper in this judicial district under 28 U.S.C. § 1400(b) because Defendant Emergent 3 has committed acts of infringement in this District, including, but not limited to, making, using, selling, and offering for sale, infringing products, and because Emergent 3 resides in this District and has a regular and established place of business in this District at 2055 North 1250 East, North Logan, Utah 84341.

20. Venue over the remaining claims is proper in this judicial district under 28 U.S.C. § 1391(b)-(c) because a substantial part of the events or omissions giving rise to this claim occurred within this judicial district.

21. This Court has general personal jurisdiction over Meosphere, LLC DBA Lightning Kite as a Utah limited liability company.

22. This Court has general personal jurisdiction over Emergent 3 as a Utah corporation.

23. This Court has general personal jurisdiction over Preston Keller as a Utah citizen and resident.

FACTUAL BACKGROUND

KIHOMAC and Lightning Kite's Mutual Non-Compete & Non-Disclosure Agreement

24. In January of 2018, KIHOMAC engaged Lightning Kite to continue to provide software development services related to the DIR-S product. Lightning Kite was contracted to design and implement the architectural design and functionalities of the application.

25. As part of KIHOMAC's engagement of Lightning Kite, Lightning Kite executed a Mutual Non-Compete and Nondisclosure Agreement (the "Lightning Kite Agreement") effective on June 18, 2018. A copy of the Lightning Kite Agreement is attached hereto as Exhibit 1.

26. The Lightning Kite Agreement obligated each party to refrain from using or disclosing Proprietary Information for five (5) years after the expiration of termination date of the Lightning Kite Agreement:

The obligation of each party to refrain from using or disclosing Proprietary Information received from the other party in contravention of the restrictions state herein shall terminate five (5) years after the expiration or termination date of this agreement.

Exhibit 1, ¶ 7.

27. Under the Lightning Kite Agreement, Lightning Kite had the right to use the Proprietary Information disclosed by KIHOMAC for the exclusive purpose of developing the DIR-S product and for no other purpose:

The Disclosing Party hereby grants to the Receiving Party a limited right to use any Proprietary Information it may provide hereunder in order to accomplish the Purpose set forth in Paragraph 1 hereof The Receiving Party shall not, without the prior written consent of the Disclosing Party: (i) use Proprietary Information for any other reason than to accomplish the specified Purpose[.]

Exhibit 1, ¶ 8.

28. In addition, the Lightning Kite Agreement included a Non-Compete Covenant, which states:

For a period of 5 years after the effective date of this Agreement, You will not directly or indirectly engage in any Business that competes with Company, without prior written consent.

Exhibit 1, ¶ 9.

29. The Lightning Kite Agreement also contained a Non-Solicitation Covenant, which states:

For a period of 5 years after the effective date of this Agreement, both parties will not directly or indirectly solicit Business from, or attempt to sell, license or provide the same or similar Products or Services as are now provided to, any customer or client of either party.

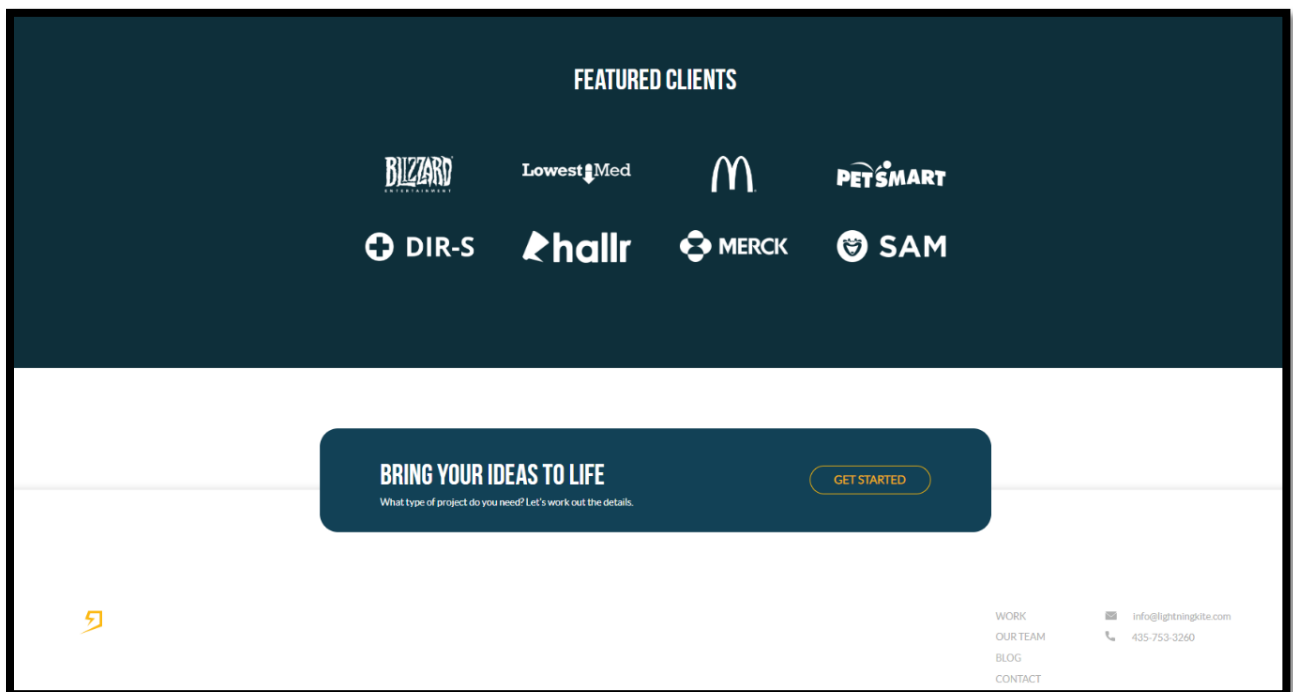
Exhibit 1, ¶ 10.

30. The Lightning Kite Agreement became effective on June 18, 2018, and the Non-Compete and Non-Solicitation Covenants remain in effect today.

31. KIHOMAC found Lightning Kite’s software development services underwhelming. The DIR-S product was experiencing significant stability issues, and Lightning Kite was unable to prevent these recurring issues in the software.

32. As KIHOMAC began considering its options, Lightning Kite notified KIHOMAC of its intent to terminate its agreement with the Company on September 23, 2021. The Lightning Kite Agreement was ultimately terminated in November 2021.

33. Despite its termination of the Lightning Kite Agreement, Lightning Kite still proudly displays DIR-S as one of its “Featured Clients” on its webpage:



See <https://www.lightningkite.com/>.

34. Because the Lightning Kite Agreement terminated in November 2021, Lightning Kite’s Non-Compete and Non-Solicitation Covenants are both still in force as of today. Exhibit 1, ¶¶ 7–8.

35. Accordingly, Lightning Kite is not permitted to use Proprietary Information gained from its engagement with KIHOMAC, to directly or indirectly engage in *any* business that competes with KIHOMAC, or to directly or indirectly solicit business from, or attempt to sell, license, or provide the same or similar products or services as are now provided to any customer or client of either party. Exhibit 1, ¶¶ 7–10.

KIHOMAC’S Patents

36. In December 2017, KIHOMAC acquired Tresit Group. As part of the acquisition, Tresit Group assigned its rights to all inventions and all patents and patent applications, including the applications leading to the 280 Patent.

37. The 280 Patent was issued on January 29, 2019 and is presumed valid. A copy of the 280 Patent is attached to this Complaint as Exhibit 2.

KIHOMAC and Preston Keller’s Relationship

38. In January 2018, Keller joined KIHOMAC as a marketing intern.

39. As a condition of his employment with KIHOMAC, Keller signed an Employee Nondisclosure and Conflict of Interest Agreement (“Employment Agreement”) on January 2, 2018. Exhibit 3.

40. As part of his Employment Agreement, Keller agreed that, without written prior consent from KIHOMAC:

The Employee shall not disclose or use any proprietary and confidential information and/or classified information (except in the performance of his duties for the Company) during the period of his/her employment by the Company or at any time thereafter.

Exhibit 3, ¶ 2(a).

41. Keller further agreed not to take with him any proprietary or confidential information with him upon leaving the employ of KIHOMAC. Exhibit 3, ¶ 2(b).

42. In addition to the Employment Agreement, Keller signed an Employee Intellectual Property Agreement (“IP Agreement”) on January 2, 2018. The IP Agreement is attached as Exhibit 4.

43. In the IP Agreement, Keller assigned to KIHOMAC all “conceptions and inventions” produced during his employment. Exhibit 4, ¶ 3(a).

44. By January 2020, Keller was promoted to DIR-S lead. Keller held this title from January 2020 until he resigned in June 2021.

45. In the fall of 2020, Keller introduced Adam Laing (“Laing”) to KIHOMAC’s leadership.

46. On November 2, 2020, Laing offered to partner with KIHOMAC in relation to the DIR-S product or acquire the product from KIHOMAC. This offer was rejected by KIHOMAC.

47. On June 24, 2021, Keller resigned from KIHOMAC.

48. In his letter of resignation to KIHOMAC via email, dated June 24, 2021, Keller stated, “I have been working contracting jobs on the weekends and recently got my General Contractor License and now it has come to the point where I need to move in another direction that is best for me and my family.”

Preston Keller forms EMERGENT 3

49. Upon information and belief, Keller formed Emergent 3 as a Utah corporation on August 2, 2021. However, he listed himself as the corporation’s Registered Agent, and he voluntarily dissolved the corporation on August 31, 2021.

50. Upon information and belief, on September 7, 2021, Keller formed Emergent 3 as a limited liability company with a different registered agent.

51. On May 16, 2022, Emergent 3 LLC was converted into a new Utah corporation, Emergent 3, Inc.

52. In Emergent 3's Statement of Conversion, Laing is listed as Emergent 3's secretary. This Statement of Conversion is attached as Exhibit 5.

KIHOMAC Learns of Lightning Kite and Emergent 3's Collaboration

53. After a year of working together as marketing partners, DIR-S garnered interest from AEGIX Global, LLC ("AEGIX") for a potential sale of the product.

54. In performing due diligence in advance of the acquisition, AEGIX learned that Emergent 3 was producing its own product, E3, which appears identical to DIR-S. AEGIX informed KIHOMAC of this product in mid-October 2022.

55. The E3 product is nearly identical to DIR-S—the look and feel, as well as the functionality, are remarkably similar.

56. On or about October 17, 2022, AEGIX leadership met with Lightning Kite's leadership, including its President, Daniel Ostler.

57. In this meeting, Ostler revealed that Lightning Kite had contracted with Emergent 3 to assist with the development of another emergency management product with the same features as DIR-S.

58. Ostler further revealed to AEGIX the Lightning Kite had been solicited by Keller, and that Lightning Kite agreed to assist because of the negative relationship it had with KIHOMAC during the development of DIR-S.

59. In response to cease-and-desist letters, both Lightning Kite and Emergent 3 acknowledged that they had collaborated on the E3 product.

CAUSES OF ACTION

Count I: Patent Infringement **(Against Emergent 3)**

60. Plaintiff incorporates by reference Paragraphs 1–59 as though fully set forth herein.

61. Emergent 3 has infringed the 280 Patent in violation of 35 U.S.C. § 271 with respect to the E3 application.

62. For example, Emergent 3 has directly infringed the 280 Patent by making, using, selling and/or offering to sell within the United States its software application, E3.

63. In addition, Emergent 3 has indirectly infringed the 280 Patent by encouraging and facilitating others to perform acts known by Emergent 3 to infringe the 280 Patent with the specific intent that those performing the acts infringe the 280 Patent.

64. For example, Emergent 3 instructs and encourages users of the E3 application in a manner that infringes the 280 Patent at least by distributing advertisements and promotional materials encouraging its customers to perform the method claimed in the 280 Patent. Such materials include at least the videos available at <https://www.youtube.com/watch?v=PGi-KJPKRPU>, <https://www.youtube.com/watch?v=YEzGIF4d9Mc>, and <https://www.youtube.com/watch?v=ilgb3TfNk8w>, among others.

65. Emergent 3 also contributes to the infringement of the 280 Patent by making, using, selling, and/or offering to sell within in the United States the E3 application, for which there is no suitable or substantial noninfringing use and which embodies a material part of the

inventions described in the 280 Patent. In addition, upon information and belief, the E3 application is known to Emergent 3 to be made or especially adapted for use in the infringement of the 280 Patent.

66. A representative claim chart demonstrating how Emergent 3 infringes and induces others to infringe the 280 Patent through the use of the E3 application is attached as Exhibit 6.

67. Laing, Emergent 3's Secretary has had actual knowledge of the 280 Patent at least as of October 12, 2020, when he was provided with a copy of the 280 Patent during discussions regarding his potential investment in DIR-S. Thus, upon information and belief, Emergent 3 has had actual knowledge of the 280 Patent since its inception, at least by virtue of the knowledge of Laing.

68. In addition, Emergent 3 had actual knowledge of the 280 Patent and its infringement of the same at least as of November 22, 2022, when KIHOMAC: (i) provided Emergent 3 with a copy of the 280 Patent; (ii) described how Emergent 3 and its customers and/or users of the E3 application infringe certain of claims of the 280 Patent; and (iii) described how Emergent 3 specifically encouraged its customers and/or users of the E3 application to infringe the 280 Patent.

69. The 280 Patent is presumed valid.

70. Despite Emergent 3's knowledge of the 280 Patent and its infringement of the same, Emergent 3 has continued to infringe the 280 Patent. Accordingly, Emergent 3's infringement of the 280 Patent has been willful and deliberate.

71. KIHOMAC has been injured and seeks damages to adequately compensate it for Emergent 3's infringement of the 280 Patent in accordance with 35 U.S.C. § 284.

72. Upon information and belief, Emergent 3 will continue to infringe the 280 Patent unless permanently enjoined by this Court. KIHOMAC therefore requests that this court enter an order under 35 U.S.C. § 283 to permanently enjoin Emergent 3 from continuing to make, use, sell, offer for sale, and/or import into the United States the products accused of infringing the 280 Patent and from further inducing or contributing to the infringement of the 280 Patent.

Count II: Breach of Contract
(Against Keller)

73. Plaintiff incorporates by reference Paragraphs 1–72 as though fully set forth herein.

74. The Employment Agreement and the IP Agreement are valid, enforceable contracts.

75. KIHOMAC performed its contractual obligations under the Employment Agreement and the IP Agreement.

76. Keller, upon information and belief, breached his contractual obligations by disclosing proprietary and confidential information after the conclusion of his employment and taking proprietary and confidential information with him upon the end of his employment.

77. As a result of Keller’s breach of his various agreements with the Company, Plaintiff has suffered and will continue to suffer economic harm.

Count III: Breach of Contract
(Against Lightning Kite)

78. Plaintiff incorporates by reference Paragraphs 1–77 as though fully set forth herein.

79. The Lightning Kite Agreement is a valid, enforceable contract.

80. KIHOMAC performed its contractual obligations under the Lightning Kite Agreement.

81. Lightning Kite, upon information and belief, breached its contract obligations by:
- a. using and disclosing KIHOMAC's Proprietary Information outside of the specified Purpose of developing the DIR-S application;
 - b. engaging, directly or indirectly, in business that competes with KIHOMAC without prior written consent; and
 - c. attempting to sell or provide products and services as were then provided to any KIHOMAC customer or client.

82. As a result of Lightning Kite's breach of its contractual obligations, KIHOMAC has suffered and will continue to suffer economic harm.

Count IV: Tortious Interference with Prospective Economic Relations
(Against All Defendants)

83. Plaintiff incorporates by reference Paragraphs 1–82 as though fully set forth herein.

84. Defendants knew that their development of an identical emergency management application would affect KIHOMAC's potential economic relations with customers in the space.

85. Defendants were substantially certain that this would harm KIHOMAC's financial prospects in attempting to distribute the product or sell the product to a potential acquirer.

86. Defendants desired to harm KIHOMAC's financial prospects with respect to the DIR-S product by developing a competing product based on knowledge and expertise acquired from their development efforts related to DIR-S.

87. Defendants achieved this goal by infringing on the 280 Patent, improperly using KIHOMAC's proprietary and confidential information, and violating their contractual obligations to KIHOMAC.

88. As a result of Defendants' actions, KIHOMAC has suffered and will continue to suffer economic harm.

Count V: Civil Conspiracy
(Against All Defendants)

89. Plaintiff incorporates by reference Paragraphs 1–88 as though fully set forth herein.

90. Defendants knowingly developed a product that infringed the 280 Patent and relied upon KIHOMAC's proprietary information disclosed by Keller and Lightning Kite in violation of their contract obligations.

91. Defendants' overt actions to this effect, detailed in Paragraphs 45–52 and 57–58, were undertaken to tortiously interfere with KIHOMAC's prospective economic relations and infringe on KIHOMAC's intellectual property.

92. At all times, Defendants' joint efforts were intended to injure KIHOMAC and harm its economic prospects as a result of negative past interactions and personal animus.

93. As a result of this combination and the resulting actions taken by Defendants, KIHOMAC has suffered and will continue to suffer economic damages.

DEMAND FOR INJUNCTIVE RELIEF

94. Plaintiff has been and continues to be irreparably harmed by Defendants' tortious conduct, and monetary damages are insufficient on account of Plaintiff's continued lost opportunities and the damage to the company's reputation and goodwill.

95. As a result of this irreparable harm, Plaintiff is entitled to injunctive relief.

96. Plaintiff seeks an injunction preventing Defendants from further:

a. making, using, selling, offering for sale, or importing any service or product that infringes on the 280 Patent;

b. inducing any third party to use products or services in a manner that infringes the 280 Patent or contributing to the infringement of the 280 Patent;

c. development of any service or product that uses or relies upon KIHOMAC's proprietary and confidential information;

d. tortiously interfering with KIHOMAC's prospective economic relations.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff hereby requests trial by jury of all claims and issues triable of right by a jury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in favor of Plaintiff as follows:

a. Enter judgment in Plaintiff's favor as to all Counts asserted;

b. Enjoin Emergent 3 from further infringement on the 280 Patent;

c. Enjoin Keller and Lightning Kite from further violations of their contractual obligations to KIHOMAC;

d. Award Plaintiff damages against Defendants in an amount to be proven at trial but not less than \$75,000;

- e. Award Plaintiff damages against Emergent 3 in an amount to be proven at trial to adequately compensate Plaintiff for Emergent 3's infringement of the 280 Patent. Such damages should be no less than a reasonable royalty under 35 U.S.C. § 284;
- f. Award Plaintiff treble damages against Emergent 3 under 35 U.S.C. § 284 for willful infringement of the 280 Patent;
- g. Find that this case is exceptional under 35 U.S.C. § 285 and order Emergent 3 to pay Plaintiff's reasonable attorneys' fees;
- h. An award of pre- and post-judgment interest to the maximum extent allowed by law;
- i. Award Plaintiff all costs and expenses of this action, including attorneys' fees; and
- j. Award Plaintiff all other relief, in law or equity, that this Court deems just and proper.

DATED: November 22, 2022.

/s/ Nicole A. Skolout
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