

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUFFOLK SUPERIOR COURT
BUSINESS LITIGATION SESSION

ACCUTRAX LLC,

Plaintiff,

v.

FINNEGAN, HENDERSON,
FARABOW, GARRETT
& DUNNER, LLP,

Defendant.

Civil Action No.:

17-1617

COMPLAINT AND JURY DEMAND

Accutrax LLC, by and through its undersigned counsel, hereby makes its Complaint against Finnegan, Henderson, Farabow, Garrett & Dunner, LLP ("Finnegan") as follows:

PARTIES

1. Accutrax LLC is a Delaware limited liability company that was formed on June 6, 2013, and has a principal place of business at 214 South Meadow Road, Plymouth, Massachusetts 02360.
2. Finnegan, Henderson, Farabow, Garrett & Dunner, LLP ("Finnegan") is a District of Columbia limited liability partnership with an office at Two Seaport Lane, Sixth Floor, Boston, Massachusetts 02210.
3. The two members of Accutrax LLC are Harry S. Billado, Jr. ("Billado"), and Robert E. Cumings, Jr. ("Cumings").
4. Accutrax LLC was formed to commercialize a razor utility knife with a graphite pencil blade ("Marking Blade") conceived of by Michael Kildevaeld ("Kildevaeld").

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction pursuant to M.G.L. c. 212, § 4.

6. This Court has general and specific jurisdiction over Finnegan pursuant to M.G.L. c. 223A, §§2 and 3.
7. Venue is proper in the Business Litigation Session of Suffolk County Superior Court pursuant to M.G.L. c. 223, § 8, and Superior Court Administrative Directive No. 09-1 because this case includes claims involving business torts, breaches of contract and fiduciary duties, and malpractice claims by business enterprises against professionals.

FACTUAL ALLEGATIONS

8. Kildevaeld, Billado, and Cumings were business partners concerning the Marking Blade and they had agreed to an operating agreement for an LLC by an email dated January 27, 2013.
9. Kildevaeld, Billado, and Cumings agreed to form a Delaware limited liability company ("LLC") whereby Kildevaeld agreed to assign his ownership rights in the Marking Blade and any resulting patent rights into the LLC in exchange for contributions by Billado and Cumings to prosecute the patent application, commercialize the patent, and to market, manufacture, and sell the Marking Blade.
10. Initially, Kildevaeld, Billado, and Cumings intended to operate under the name Contractor Trusted, LLC. Kildevaeld, Billado, and Cumings intended to market the Marking Blade under the name Accutrax.
11. Kildevaeld, Billado, and Cumings engaged Finnegan to prosecute the Marking Blade patent application.
12. Kildevaeld provided to Finnegan the name of Contractor Trusted, LLC, as the client.
13. Kildevaeld provided to Finnegan the scope of the retention: to prosecute the Marking Blade patent application on behalf of Contractor Trusted, LLC.
14. On March 4, 2013, Finnegan's lead partner on this matter, Attorney Denise DeFranco ("Attorney DeFranco") of Finnegan's Boston office, forwarded to Kildevaeld Finnegan's standard engagement agreement. The subject line of Attorney DeFranco's email was: FW: Engagement Agreement to Contractor Trusted, LLC. **See Tab A.**

15. A copy of the engagement agreement to which reference is made in the preceding paragraph is at **Tab B** along with an invoice sent by Finnegan for a fee advance in the amount of \$5,000.00.
16. Consistent with the information Kildevaeld provided to Finnegan, Finnegan's invoice and engagement agreement both identified the client as Contractor Trusted, LLC. *See Tab B.*
17. Consistent with the information Kildevaeld provided to Finnegan, the engagement agreement identified Finnegan's scope of engagement as representing Contractor Trusted, LLC with the patent application. *See Tab B.*
18. Consistent with the agreement by Kildevaeld, Billado, and Cumings that Contractor Trusted, LLC, would own the Marking Blade patent rights that Finnegan had been engaged to prosecute, Finnegan identified Contractor Trusted, LLC as the owner of the patent rights:

Contractor Trusted, LLC ("you," "your") has engaged Finnegan, Henderson, Farabow, Garrett & Dunner, LLP ("we," "us," "our") to represent it in connection only with a U.S. Patent Application relating to your innovation concerning a razor utility knife with a graphite pencil blade.

See Tab B.

19. Finnegan made clear that it represented in this engagement only Contractor Trusted, LLC, and not any officer, director, shareholder or employee:

In particular, we represent only Contractor Trusted, LLC, and not any corporate parent, subsidiary or affiliate, joint venture, investor or other related entity. Also, we do not represent any officer, director, shareholder or employee. If any other related entity or individual wants to retain our legal services, we are pleased to consider that representation separately.

See Tab B.

20. On information and belief, Finnegan's intake file and conflict check documentation provide further documentation that Finnegan understood its client was the LLC.
21. Finnegan drafted and emailed to Kildevaeld the engagement agreement at **Tab B** and this engagement agreement contained the identity of the client and scope of the retention as Kildevaeld had provided to it to Finnegan.

22. Kildevaeld then forwarded to Billado the retention letter and invoice at **Tab B**.
23. On March 5, 2013, Attorney DeFranco participated in a conference call with Kildevaeld and Billado about representing the LLC.
24. On March 5, 2013, Kildevaeld and Billado provided Attorney DeFranco with additional background about their plans and reiterated that they wanted Finnegan to prosecute the Marking Blade patent on behalf of the LLC.
25. On March 6, 2013, Billado signed the engagement agreement on behalf of Contractor Trusted, LLC and wrote under his name that he did so in his capacity as a member of Contractor Trusted, LLC. Finnegan, which drafted this signature line on the engagement agreement, drafted it for signature by an entity and not for an individual. *See Tab B*.
26. Billado then returned the executed engagement agreement to Finnegan with payment in good funds in the amount of \$5,000. *See Tab C*.
27. In an email to Attorney DeFranco that same day attached at **Tab D**, with a copy to Kildevaeld and the subject line "Accutrax Pencil Blade," Billado wrote in relevant part:

Today I have put the Engagement Letter, signed and with check in the mail. It is attentioned to Patricia Corekin and it's going to DC via FedEx overnight. Tracking is 496520204450.

The check is from my SealPro Products, LLC account, not Contractor Trusted, LLC, which we still need to create between Michael, Bob and myself.

We all greatly appreciate your intervention and interest on our behalf! Please keep in mind (as I know you already have), that we are just a squirrel trying to get a nut in this great big world ... ha, ha.

28. Because the check came from SealPro Products, LLC, one of Billado's other companies unrelated to Kildevaeld, he made a notation next to his name on the engagement agreement so that Finnegan could associate the check with this engagement. *See Tab B, p. 3*.
29. On March 7, 2013, Attorney DeFranco responded to Billado's email and copied Kildevaeld. *See Tab D*. Attorney DeFranco wrote, "Thank you for the heads up, Harry. I will give Patricia a heads-up to watch for it. I look forward to working with you little squirrels." *Id.*

30. On March 10, 2013, Billado introduced himself as Kildevaeld's "partner in the **ACCUTRAX Pencil Blade project**" in an email to another Finnegan employee in Finnegan's Boston office, Arpita Bhattacharyya ("Bhattacharyya"). *See Tab E.*
31. Bhattacharyya replied to the email at **Tab E**, copying Attorney DeFranco and Kildevaeld. *Id.*
32. On March 11, 2013, Attorney DeFranco sent an email to Billado that indicated Finnegan would have draft papers "to you and Michael tomorrow." *See Tab F.*
33. On or about March 15, 2013, Finnegan made initial filings with the U.S. Patent and Trademark Office ("USPTO") concerning the Marking Blade.
34. On June 6, 2013, Kildevaeld, Billado, and Cumings formed their Delaware LLC. They did not use the name Contractor Trusted, LLC. Instead, they decided to use the name Accutrax LLC. Contractor Trusted, LLC was never formed as a legal entity.
35. Finnegan had actual as well as constructive knowledge that Kildevaeld, Billado, and Cumings used the name Accutrax LLC instead of Contractor Trusted, LLC for their LLC.
36. At **Tab G** are invoices dated April 19, 2013, and May 17, 2013, from Finnegan to Contractor Trusted, LLC. At **Tab G** also are copies of checks from Billado paying these invoices in good funds. On both invoices, Accutrax is noted in the Matter line.
37. Billado paid all three invoices generated by Finnegan for this engagement, *see Tab C and G.*
38. Between March 2013 and August 2013, Billado paid Finnegan approximately \$15,000 on behalf of the LLC for the engagement.
39. In no way did using a different corporate name change the client relationship: Finnegan's client at all times was the LLC.
40. Despite its agreement to prosecute the Marking Blade patent application for the LLC, Finnegan prosecuted the patent for Kildevaeld and secured it for him.
41. At no time did Finnegan take any steps to advise the LLC, or document or otherwise record for the LLC, any assignment to the LLC of the Marking Blade patent application or the Marking Blade patent rights.
42. Subsequently, and as a result of its filings with the USPTO, the USPTO issued a patent for the Marking Blade to Kildevaeld.

43. Because Finnegan failed to document or otherwise record an assignment of the Marking Blade patent rights to the LLC, Kildevaeld subsequently took the position that he owns all the rights in the Marking Blade patent.
44. Because Finnegan claimed during the prosecution of the Marking Blade patent that it represented Kildevaeld individually, Kildevaeld subsequently took the position that he owns all the rights in the Marking Blade patent.
45. At all times, Finnegan's client was the LLC.
46. At all times, Finnegan knew that its client was the LLC.
47. Finnegan encouraged Kildevaeld not to assign the Marking Blade patent rights to the LLC and it encouraged him instead to seek to negotiate a new deal with the LLC.
48. On or around August 21, 2013, Kildevaeld told Billado in a telephone call that an attorney from Finnegan's Washington, D.C., office, John C. Paul, represented him individually in his negotiations with the LLC concerning a new deal. Billado objected to this arrangement.
49. Shortly after the telephone call referenced in the preceding paragraph, on or around August 21, 2013, Attorney DeFranco called Billado and told him that she was "insulted" when she learned that he had signed the engagement agreement at **Tab B**.
50. On September 26, 2013, Attorney DeFranco suggested a conference call with Billado and Kildevaeld about Finnegan's representation going forward. Billado replied that he could not be available at the proposed time on September 26, 2013, but could be available the next day. *See Tab H*.
51. A conference call took place on September 27, 2013, between Attorney DeFranco, Billado, and Kildevaeld. Kildevaeld on this telephone call stated that he did not know what an engagement agreement was nor did he realize that he had forwarded one to Billado earlier that year in March. The call resolved nothing.
52. In a subsequent conference call on October 3, 2013, Finnegan, through Attorney DeFranco and Attorney James Hammond, explained that it represented Kildevaeld and not Accutrax LLC nor any other company. Billado's personal counsel, Attorney Thomas Manson, reiterated the position Billado took during the August 21, 2013, telephone call with Attorney DeFranco: Finnegan represented the LLC, not any one individual member of it, and Finnegan could not represent Kildevaeld in a negotiation against the LLC.
53. After the October 3, 2013, phone conference, Kildevaeld found separate representation in his individual capacity.
54. On or around October 22, 2013, Attorney Forbes Sargent ("Attorney Sargent") began his representation of Kildevaeld individually.

55. On information and belief, Attorney DeFranco recommended Attorney Sargent to represent Kildevaeld personally, to claim that Kildevaeld and not the LLC owned the Marking Blade patent rights, and to negotiate an amended operating agreement for the LLC that was more favorable to Kildevaeld.
56. Attorney Sargent conferred with Attorney DeFranco concerning the actions and negotiations to which reference is made in the preceding paragraph. *See Tab I.*
57. On information and belief, additional correspondence exists, and additional communications took place, between Kildevaeld, Attorney Sargent, Attorney DeFranco, and other Finnegan personnel concerning Kildevaeld's negotiations against the LLC and other Kildevaeld actions that were adverse to the LLC's interests.
58. Meanwhile, through the efforts of Billado and Cumings, Accutrax LLC began commercializing the Marking Blade.
59. All three members of Accutrax LLC on its behalf signed an agreement with Snyder Manufacturing Inc. ("Snyder") in February 2014 whereby Snyder began manufacturing the Marking Blade.
60. Attorney Sargent drafted the Snyder agreement to which reference is made in the preceding paragraph.
61. Accutrax LLC also began marketing the Marking Blade to Stanley Black and Decker ("Stanley").
62. Stanley received commitments from some of its major retailers to purchase a version of the Marking Blade. Stanley submitted a Master Purchase Agreement ("MPA") to Accutrax on October 10, 2014. *See Tab J.*
63. Stanley forecast selling in 2015, the launch year for the product, 150,000 3-pack units of the Marking Blade along with 287,000 units of a holder for it invented by Billado. *See Tab K.*
64. Stanley contemplated making Marking Blade products available globally and expected an initial launch in at least 1500 Home Depot stores. *See Tab L.*
65. Stanley marketed Marking Blade products to other major hardware retail chains as well and expected the True Value Company to list the product. *See Tab M.*
66. On October 21, 2014, Billado and Cumings learned that Kildevaeld contacted Stanley directly and attempted to negotiate for himself an exclusive relationship with Stanley that eliminated Accutrax LLC.

67. In an email dated October 27, 2014, attached at **Tab N**, Kildevaeld wrote to Stanley representatives, Billado, and Cumings, that he would "vigorously enforce my patents against any and all unauthorized sales of products covered by my patents."
68. Any possible deal with Stanley collapsed by November 2014 because Stanley did not want to get in the middle of a patent ownership dispute. *See Tab O, P, and Q.*
69. Accutrax LLC's deal with Stanley would not have collapsed but for Finnegan's representation of Kildevaeld individually and in a manner adverse to the LLC's interests and its failure to document and record properly an assignment of the Marking Blade patent rights to the LLC.
70. On information and belief, Attorney DeFranco and other Finnegan personnel assisted, advised, or otherwise supported Kildevaeld once Accutrax LLC filed suit against Kildevaeld on November 12, 2014.
71. On November 17, 2014, Kildevaeld forwarded to Attorney DeFranco emails with Stanley. *See Tab P. p. 8 (marked with Bates Number BC00474).*
72. On or about February 25, 2015, Attorney DeFranco and Finnegan filed with the USPTO a Request for Withdrawal.

Count I: Professional Malpractice

73. Plaintiff repeats and realleges the allegations contained in all preceding paragraphs above.
74. Finnegan owed to Accutrax LLC its undivided duties, including but not limited to a duty of loyalty and a fiduciary obligation.
75. As counsel to the LLC, Finnegan owed it a duty to act according to its interests and not in the interests of a non-client individual member.
76. Finnegan had a conflict of interest by representing and otherwise advising Kildevaeld individually in a manner adverse to Accutrax LLC.
77. Finnegan breached its duties by representing and otherwise advising Kildevaeld individually in a manner adverse to Accutrax LLC.
78. Finnegan violated the applicable standard of care it owed to the LLC by failing to document or otherwise record properly any assignment to the LLC of the Marking Blade patent rights.
79. Finnegan violated the applicable standard of care it owed to the LLC by failing to advise the LLC properly as to securing and recording an assignment of patent rights from Kildevaeld.

80. Finnegan violated the applicable standard of care it owed to the LLC by failing to clarify ownership of the Marking Blade patent rights and creating and filing appropriate documents with the USPTO after it did so.
81. As a result of Finnegan's breaches of its duties and violation of the applicable standard of care it owed to its client, Accutrax LLC, Accutrax LLC has incurred and continues to incur substantial monetary damages, increased costs, loss of interest income, lost business opportunities and lost profits, for which Finnegan is liable.

Count II: Breach of Fiduciary Duty

82. Plaintiff repeats and realleges the allegations contained in all preceding paragraphs above.
83. As its legal counsel, Finnegan had a fiduciary obligation to Accutrax LLC.
84. Finnegan breached its fiduciary duty to Accutrax LLC by representing and otherwise advising Kildevaeld individually in a manner adverse to Accutrax LLC.
85. As a result of Finnegan's breach of fiduciary duty, Accutrax LLC has incurred and continues to incur substantial monetary damages, increased costs, loss of interest income, lost business opportunities and lost profits, for which Finnegan is liable.

Count III: Breach of Contract

86. Finnegan entered into the engagement agreement at **Tab B**.
87. Finnegan breached the engagement agreement at **Tab B**.
88. As a result of Finnegan's breach of the engagement agreement, Accutrax LLC has incurred and continues to incur substantial monetary damages, increased costs, loss of interest income, lost business opportunities and lost profits, for which Finnegan is liable.

Count IV: Aiding and Abetting the Commission of Torts and Breach of Fiduciary Duty

89. Plaintiff repeats and realleges the allegations contained in all preceding paragraphs above.
90. Kildevaeld committed torts including but not limited to interference with contractual relations and breach of fiduciary duty.
91. Finnegan knew that Kildevaeld was committing the above-referenced torts and breaches.
92. Finnegan actively participated in or substantially assisted in Kildevaeld's commission of the above-referenced tort and breaches.

93. As a result of Finnegan's aiding and abetting the commission of torts and breach of fiduciary duty, Accutrax LLC has incurred and continues to incur substantial monetary damages, increased costs, loss of interest income, lost business opportunities and lost profits, for which Finnegan is liable.

WHEREFORE, Accutrax LLC respectfully requests that this Court enter the following relief:

1. On Count I through IV, enter judgment for the Plaintiff in the amount of damages to be proven at trial including, but not limited to, lost profits, interest and costs.
2. Grant to the Plaintiff such further and other relief as this Court deems just and proper.

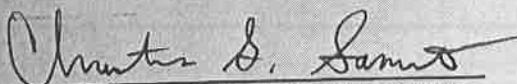
JURY DEMAND

The Plaintiff, Accutrax LLC, hereby demands a jury trial for all claims set forth in this action.

Respectfully submitted,

ACCUTRAX LLC

By its Attorney,



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Dated: May 24, 2017