

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION**

LUMINEX CORPORATION)	
)	
PLAINTIFF,)	
)	
VS.)	CIVIL ACTION NO. _____
)	
DIATHERIX LABORATORIES, INC.,)	
AND DENNIS GRIMAUD)	
)	
DEFENDANTS.)	

ORIGINAL COMPLAINT

Plaintiff Luminex Corporation (“Luminex”) files this Complaint against defendants Diatherix Laboratories, Inc. (“Diatherix”) and Dennis Grimaud, (“Grimaud”) (collectively, Defendants) for infringement of U.S. Patent No. 5,981,180 (“the ’180 Patent”), U.S. Patent No. 6,411,904 (“the ’904 Patent”), and U.S. Patent No. 6,632,526 (“the ’526 Patent”), (collectively, “the Patents-in-Suit”) under 35 U.S.C. § 271.

I. PARTIES

1. Plaintiff Luminex is a company organized and existing under the laws of Delaware. Luminex maintains its principal place of business at 12212 Technology Blvd., Austin, Texas 78727. Luminex is the owner of all intellectual property rights referenced herein.

2. Upon information and belief, defendant Diatherix Laboratories, Inc. is, and at all relevant times mentioned herein, a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 601 Genome Way, Suite 2100, Huntsville, Alabama 35806. Diatherix is a clinical laboratory that provides testing services for healthcare providers for the identification of infectious and genetic diseases, and cancer in the United States

and, more particularly, in the Northern District of Alabama. Pursuant to Fed. Rule of Civ. P. 4(h)(1), Diatherix Laboratories, Inc. may be served with service of process by serving a copy of the Complaint on its registered agent for service of process: 601 Genome Way Suite 2100, Huntsville, Alabama 35806.

3. Upon information and belief, defendant Dennis Grimaud is the Chairman and CEO for defendant Diatherix. Pursuant to Fed. Rule of Civ. P. 4(e)(2), Mr. Grimaud may be served with service of process by serving a copy of the Complaint on him personally or at his individual dwelling.

4. Diatherix designs, develops, sells, offers to sell, and performs testing for numerous medical conditions. Diatherix has developed test panels for commercial testing of these conditions. These panels, including without limitation, Respiratory Infections; Viral Respiratory; Bacterial Pneumonia; Atypical Pneumonia; Bronchitis; Pharyngitis; Rhinosinusitis; Ear, Nose, and Throat; Influenza; Infectious Disease; Staphylococcus Differentiation; Urinary Tract Infection; Gastrointestinal; Clostridium difficile Toxin B gene; Sexually Transmitted Disease; STD 5; CT+NG+T. vaginalis; Bacterial Vaginosis; Candidiasis; Group B Streptococcus; Herpes Simplex Virus; and HPV High Risk Typing. Upon information and belief, Diatherix uses Luminex's xMAP technology without authorization to perform these commercial tests, and thus infringes the Patents-in-Suit.

II. JURISDICTION AND VENUE

5. This is an action for patent infringement arising under the patent laws of the United States, Title 35, United States Code. This Court has exclusive subject matter jurisdiction over this case for patent infringement under 28 U.S.C. §1338(a).

6. This Court has jurisdiction over the contract claims in this case pursuant to 28 U.S.C. § 1367(a) and pursuant to 28 U.S.C. § 1332 because there is complete diversity of citizenship among the parties and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

7. This Court has personal jurisdiction over Diatherix and Mr. Grimaud. Diatherix and Mr. Grimaud have conducted and continue to conduct business within the State of Alabama. Furthermore, Mr. Grimaud is the chief executive officer of Diatherix, and Diatherix is the alter ego of Mr. Grimaud. Diatherix and Mr. Grimaud, directly or through intermediaries (including distributors, retailers, and others), offers for sale, sells, performs, and advertises (including making available to the public an interactive web page) its commercial testing services in the United States, the State of Alabama, and the Northern District of Alabama. Diatherix and Mr. Grimaud have purposefully and voluntarily placed Diatherix's commercial testing services in the stream of commerce with the expectation that they will be purchased by consumers in the Northern District of Alabama and elsewhere. These infringing testing services have been purchased and used by consumers, and performed by Diatherix and Mr. Grimaud in the Northern District of Alabama. Mr. Grimaud further aids and abets the infringing commercial testing performed by Diatherix, and Diatherix and Mr. Grimaud have committed the tort of patent infringement within the State of Alabama, and more particularly, within the Northern District of Alabama.

8. Venue is proper in the Northern District of Alabama under 28 U.S.C. §§ 1391 and 1400(b).

A. Luminex and the Patents-in-Suit

9. Luminex has developed a highly flexible and patented technology called xMAP® for accurately and quickly performing numerous tests on a single sample. xMAP® technology is capable of performing up to at least 500 tests—including protein expression profiling, focused gene expression profiling, autoimmune disease, genetic disease, molecular infectious disease, and HLA testing—on a single sample.

10. Luminex's xMAP® technology combines advanced fluidics, optics, and digital signal processing with proprietary microsphere technology to deliver multiplexed assay capabilities. Featuring a flexible, open-architecture design, xMAP® technology can be configured to perform a wide variety of bioassays quickly, cost-effectively and accurately. Luminex has developed a fully integrated technology system for commercial testing purposes, including the hardware, software, and materials required to perform these tests. In addition, Luminex designs, develops, manufactures, distributes and sells its own portfolio of molecular diagnostic assays. Several of the unauthorized commercial testing services offered by Diatherix are competitive to the molecular diagnostic assays offered by Luminex and are causing harm to Luminex.

11. The '180 Patent, entitled "Multiplexed Analysis of Clinical Specimens Apparatus and Methods," was duly and legally issued by the United States Patent and Trademark Office on November 9, 1999, after a full and fair examination. A copy of the '180 Patent is attached as Exhibit A. Luminex is the assignee of all rights, title, and interest in and to the '180 Patent and possesses all rights of recovery under the '180 Patent.

12. The '904 Patent, entitled "Zero Dead Time Architecture for Flow Cytometer," was duly and legally issued by the United States Patent and Trademark Office on June 25, 2002,

after a full and fair examination. A copy of the '904 Patent is attached as Exhibit B. Luminex is the assignee of all rights, title, and interest in and to the '904 Patent and possesses all rights of recovery under the '904 Patent.

13. The '526 Patent, entitled "Precision Fluorescently Dyed Particles and Methods of Making and Using the Same," was duly and legally issued by the United States Patent and Trademark Office on October 14, 2003, after a full and fair examination. A copy of the '526 Patent is attached as Exhibit C. Luminex is the assignee of all rights, title, and interest in and to the '526 Patent and possesses all rights of recovery under the '526 Patent.

B. Diatherix, Mr. Grimaud, and the Patents-in-Suit

14. Mr. Grimaud is the founder, chairman, and Chief Executive Officer of Diatherix. Upon information and belief, Diatherix is composed of few employees, including Randy Ward (President and Chief Operating Officer), Frank Honkanen (Laboratory Director), and a molecular diagnostics team. Since its inception Diatherix has been and continues to be the alter ego of Mr. Grimaud. Upon information and belief, Mr. Grimaud is responsible for all commercial sales activities by Diatherix, including obtaining the customers for its commercial testing.

15. Mr. Grimaud has been aware of Luminex's intellectual property, including the Patents-in-Suit for years. Before joining Diatherix, Mr. Grimaud was President of Genaco, a company that licensed Luminex's patents relating to xMAP® technology. In November 2008, after Mr. Grimaud became Diatherix's Chief Executive Officer, Diatherix was in discussions with Luminex regarding a license to Luminex's intellectual property, but Diatherix never took a license, leading Luminex to believe that Diatherix had decided not to use Luminex's technology. Luminex recently learned that Diatherix did adopt Luminex's technology but without a license—thus willfully infringing Luminex's patents for quite some time unbeknownst to Luminex.

16. Diatherix also had additional actual knowledge of the Patents-in-Suit as a result of receiving a Luminex instrument and fluorescent microspheres, each of which were clearly marked with the patent numbers of the Patents-in-Suit. Diatherix was also in possession of end user license documentation which specifically restricts the use of Luminex's Instrument to Luminex microspheres, the commercial use of which requires an explicit license from Luminex.

17. Upon information and belief, Diatherix obtained Luminex microspheres from Bio-Rad Laboratories, Inc., a distributor of Luminex's proprietary microspheres, subject to the terms of an end user agreement that precluded Diatherix from using Luminex's microspheres for commercial purposes. Diatherix, however, has breached the end user agreement by using Luminex's microspheres for commercial purposes, and thus infringed the Patents-in-Suit, by using Luminex's proprietary microspheres for commercial purposes, which is an unauthorized purpose under the end user agreement that governs Diatherix's use of Luminex's proprietary microspheres.

18. Upon information and belief, Diatherix received at least two Luminex proprietary instruments from Qiagen, GmbH. Diatherix received the Luminex instruments subject to the terms of an end user agreement that allowed Diatherix to use the Luminex instruments only with fluorescently labeled microspheres authorized by Luminex. The end user agreement further limited the use of the Luminex instrument by Diatherix for research purposes only, and not for commercial testing purposes. Diatherix, however, has violated the end user agreement, and thus infringed the Patents-in-Suit, by using the Luminex instruments for unauthorized purposes and with unauthorized microspheres.

III. COUNT ONE: Infringement of U.S. Patent No. 5,981,180

19. Luminex refers to and incorporates herein the allegations of Paragraphs 1-18 above.

20. Diatherix and Mr. Grimaud have been directly infringing and indirectly infringing by way of inducing infringement of the '180 Patent in this District and elsewhere, by making, using, offering for sale, and performing biological testing services, including the commercial testing panels and applications, including Respiratory Infections; Viral Respiratory; Bacterial Pneumonia; Atypical Pneumonia; Bronchitis; Pharyngitis; Rhinosinusitis; Ear, Nose, and Throat; Influenza; Infectious Disease; Staphylococcus Differentiation; Urinary Tract Infection; Gastrointestinal; Clostridium difficile Toxin B gene; Sexually Transmitted Disease; STD 5; CT+NG+T. vaginalis; Bacterial Vaginosis; Candidiasis; Group B Streptococcus; Herpes Simplex Virus; and HPV High Risk Typing, covered by at least one claim of the '180 Patent, all to the injury of Luminex.

21. Mr. Grimaud has aided and abetted Diatherix's infringement of the '180 patent by encouraging Diatherix's employees to perform testing procedures that Mr. Grimaud knows infringes the Patents-in-Suit. The direct infringement occurs by the activities of Mr. Grimaud and/or the employees of Diatherix who use a Luminex instrument in combination with reagents, microspheres, and software to perform infringing testing procedures. Mr. Grimaud received notice of the Patents-in-Suit, starting at least as early as November 2008. Mr. Grimaud specifically intended Diatherix's employees to infringe the '180 patent, and Mr. Grimaud was aware that the normal and intended use of the Luminex instrument in conjunction with reagents, microspheres, and software would infringe the '180 patent.

22. Luminex has at all times complied with the marking provisions of 35 U.S.C. § 287.

23. Upon information and belief, Diatherix and Mr. Grimaud have had and presently have actual notice of the '180 Patent, at least as early as November 2008, and have been and are aware of their infringement, and Diatherix and Mr. Grimaud's infringement have been and continue to be willful.

24. Luminex has been irreparably harmed by Diatherix and Mr. Grimaud's acts of infringement of the '180 Patent, and will continue to be harmed unless and until Diatherix and Mr. Grimaud's acts of infringement are enjoined and restrained by order of this Court.

25. As a result of Diatherix and Mr. Grimaud's acts of infringement, Luminex has suffered and will continue to suffer damages in an amount to be proved at trial.

IV. COUNT 2: Infringement of U.S. Patent No. 6,632,526

26. Luminex refers to and incorporates herein the allegations of Paragraphs 1-18 above.

27. Diatherix and Mr. Grimaud have been directly infringing and indirectly infringing by way of inducing infringement of the '526 Patent in this District, and elsewhere, by making, using, offering for sale, and performing biological testing services, including the commercial testing panels and applications, including Respiratory Infections; Viral Respiratory; Bacterial Pneumonia; Atypical Pneumonia; Bronchitis; Pharyngitis; Rhinosinusitis; Ear, Nose, and Throat; Influenza; Infectious Disease; Staphylococcus Differentiation; Urinary Tract Infection; Gastrointestinal; Clostridium difficile Toxin B gene; Sexually Transmitted Disease; STD 5; CT+NG+T. vaginalis; Bacterial Vaginosis; Candidiasis; Group B Streptococcus; Herpes Simplex

Virus; and HPV High Risk Typing, covered by at least one claim of the '526 Patent, all to the injury of Luminex.

28. Mr. Grimaud has aided and abetted Diatherix's infringement of the '526 patent by inducing Diatherix's employees to perform testing procedures that Mr. Grimaud knows infringes the Patents-in-Suit. The direct infringement occurs by the activities of Mr. Grimaud and/or the employees of Diatherix who use a Luminex instrument in combination with reagents, microspheres, and software to perform infringing testing procedures. Mr. Grimaud received notice of the Patents-in-Suit, starting at least as early as November 2008. Mr. Grimaud specifically intended Diatherix's employees to infringe the '526 patent, and Mr. Grimaud was aware that the normal and intended use of the Luminex instrument in conjunction with reagents, microspheres, and software would infringe the '526 patent.

29. Luminex has at all times complied with the marking provisions of 35 U.S.C. § 287.

30. Upon information and belief, Diatherix and Mr. Grimaud have had and presently have actual notice of the '526 Patent at least as early as November 2008, have been and are aware of their infringement, and Diatherix and Mr. Grimaud's infringement have been and continue to be willful.

31. Luminex has been irreparably harmed by Diatherix and Mr. Grimaud's acts of infringement of the '526 Patent, and will continue to be harmed unless and until Diatherix and Mr. Grimaud's acts of infringement are enjoined and restrained by order of this Court.

32. As a result of Diatherix and Mr. Grimaud's acts of infringement, Luminex has suffered and will continue to suffer damages in an amount to be proved at trial.

V. COUNT 3: Infringement of U.S. Patent No. 6,411,904

33. Luminex refers to and incorporates herein the allegations of Paragraphs 1-18 above.

34. Diatherix and Mr. Grimaud have been directly infringing and indirectly infringing by way of inducing infringement of the '904 Patent in this District and elsewhere, by making, using, offering for sale, and performing biological testing services, including the commercial testing panels and applications, including Respiratory Infections; Viral Respiratory; Bacterial Pneumonia; Atypical Pneumonia; Bronchitis; Pharyngitis; Rhinosinusitis; Ear, Nose, and Throat; Influenza; Infectious Disease; Staphylococcus Differentiation; Urinary Tract Infection; Gastrointestinal; Clostridium difficile Toxin B gene; Sexually Transmitted Disease; STD 5; CT+NG+T. vaginalis; Bacterial Vaginosis; Candidiasis; Group B Streptococcus; Herpes Simplex Virus; and HPV High Risk Typing, covered by at least one claim of the '904 Patent, all to the injury of Luminex.

35. Mr. Grimaud has aided and abetted Diatherix's infringement of the '904 patent by inducing Diatherix's employees to perform testing procedures that Mr. Grimaud knows infringes the Patents-in-Suit. The direct infringement occurs by the activities of Mr. Grimaud and/or the employees of Diatherix who use a Luminex instrument in combination with reagents, microspheres, and software to perform infringing testing procedures. Mr. Grimaud received notice of the Patents-in-Suit, starting at least as early as November 2008. Mr. Grimaud specifically intended Diatherix's employees to infringe the '904 patent, and Mr. Grimaud was aware that the normal and intended use of the Luminex instrument in conjunction with reagents, microspheres, and software would infringe the '904 patent.

36. Luminex has at all times complied with the marking provisions of 35 U.S.C. § 287.

37. Upon information and belief, Diatherix and Mr. Grimaud have had and presently have actual notice of the '904 Patent, at least as early as November 2008, have been and are aware of their infringement, and Diatherix and Mr. Grimaud's infringement have been and continue to be willful.

38. Luminex has been irreparably harmed by Diatherix and Mr. Grimaud's acts of infringement of the '904 Patent, and will continue to be harmed unless and until Diatherix and Mr. Grimaud's acts of infringement are enjoined and restrained by order of this Court.

39. As a result of Diatherix and Mr. Grimaud's acts of infringement, Luminex has suffered and will continue to suffer damages in an amount to be proved at trial.

VI. COUNT 4: Breach of Contract

40. Luminex refers to and incorporates herein the allegations of Paragraphs 1-18 above.

41. Diatherix obtained Luminex microspheres subject to the terms of an end user agreement that precluded Diatherix from using Luminex's microspheres for commercial purposes.

42. Diatherix breached the end user agreement by using Luminex's microspheres for commercial purposes.

43. All conditions precedent to the enforcement of the contract have occurred or been performed.

44. As a direct result of the breach of the end user agreement by Diatherix, Luminex has suffered and will continue to suffer damages in an amount to be proved at trial.

VII. PRAYER FOR RELIEF

Luminex prays for the following relief:

- A. A judgment that Diatherix and Mr. Grimaud have infringed the Patents-in-Suit;
- B. A judgment and order requiring Diatherix and Mr. Grimaud to pay Luminex for all damages under 35 U.S.C. § 284, including supplemental damages for any continuing post-verdict infringement up until entry of the final judgment, with an accounting, as needed, and treble damages for willful infringement;
- C. A judgment that Diatherix's use of Luminex microspheres breached the end-user contract causing damage to Luminex;
- D. A judgment and order requiring Diatherix to pay Luminex for all damages for Diatherix's breach of contract;
- E. A judgment and order requiring Diatherix and Mr. Grimaud to pay to Luminex pre-judgment and post-judgment interest on the damages awarded;
- F. A judgment and order finding this to be an exceptional case and requiring Diatherix and Mr. Grimaud to pay the costs of this action (including all disbursements) and attorneys fees as provided by 35 U.S.C. § 285;
- G. A judgment and order that Diatherix and Mr. Grimaud, its agents, employees, representatives, successors and assigns, and those acting in privity or in concert with them, be preliminarily and permanently enjoined from further infringement of the Patents-in-Suit; and
- H. Such other and further relief as this Court deems just and equitable.

VIII. DEMAND FOR JURY TRIAL

Luminex hereby demands that all issues be determined by jury.

DATED: November 8, 2013.

Respectfully submitted,

/s/ James R. Moncus, III

James R. Moncus, III

Bar #: ASB-7685-A62D

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