

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Geospan Corporation,

Court File No. 13-cv-1104 (SRN/JSM)

Plaintiff,

v.

**SECOND AMENDED COMPLAINT
AND JURY DEMAND**

Pictometry International Corporation,
Eagle View Technologies, Inc., and
EagleView Technology Corporation,

Defendants.

Plaintiff Geospan Corporation (“Geospan”), for its Complaint against Defendants Pictometry International Corporation (“Pictometry”), Eagle View Technologies, Inc. (“Eagle View”), and EagleView Technology Corporation (“EVT”), states and alleges as follows:

PARTIES

1. Geospan is a Minnesota corporation with its principal place of business at 10900 73rd Avenue North, Suite 136, Minneapolis, MN 55369.
2. On information and belief, Pictometry is a Delaware corporation with its principal place of business at 100 Town Centre Drive, Suite A, Rochester, New York 14623-4260.
3. On information and belief, Eagle View is a Washington corporation with its principal place of business at 3700 Monte Villa Pkwy, Suite 200, Bothell, WA 98021.

4. On information and belief, EVT is a Delaware corporation with principal places of business at 100 Town Centre Drive, Suite A, Rochester, New York 14623-4260 and 3700 Monte Villa Pkwy, Suite 200, Bothell, WA 98021.

JURISDICTION AND VENUE

5. This is an action for patent infringement arising under the patent laws of the United States, including 35 U.S.C. §§ 271 and 281-285.

6. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1338(a).

7. Venue is proper in this Court under 28 U.S.C. §§ 1391(b) and 1400(b) because Pictometry, Eagle View, and EVT are subject to personal jurisdiction in this judicial district and, on information and belief, have committed acts of infringement in this district.

FACTS

The '946 Patent.

8. Geospan is the owner, by assignment, of all right, title, and interest in U.S. Patent No. 5,633,946 ("the '946 Patent"), entitled "Method and Apparatus for Collecting and Processing Visual and Spatial Position Information From a Moving Platform," which issued on May 27, 1997. A copy of the '946 Patent is attached as **Exhibit A**.

9. The '946 Patent describes a method for collecting and processing visual and spatial position information for the purpose of forming a geographic information database. The information in the database can then be used to accurately determine the spatial position of an object seen in the collected visual information.

10. The science of obtaining accurate information about physical objects through interpretation of photographic or visual images is known as photogrammetry.

Competition Between Geospan and Pictometry.

11. Geospan and Pictometry are competitors in the field of photogrammetry.

12. Pictometry's business is primarily devoted to providing aerial photogrammetry, which uses images taken from an airplane.

13. Geospan uses both ground-based and aerial photogrammetry.

Prior Litigation Between Geospan and Pictometry.

14. On March 20, 2008, Geospan sued Pictometry in this Court for infringing the '946 Patent. *Geospan Corp. v. Pictometry Int'l Corp.*, Case No. 08-cv-00816-ADM-JSM ("Geospan 1") at Dkt. No. 1.

15. Pictometry counterclaimed for a declaratory judgment of non-infringement. Geospan 1 at Dkt. No. 34.

16. Pictometry twice amended its Answer to add defenses and counterclaims. In May 2009, Pictometry asserted a counterclaim for a declaratory judgment of invalidity under 35 U.S.C. §§ 103 and 112. Geospan 1 at Dkt. No. 73. In July 2009, Pictometry asserted counterclaims for inequitable conduct and invalidity under 35 U.S.C. § 102. Geospan 1 at Dkt. No. 94.

17. In Geospan 1, Geospan accused Pictometry of infringing claims 1, 3, and 4 of the '946 Patent through its use of its "dual/two-camera" image collection process combined with its internal "tie pointing" process. Likewise, Geospan accused Pictometry

of infringing claims 1, 3, 4, 7, and 16 through its use of its “penta/five-camera” image collection process combined with the tie pointing process.

18. Likewise, in *Geospan 1*, *Geospan* accused *Pictometry* of infringing claim 16 of the ‘946 Patent through its use of its penta/five-camera image collection process combined with its use of a “single ray projection” method for determining the location of objects in the captured images.

19. On August 4, 2010, District Court Judge Ann Montgomery issued an Amended Memorandum Opinion and Order regarding claim construction of the ‘946 Patent (the “*Markman* Order”). *Geospan 1* at Dkt. No. 169; *Geospan Corp. v. Pictometry Int’l Corp.*, 731 F.Supp.2d 858 (D. Minn. 2010). Judge Montgomery rejected *Pictometry*’s request to narrowly construe the claim terms “moving platform” and “video camera” and determined that those terms require no construction. *Geospan 1* at Dkt. No. 169, pp. 13 and 16; *see also Geospan*, 731 F.Supp.2d at 866, 868.

20. Claim 1 of the ‘946 Patent contains five elements. After the *Markman* Order, *Pictometry* conceded that its dual and penta image collection systems meet the first four steps of claim 1. *Geospan 1* at Dkt. No. 242, p. 6.

21. *Pictometry* contended, however, that the fifth element of claim 1 of the ‘946 Patent, the “determining location” step, requires the use of multiple images to determine location of an object in those images. *Pictometry* argued that it determines the location of objects in images using single ray projection, which requires only a single image to determine location. Thus, *Pictometry* argued, its use of single ray projection method does not meet the final step in claim 1. *Geospan 1* at Dkt. No. 187, p. 2.

22. While tie pointing does use multiple images, Pictometry argued that the process does not actually determine the location of any objects in those images. Pictometry contended that tie pointing is a quality control check and does not affect the location determination already provided by single ray projection. Geospan 1 at Dkt. No. 242, pp. 10-11.

23. Claim 16 of the '946 Patent contains eight elements. After the *Markman* Order, Pictometry conceded that its penta image collection system meets the first seven steps of claim 16. *Id.* at pp. 11-12. As with claim 1, however, Pictometry contended that the “determining location” step in claim 16 requires the use of multiple images to determine location of an object in those images. Accordingly, Pictometry argued that its single ray projection and tie pointing processes do not fulfill that step. *Id.*

Pictometry Denies Using Multiple Images to Determine Location.

24. In its summary judgment briefing and supporting declaration, Pictometry argued that it determines location using ***only*** single ray projection: “As each image is captured, it is processed by the computer systems on the plane and the geographic coordinates of each pixel in each image are determined in real time. ***At no time does Pictometry resort to the use of a second image to calculate the geographic coordinates of the pixels in the first image*** Therefore, Pictometry does not use two images to determine the location of an object as required by Claims 1, 3, 4, and 7 of the '946 patent.” Geospan 1 at Dkt. No. 187, p. 2 (emphasis added).

25. Pictometry repeatedly made the same representation during discovery and in its non-infringement claim charts in Geospan 1.

26. In her Summary Judgment Order, Judge Montgomery agreed with Pictometry that the determining location steps in claims 1 and 16 of the '946 Patent (and by extension claims 3, 4, and 7) require the use of two or more images to determine location of an object shown in those images. Geospan 1 at Dkt. No. 242, pp. 7-14. Thus, she concluded that single ray projection does not meet the determining location steps. *Id.*

27. Judge Montgomery also agreed with Pictometry that the "tie pointing" process does not use multiple images to actually determine location. *Id.* at pp. 10-11. As a result, the question of infringement in Geospan 1 came down to whether Pictometry ever used multiple images to determine location of an object shown in those images.

28. In answering that question, Judge Montgomery relied on a Declaration from Stephen L. Schultz, Pictometry's Chief Technology Officer, to support the following conclusion: "Pictometry does not infringe the final element of Claim 1 because it does not determine location of an object based upon the location of the object in more than one image. Pictometry determines the location of objects through single ray projection." *Id.* at p. 7.

29. Judge Montgomery continued: "In summary, Pictometry does not determine location of an object 'based upon' a location of the object in multiple images. The undisputed facts of record show that Pictometry determines location based *only* upon the location of an object in a single image and its mathematical model of the ground through a method known as single ray projection. Therefore, as a matter of law Pictometry does not infringe Claim 1." *Id.* at p. 11 (emphasis added).

30. Regarding claim 16 of the '946 Patent, Judge Montgomery stated as follows: "Therefore, Claim 16, like Claim 1, requires the location of an object to be determined based upon the location of an object in multiple images.... As with Claim 1, then, Pictometry's method of using single ray projection to determine location from a single image does not infringe this claim." *Id.* at p. 13.

31. Accordingly, Judge Montgomery decided that Pictometry's dual and penta systems, combined with Pictometry's use of its single ray projection and tie pointing methods, do not infringe claims 1, 3, 4, 7, and 16 of the '946 Patent. *Id.* at pp. 11-13.

32. Judge Montgomery went on to consider Pictometry's invalidity and inequitable conduct counterclaims. *Id.* at pp. 14-20. She rejected Pictometry's arguments and granted Geospan summary judgment dismissing Pictometry's invalidity and inequitable conduct counterclaims with prejudice. *Id.*

33. Geospan appealed the summary judgment dismissing its infringement claims to the United States Court of Appeals for the Federal Circuit. Case No. 2011-1380, -1405. In the appeal, Geospan argued that claim 16 of the '946 Patent covers the use of single ray projection method to determine location. It also argued that tie pointing does, in fact, determine the location of objects shown in more than one image.

34. Pictometry cross-appealed, contending that Judge Montgomery erred by (1) declining to adopt Pictometry's proposed constructions for the terms "moving platform" and "video camera" during the *Markman* process, and by (2) dismissing Pictometry's invalidity and inequitable conduct counterclaims with prejudice.

35. In its “Red Brief” opposing Geospan’s appeal, Pictometry repeated its claim that it never uses multiple images to determine location: “With regard to claim 1 of the ‘946 patent, the district court *correctly* found that Pictometry determines the location of an object in its aerial photographs using *only* a single image by a process known as ‘single ray projection.’” Red Brief, p. 11 (emphasis added), attached as **Exhibit B**.

36. The Federal Circuit upheld Judge Montgomery’s judgment *per curiam* under Federal Circuit Rule 36.

Geospan Discovers That Pictometry Sells a Product That Uses Multiple Images to Determine Location

37. While Geospan’s Federal Circuit appeal was pending, it learned for the first time that Pictometry’s online software product, Pictometry Online (“POL”), in fact uses multiple images to determine the location of objects shown in those images.

38. Specifically, POL allows users to “measure elevation [of an object] anywhere above the ground” by “clicking corresponding points in two side-by-side images.” See **Exhibit C** (POL “help sheets” entitled “Measuring elevation without elevation data” and “Measuring slope without elevation data”).

39. In the help sheets, Pictometry indicates that when a user selects the “Dual Pane Mode” in POL, the “Image window splits into two, showing the current Oblique image on the left and the corresponding Ortho image on the right.” *Id.*

40. Pictometry further states in the help sheets that “viewing an Oblique image in the right window also yields good results.” *Id.*

41. A series of screen shots from POL show two examples of Pictometry's Measure XYZ Coordinate Tool being used to determine the location of an object using multiple images. **Exhibit D**, pp. 1-8.

42. In the first example (Exhibit D, pp. 1-4), the user began by selecting the Measure XYZ Coordinate Tool icon shown in the toolbar near the top of the webpage. *Id.*, p. 1.

43. POL prompted the user to "Select Point to be measured." *Id.*, p. 2.

44. The user selected one of the peaks of the roof on the building shown in the oblique image in the left window. *Id.*, p. 3.

45. POL then prompted the user to "Select corresponding point in second image" (*i.e.* the oblique image in the right window). *Id.*

46. When the user selected the same peak of the roof in the second image, as shown by the red crosshairs in the images, POL determined the location of that object and provided the latitude, longitude, and elevation coordinates for the peak. *Id.*, p. 4.

47. Pages 5-7 of Exhibit D show the same process repeated using the same peak of the building, but with a different image in the left window. Specifically, the image in the left window on pages 1-4 of Exhibit D faces north upward. The image in the left window on pages 5-7 faces south upward. *Id.*, pp. 1-7.

48. The result was the same. The example shown on pages 5-7 of Exhibit D produced nearly identical latitude, longitude, and elevation coordinates for the same peak of the building's roof as the example on pages 1-4.

49. POL also contains a “Slope Tool” that determines the slope of objects (such as a roof line) above the ground without using elevation data. **Exhibit D** contains screen shots showing two examples of the Slope Tool in use. *Id.*, pp. 8-18.

50. Thus, POL can determine the location of an object shown in multiple images and meets the determining location steps in claims 1 and 16.

51. Upon information and belief, Pictometry introduced the Measure XYZ Coordinate Tool and the Slope Tool into its POL software after Geospan filed its complaint in Geospan 1 on March 20, 2008. *Compare* Geospan 1 at Dkt. No. 1 with **Exhibit E**, p. 6 (identifying the two features as two of “three new buttons in the Toolbar” in version 1.8) and **Exhibit F**, pp. 1-2 (identifying February 23, 2009 as the date for version 8).

52. Despite having numerous opportunities in Geospan 1 to disclose that POL does in fact use multiple images to determine location of an object shown in those images, Pictometry failed to do so.

53. Instead, as shown above, Pictometry affirmatively stated to Judge Montgomery and the Federal Circuit that it determines location of objects in images *only* using single ray projection method.

54. Pictometry introduced the Measure XYZ Coordinate Tool and Slope Tool to POL after Geospan filed the Complaint in Geospan 1 and then concealed the fact that Pictometry uses multiple images to determine location from discovery and the Court. Thus, Geospan has not had a full and fair opportunity to litigate whether Pictometry’s

dual and penta image collection systems infringe claims 1, 3, 4, 7, and 16 when combined with Pictometry's Measure XYZ Coordinate Tool and Slope Tool in POL.

Pictometry and Eagle View Merge and Form EVT

55. On January 7, 2013, Pictometry and Eagle View announced in a press release that the companies had merged and "combined their business into a single entity."

56. The press release explained that, through a "merger-of-equals" transaction, both Pictometry and Eagle View became wholly-owned subsidiaries of a "new entity."

57. On information and belief, EVT is the "new entity" referred to in the press release.

58. The press release further explained that the former shareholders of Eagle View and Pictometry would hold approximately 50% of the outstanding capital stock of the new entity on a fully-diluted basis.

59. Pictometry and Eagle View are operated by the same executive team, as shown by their respective websites. The team includes executives that worked for Pictometry before the merger, such as Mr. Schultz.

COUNT I – INFRINGEMENT OF U.S. PATENT NO. 5,633,946

60. In Geospan 1, Pictometry conceded that under the Court's construction of "moving platform" and "video camera," Pictometry's dual and penta systems met the first four elements of claim 1 of the '946 Patent and its penta system met the first seven elements of claim 16 of the '946 Patent.

61. The Federal Circuit affirmed the Court's judgment, including the "moving platform" and "video camera" constructions.

62. Pictometry's Measure XYZ Coordinate Tool and Slope Tool each performed the determining location steps in claims 1 and 16 of the '946 Patent.

63. On information and belief, Pictometry used multiple images captured by its dual or penta systems to determine the location of objects shown in those images as part of its process for creating three-dimensional (3D) models, including but not limited to Pictometry's Real3D[®] products and services.

64. On information and belief, Pictometry used multiple images captured by its dual or penta systems to determine the location of objects shown in those images as part of its process for creating roof reports.

65. Pictometry directly infringed claims 1, 3, 4, 7, and 16 of the '946 Patent by performing, making, using, selling, and/or offering to sell products or services that used images captured by Pictometry's dual or penta system when combined with the Measure XYZ Coordinate Tool or Slope Tool within POL.

66. Pictometry directly infringed claims 1, 3, 4, 7, and 16 of the '946 Patent by making, using, selling, and/or offering to sell products including 3D models and roof reports.

67. Before the January 2013 merger, Eagle View purchased or licensed images from Pictometry that were captured using Pictometry's dual or penta systems.

68. On information and belief, Eagle View used those images to determine the location of objects shown in the images as part of its process for creating roof and wall reports.

69. On information and belief, Eagle View sent images it received from Pictometry to a facility in the Philippines to create roof and wall reports. Eagle View then imported the completed reports back into the United States and delivered them to customers.

70. After the merger, Eagle View continued to use multiple images captured by Pictometry's dual or penta systems to determine the location of objects shown in those images as part of its process for creating roof and wall reports.

71. Eagle View directly infringed claims 1, 3, 4, 7, and 16 of the '946 Patent, both before and after the January 2013 merger, by making, using, selling, offering to sell, and/or importing into the United States products including its roof and wall reports.

72. On information and belief, EVT controls and operates the combined business of Pictometry and Eagle View. The January 7, 2013 press release indicates that Eagle View and Pictometry "combined their businesses into a single entity." Pictometry and Eagle View are wholly-owned subsidiaries of EVT, and EVT is owned by the former shareholders of Eagle View and Pictometry. Eagle View and Pictometry also share a common executive team.

73. EVT advertised the combined nature of Eagle View's and Pictometry's products and services. For example, on Pictometry's website, an advertisement entitled "A Perfect Match" stated that "Pictometry has merged with EagleView Technologies to bring you a full-service suite of solutions for your business, including the highest quality aerial images and the most accurate roof and wall reports designed to flow seamlessly

into the EagleView Estimator™.” Clicking a link on that page marked “Go to our Roof Report Website” sent users to Eagle View’s website.

74. EVT directly infringed claims 1, 3, 4, 7, and 16 of the ‘946 Patent by making, using, selling, offering to sell, and/or importing into the United States products including roof reports, wall reports, 3D models, and the POL software.

75. EVT also directly infringed claims 1, 3, 4, 7, and 16 of the ‘946 Patent by exercising control or direction over the infringement of its wholly-owned subsidiaries, Pictometry and Eagle View.

76. Pictometry actively induced others to infringe claims 1, 3, 4, 7, and 16 of the ‘946 Patent or contributed to the infringement of those claims by others. Pictometry undeniably knew of the ‘946 Patent when it added the Measure XYZ Coordinate Tool and the Slope Tool to POL, as Geospan 1 was on-going at the time. It also knew about the ‘946 Patent when it sold or licensed images to Eagle View for use in Eagle View’s roof and wall reports prior to the merger.

77. On information and belief, Pictometry also knew when it sold or licensed images to Eagle View that Eagle View would send Pictometry’s images to Eagle View’s facility in the Philippines and import completed products including roof and wall reports back into the United States for sale to customers.

78. Pictometry knew or should have known that Eagle View would directly infringe the ‘946 Patent by using images that Pictometry provided to prepare products including roof and wall reports. Pictometry actively induced and contributed to that infringement.

79. Pictometry also directed its customers to use the Measure XYZ Coordinate Tool and Slope Tool in combination with images captured by Pictometry's dual and penta systems.

80. The entire purpose and only intended use of the Measure XYZ Coordinate Tool is to determine location using multiple images.

81. The Measure XYZ Coordinate Tool is a separate and distinct feature within POL, and it has no substantial, non-infringing use.

82. The entire purpose and only intended use of the Slope Tool is to determine location using multiple images and thereby determine the slope between two points.

83. The Slope Tool is a separate and distinct feature within POL, and it has no substantial, non-infringing use.

84. At a minimum, Pictometry induced or contributed to infringement of claims 1, 3, 4, 7, and 16.

85. EVT knew of the '946 Patent after the merger because it is owned in part by the former shareholders of Pictometry. The common executive team of Pictometry and Eagle View also contains executives from pre-merger Pictometry, such as Mr. Schultz, who were well aware of the Geospan 1 suit.

86. EVT induced or contributed to direct infringement by Eagle View and Pictometry by directing or controlling the combined companies to make, use, sell, offer to sell, and/or import products including roof reports, wall reports, 3D models, and the POL software.

87. Defendants' infringement of the '946 Patent has damaged Geospan. Geospan is entitled to recover damages that will adequately compensate it for the infringement in an amount to be determined at trial, but in any case no less than a reasonable royalty.

88. Pictometry's infringement of the '946 Patent was willful, deliberate, and intentional, as shown by Pictometry's false statements to Judge Montgomery and the Federal Circuit denying that it ever uses multiple images to determine location. At the time Pictometry made those statements, Pictometry knew that its POL software did in fact use multiple images to determine location. Pictometry also knew about the '946 Patent when it created roof reports and 3D models.

89. Eagle View willfully infringed the '946 Patent before the merger, as it knew of the Geospan 1 lawsuit between Pictometry and Geospan. Given Pictometry's admissions about its image capture system, Eagle View knew or should have known that it was infringing by creating roof reports using images obtained from Pictometry.

90. Eagle View and EVT also willfully infringed after the merger, as they were aware of the '946 Patent and Pictometry's admissions from Geospan 1. Despite this knowledge, Eagle View and EVT continued to use multiple images to determine the location of objects shown in those images as part of creating products including roof and wall reports.

PRAYER FOR RELIEF

WHEREFORE, Geospan prays for judgment that:

- A. Defendants infringe claims 1, 3, 4, 7, and 16 of the '946 Patent;
- B. Geospan be awarded compensatory and exemplary damages, including treble damages for willful infringement as provided by 35 U.S.C. § 284, with interest, but in any case no less than a reasonable royalty;
- C. Geospan be awarded its attorneys' fees, costs, and expenses in this action pursuant to 35 U.S.C. § 285 and Fed. R. Civ. P. 54;
- D. Geospan be awarded pre-judgment interest and post-judgment interest on its damages, as allowed by law; and
- E. Geospan be awarded such other relief as this Court may deem just, equitable, and proper.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Geospan respectfully requests a trial by jury of all issues so triable.

Dated: July 23, 2014

s/Grant D. Fairbairn

Kurt J. Niederluecke (#0271597)

Grant D. Fairbairn (#0327785)

Ted C. Koshiol (#0390542)

FREDRIKSON & BYRON, P.A.

200 South Sixth Street, Suite 4000

Minneapolis, MN 55402-1425

Telephone: 612.492.7000

Facsimile: 612.492.7077

Attorneys for Plaintiff Geospan Corporation