

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

_____)	
AntennaSys, Inc.)	
)	
Plaintiff)	
)	Civil Action No. 1:17-cv-00105-PB
v.)	
)	
AQYR Technologies, Inc.)	<u>JURY TRIAL DEMANDED</u>
)	
and)	
)	
Windmill International, Inc.)	
)	
Defendants)	
_____)	

AMENDED COMPLAINT

Plaintiff AntennaSys, Inc. (“AntennaSys”), by its undersigned attorneys, brings this complaint against defendants AQYR Technologies, Inc. (“AQYR”) and Windmill International, Inc. (“Windmill”) seeking damages and other relief. Plaintiff alleges as follows:

PARTIES

1. Plaintiff AntennaSys is a New Hampshire corporation with a principal place of business at 15 Bedros Street, Windham, New Hampshire 03087.

2. Defendant AQYR is a New Hampshire corporation with a principal place of business at 26 Clinton Drive, Hollis, New Hampshire 03049. AQYR sells antenna products including TYPHOON Ku-Band Terminal, the KA-PRT Portable Receive Terminal, the DIAMONDBACK AutoAQYR and the ThinPack AutoAQYR Terminal (hereinafter the “AQYR

products” or the “Disputed Products”)¹. AQYR is a wholly owned subsidiary of defendant Windmill.

3. Defendant Windmill is a Delaware corporation with a principal place of business at 2 Robinson Road, Nashua, New Hampshire 03060.

Jurisdiction and Venue

4. This action arises under the patent laws of the United States, Title 35 U.S.C. §§101 et seq. and also under New Hampshire contract law, unjust enrichment and NH RSA 358-A. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§1331, 1332 and 1338(a).

5. This Court has personal jurisdiction over defendant AQYR in that defendant is incorporated in this state, its principal place of business is in this state and it transacts business in this state including marketing and selling the AQYR products in this state. This Court has personal jurisdiction over defendant Windmill in that Windmill’s principal place of business is in this state and it regularly transacts business in this state including marketing and selling the Disputed Products in this state.

6. Venue is proper in this district pursuant to 28 U.S.C. §§1391 and 1400(b).

Factual Background

7. AntennaSys is in the business of providing customized antenna services and consulting including inventing antennas and antenna systems.

8. According to its website, Windmill provides “innovative solutions and services to the United States and allied governments in support of national security and acquisition programs.”

¹AQYR also sells other antenna products that AQYR and its parent corporation Windmill acknowledge are subject to a license agreement between Windmill and AntennaSys.

9. Windmill and AntennaSys entered into a license agreement dated April 4, 2008, whereby certain patents and rights associated with certain patent applications were licensed to Windmill (the “License Agreement”). A copy of the License Agreement is attached as Exhibit 1. The License Agreement provides that Windmill and AntennaSys each own a one-half undivided (50%) interest in the “PATENTS” as defined in the License Agreement. The License Agreement also provides that Windmill shall transfer its one-half interest in the PATENTS to a limited liability company named GBS Positioner LLC. (“GBS”) and shall assign the License Agreement to the LLC and Windmill shall own the entire membership interest in the LLC. The license agreement also provided that Windmill “shall be responsible for any and all costs and expenses relating to the maintenance of the Patents and prosecution of U.S. Patent Applications before the U.S. Patent and Trademark Office.” Paragraph 6A. In addition, the license agreement provided that “The Parties shall reasonably cooperate fully and in good faith with each other for the purpose of securing and preserving its rights to the PATENTS.” Paragraph 7D.

10. On October 7, 2008, the United States Patent and Trademark Office duly and lawfully issued U.S. Patent No. 7,432,868 (the “’868 Patent” or the “Patent-in-Suit”), entitled “Portable Antenna Positioner Apparatus and Method.” A true and correct copy of the ‘868 Patent is attached as Exhibit 2. The claims of the ‘868 Patent generally relate to an antenna positioner and method for utilizing an antenna positioner which may be used in communicating with geostationary, geosynchronous and low-earth-orbit satellites. The ‘868 Patent is included within the definition of PATENTS under the License Agreement in that U.S. Patent Application Serial No. 11/412,720 is part of the License Agreement and that application was granted as the ‘868 Patent.

11. Paragraph 1 (C) of the License Agreement defines the United States Federal Marketplace (“USFM”) as “any sales to a United States Government Department or Agency.” Paragraph 1 (D) of the License Agreement defines the Commercial Marketplace (“CM”) as “any sales to a party that is not in the United States Federal Marketplace. The Commercial Marketplace includes but is not limited to direct sales to foreign governments, corporations, institutions, and non-profit organizations.”

12. Within the USFM as defined in the License Agreement, Windmill agreed to make payments of \$1,000.00 for each of the first 200 units sold, and \$1,500.00 for each unit thereafter. With respect to the commercial United States market or “CM” as it is defined in the License Agreement, Windmill agreed to pay three percent of the Gross Sales Price for each unit sold. Windmill promised to “utilize its best efforts to market, produce, and sell” with respect to both markets. *Id.* at ¶¶3(A)(6); 4(A)(3).

13. Paragraph 4 (A) (3) of the License Agreement provides that “Windmill agrees to utilize its best efforts to market, produce and sell to the CM. As a measure of best effort to market, Windmill warrants that it will sell a minimum of 40 units of the PRODUCT in the CM by January 1, 2010, and that it will sell at a minimum 50 units of the PRODUCT in the CM annually thereafter....” PRODUCT is defined as “anything manufactured that involves the intellectual property rights as protected by the PATENTS defined in this Agreement.” Paragraph 4A(4) of the License Agreement provides that if Windmill fails to meet these minimum sales requirements, Windmill shall lose its exclusive license in the CM and that thereafter, “either Windmill or AntennaSys shall have the right to exploit the Patents in the CM”. Paragraph 4A(5) provides that if the license in the CM becomes non-exclusive, either party employing the Patents

to manufacture or sell products in the CM shall pay a five percent royalty for each unit sold. Windmill has not met the minimum sales requirements set forth in the License Agreement.

14. Upon information and belief, GBS currently holds Windmill's one-half (1/2) interest in the PATENTS, which was defined to include U.S. Patent No. 7,432,868. However, upon information and belief, AQYR currently sells PRODUCTS under the License Agreement using the licensed PATENTS.

15. The License Agreement provides:

In the event that Windmill transfers its membership interest in the LLC to a third party, or in the event that the PATENTS and the License Agreement are sold by the LLC to a third party, upon the closing Windmill shall pay AntennaSys an amount equal to twenty percent (20%) of the amount received from such transfer, less all reasonable expenses incurred by Windmill or the LLC, as the case may be, relating to the sale of the LLC or its assets.

License Agreement at ¶2.

16. The License Agreement also provides that “[b]oth Parties agree that all PRODUCT shall be marked with the appropriate language (in accordance with 35 U.S.C 287(a) for all applicable patents.” *Id.* at ¶6(G).

17. The License Agreement further provides, any decision arising out of the arbitration proceeding “shall include the assessment of costs, expenses, and reasonable attorneys’ fees” *Id.* at ¶11A(3)

18. In early August 2016, AntennaSys requested an audit pursuant to Section 9 of the License Agreement, which expressly allows either party to request an audit of “the Parties’ records relating to the PRODUCT including but not less than the number of units of the

PRODUCT sold and the Gross Sale Price of the PRODUCT in the [commercial market].” Id. at ¶9.

19. As a result of the audit request, AntennaSys received some limited information. Specifically, on August 25, 2016, Windmill provided a summary of units sold and some pricing information. AntennaSys requested additional information regarding products listed on the AQYR website, but not listed in the summary. These included the Disputed Products. The Disputed Products based on current information are Typhoon; KA-PRT, Diamondback, and ThinPAK. It is possible that there are other products as well that have been or will be marketed or sold that also may be subject to the License Agreement.

20. Windmill agreed to provide the information and on September 16, 2016 indicated that the four Disputed Products listed on AQYR’s website use “different positioner technology” than the technology in the Agreement, without further information or analysis.

21. There then were a series of communications that did not provide comfort to AntennaSys and that suggested that intellectual property rights as protected by the PATENTS were in fact being used in the disputed products. Further, upon information and belief, Windmill is actively marketing products in competition with the licensed Product(s), despite its “best efforts” obligations.

22. AntennaSys initially filed an arbitration claim against Windmill pursuant to the arbitration provision in the License Agreement. However, since AntennaSys also had filed a lawsuit in this Court against AQYR, the parties agreed that AntennaSys would withdraw the arbitration claim without prejudice to the merits of those claims and the parties would proceed with all pertinent claims in this Court. The parties have expressly agreed to waive arbitrability with respect to the issues framed in this lawsuit.

Count I – Breach of Contract (Windmill)

23. Plaintiff restates and re-alleges paragraphs 1 through 22 as if fully stated herein.

24. Pursuant to the License Agreement, Windmill had obligations to plaintiff, including, but not necessarily limited to, the duty to make certain royalty payments and the duty to use its “best efforts” to market and sell the underlying product. Windmill has failed to do so, as described above. To the extent that Windmill has designed products that are intended to be outside the scope of the licensed intellectual property rights as protected by the PATENTS, such actions are a breach of the express obligations of the Agreement including but not limited to best efforts obligation. Windmill has otherwise breached its best effort obligations under the Agreement. Further, Windmill has breached its obligations, pursuant to Paragraph 6 (G) of the Agreement to properly mark both the Disputed Products and PRODUCT(S) upon which Windmill acknowledges are covered by the Agreement.

25. As a result of Windmill’s various breaches of the License Agreement, plaintiff has been damaged in an amount to be determined at the hearing in this matter. Plaintiff also is entitled to its costs, appropriate interest, and reasonable attorneys’ fees.

Count II – Unjust Enrichment (Windmill)

26. Plaintiff restates and re-alleges paragraphs 1 through 25 as if fully stated herein.

27. Windmill has received, and continues to receive, the value of plaintiff’s fifty percent share of the PATENT(S). However, Windmill has failed to make payment for such benefit.

28. By knowingly accepting this benefit without providing the agreed upon consideration, Windmills have been unjustly enriched to plaintiff’s detriment.

29. Windmill should be required to disgorge the value of the benefits unconscionably retained. Plaintiff also is entitled to appropriate interest, costs and its reasonable attorneys' fees pursuant to the Agreement.

Count III – Breach of the Covenant of Good Faith and Fair Dealing (Windmill)

30. Plaintiff restates and re-alleges paragraphs 1 through 29 as if fully stated herein.

31. The License Agreement included an implied covenant of good faith and fair dealing. This includes, but is not necessarily limited to, the duty to use best efforts to market, produce and sell the underlying PRODUCT. To the extent that Windmill has designed products that are intended to be outside the scope of the licensed PATENTS such actions are not only a breach of the express obligations of the Agreement but a violation of the implied covenant of good faith and fair dealing.

32. Windmill's conduct, as described above, constitutes a breach of the implied covenant of good faith and fair dealing.

33. As a direct and proximate result of Windmill's breach of this covenant, plaintiff has been damaged in an amount to be proven at the hearing in this matter. Plaintiff also is entitled to its costs, appropriate interest, and reasonable attorneys' fees.

Count IV-Intentional Interference with Contractual Relations (AQYR)

34. Plaintiff restates and re-alleges paragraphs 1 through 33 as if fully stated herein.

35. As described above, plaintiff and Windmill entered into the License Agreement. AQYR was and is aware of that contractual relationship.

36. AQYR has marketed and sold products that exploit the technology covered by the Agreement. Further, to the extent that Windmill has designed products that are intended to be

outside the scope of the licensed intellectual property rights as protected by the PATENTS, such actions are a breach of the express obligations of the License Agreement including but not limited to Windmill's best efforts obligation and, upon information and belief, AQYR has encouraged and participated in those breaches and any other actions that breach Windmill's best efforts and other obligations under the License Agreement.

37. In its actions, although AQYR is closely tied to and in privity with Windmill AQYR has wrongfully interfered, without justification, with plaintiff's contractual relationship with Windmill. AQYR's wrongful conduct represents an intentional interference with contractual relations. As a result of AQYR's actions, plaintiff has incurred and will continue to incur damages in an amount to be determined at trial. Plaintiff also is entitled to appropriate interest and reasonable costs and attorney's fees.

Count V – Violation of NH RSA 358-A (both defendants)

38. Plaintiff restates and re-alleges paragraphs 1 through 37 as if fully stated herein.

39. Defendants' actions, as described above, constitute unfair methods of competition and unfair or deceptive acts and practices in the conduct of trade or commerce within the State of New Hampshire as defined in RSA 358-A:2.

40. As a direct and proximate result of defendants' violations of RSA 358-A:2, plaintiff has been damaged in an amount to be determined at the hearing in this matter. Plaintiff also is entitled to its costs, appropriate interest, and reasonable attorneys' fees.

41. Upon information and belief, defendants' actions were willful and knowing violations of RSA 358-A:2. Therefore, plaintiff also is entitled to at least two and up to three times its actual damages.

COUNT VI

Patent Infringement of U.S. Patent No. 7,432,868 - 35 U.S.C. § 271 (AQYR)

42. Plaintiff realleges and incorporates by reference the allegations in Paragraphs 1-41.

43. As noted above, the claims of the '868 Patent generally relate to an antenna positioner and method for utilizing an antenna positioner which may be used in communicating with geostationary, geosynchronous and low-earth-orbit satellites.

44. Paragraph 4 (A) (3) of the License Agreement provides that “Windmill agrees to utilize its best efforts to market, produce and sell to the CM. As a measure of best effort to market, Windmill warrants that it will sell a minimum of 40 units of the PRODUCT in the CM by January 1, 2010, and that it will sell at a minimum 50 units of the PRODUCT in the CM annually thereafter....” Paragraph 4A(4) of the License Agreement provides that if Windmill fails to meet these minimum sales requirements, Windmill shall lose its exclusive license in the CM and that thereafter, “either Windmill or AntennaSys shall have the right to exploit the Patents in the CM”.

45. Paragraph 7(B) of the License Agreement provides that if infringement of any of the patents included within the License Agreement “in the USFM or the CM, in which Windmill has the exclusive license, Windmill shall bear all costs, expenses, and liabilities related to any lawsuits against a third party.” Paragraph 7 (C) provides that Windmill has the obligation to commence a lawsuit against such an infringer but that if “Windmill does not commence a lawsuit against an alleged infringer within sixty days of notification [of such infringement], AntennaSys may commence a lawsuit....” Paragraph 7 (H) of the License Agreement provides that “[i]f the

infringement occurs in the CM and Windmill has lost exclusivity to the CM, either Party has the right to commence a lawsuit.”

46. Windmill has not satisfied the minimum sales requirements in the CM. As a result, AntennaSys has the right to commence a lawsuit.

47. AQYR is, upon information and belief, a wholly owned subsidiary of Windmill. AQYR advertises, offers and, upon information and belief, sells the AQYR products. The AQYR products infringe at least claims 1, 5, 6 and 9 of the ‘868 Patent. By way of illustration, and with respect to claim 1, the AQYR products comprise an antenna with a centrally located pivot point, an elevation motor coupled with said antenna wherein said antenna rotates about said centrally located pivot point in elevation when moved by said elevation motor, at least one positioning arm coupled with said elevation motor, an azimuth motor coupled with said at least one positioning arm, a positioner base coupled with said azimuth motor, wherein said positioner base houses a computer configured to control said antenna, and said antenna, said elevation motor, said at least one positioning arm, said azimuth motor and said positioning base configured to be stowed and deployed and carried by a single person.

48. Plaintiff has notified Windmill and AQYR that it believes that the AQYR products are covered by one or more of the patents subject to the License Agreement including the ‘868 Patent.

49. Windmill has not taken any action against AQYR and AQYR has not indicated that it will stop making, using, selling or offering for sale its products to avoid infringing the ‘868 Patent. On the contrary, AQYR has contended that it does not infringe and has refused to indicate in what way it does not infringe. Given the relationship between Windmill and AQYR, it is not realistic to believe that Windmill will be asserting claims against AQYR. Further, the

provisions in the Agreement referring to claims by Windmill do not realistically apply to claims by Windmill against its wholly owned subsidiary, AQYR.

50. Under the circumstances described above, plaintiff has standing to assert the instant claims.

51. Plaintiff has suffered damages from the defendants' infringement of the '868 Patent in an amount to be determined at trial.

52. Upon information and belief, defendants' infringement of the '868 Patent was and continues to be willful and therefore subjects the defendant, pursuant to 35 U.S.C. §284, to treble damages and attorney's fees.

53. Further, defendant's conduct has caused irreparable harm and, if not enjoined, will continue to cause irreparable damage to plaintiff. As a result of the defendant's wrongful conduct, plaintiff is entitled to injunctive and other relief.

JURY DEMAND

54. Plaintiff demands a trial by jury of all issues triable by jury.

WHEREFORE, plaintiff requests that the Court:

- A. Award plaintiff its actual damages, to be determined at the hearing in this matter;
- B. Award plaintiff its reasonable attorneys' fees, appropriate interest, and costs of this action pursuant to the Agreement;
- C. Award plaintiff at least two times and as much as three times its actual damages;
- D. Rule and order that defendants infringed the Patent-in-Suit;
- E. Rule and order that defendants' infringement of the Patent-in-Suit has been willful;

- F. Award plaintiff reasonable attorneys' fees and costs;
- G. Award plaintiff triple damages;
- H. Award plaintiff appropriate interest on any judgment;
- I. Permanently enjoin defendants from infringing the Patent-in Suit pursuant to 35 USC § 283; and
- J. Award such other and further relief as the Court may deem just and proper.

Respectfully submitted,

AntennaSys, Inc.

By its attorneys,

Dated: May 16, 2017

By: /s/ Arnold Rosenblatt

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

I hereby certify that on May 16, 2017, I electronically filed the foregoing document using CM/ECF system, which will send notification of such filing(s) to all those registered with the ECF system.

/s/ Arnold Rosenblatt

Arnold Rosenblatt