IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

AutoGrip, Inc. d/b/a Auto-Grip Plaintiff, v. Armor Tool, LLC; Robert N. Poole; PDI Product Development, Inc., Defendants.	))))))))))	Civil Action No. 1:18-cv-447 COMPLAINT FOR DECLARATORY JUDGMENT

AMENDED COMPLAINT

Pursuant to Federal Rule of Civil Procedure 15(a)(1)(B), Plaintiff AutoGrip, Inc. ("Auto-Grip"), by and through its undersigned counsel, respectfully files this Amended Complaint against Defendants Armor Tool ("Armor"), Robert N. Poole ("Poole"), and PDI Product Development, Inc. d/b/a PDI ("PDI").

INTRODUCTION

1. This is a declaratory judgment action seeking a determination that Auto-Grip does not infringe any enforceable claims of U.S. Patent Nos. 6,591,719 ("'719 Patent"), 6,776,072 ("'072 Patent"), or 7,017,458 ("'458 Patent) (collectively, the "Patents-in-Suit") under 35 U.S.C. § 271, for at least the following reasons:

(a) Auto-Grip has a license to sell tools allegedly covered by the Patents-in-Suit; and

(b) The Patents-in-Suit are unenforceable due to patent misuse.

2. On information and belief, Defendant Armor is the exclusive licensee of the Patents-in-Suit.

3. On information and belief, Defendant Robert N. Poole is one of two named co-inventors, and the sole owner, of the Patents-in-Suit.

4. On information and belief, Defendant PDI, Inc. is wholly owned and controlled by Defendant Poole and is used by Poole to conduct business concerning the Patents-in-Suit.

5. On information and belief, Defendant Poole is also an LLC member, or partial owner, of Defendant Armor.

6. This action also seeks damages for Defendants' breach of contract and breach of the implied covenant of good faith and fair dealing.

7. This action also seeks damages for business defamation, business conspiracy under Va. Code 18.2-499 and 18.2-500, and for Defendant Armor's breach of the parties' Non-Disclosure Agreement.

8. This action also seeks an injunction ordering Armor and its owners, officers, employees, contractors, business partners and affiliates to refrain from contacting AutoGrip's customers or otherwise misusing AutoGrip's confidential business information.

PARTIES

9. Plaintiff Auto-Grip is a Virginia corporation with its principal place of business at 7411 Alban Station Court, Suite A-102, Springfield, VA 22150.

10. Defendant Armor is an Arizona Limited Liability Company with its principal place of business at 4001 West Indian School Rd., Phoenix, AZ 85019.

11. Defendant Robert N. Poole is an individual residing at 8361 East Evans Rd., Suite 104, Scottsdale, AZ 85260 and/or at 225 Palm Ave., Coronado, CA 92118.

12. Defendant PDI is an Arizona corporation with its principal place of business at 8361 East Evans Rd., Suite 104, Scottsdale, AZ 85260.

JURISDICTION AND VENUE

13. AutoGrip brings this action under Title 35 of the United States Code, and under 28 U.S.C. §§ 2201 and 2202, to obtain a declaration of non-infringement with respect to the Patents-in-Suit.

14. AutoGrip further brings this action under the common law of the Commonwealth of Virginia.

15. This Court has jurisdiction pursuant to the following statutes:

> (a) 28 U.S.C. § 1331, which gives district courts original jurisdiction over civil actions arising under the Constitution, laws or treaties of the United States;
>
> (b) 28 U.S.C. § 1367, which gives district courts supplemental jurisdiction over certain state law claims; and further,
>
> (c) If and to the extent that Section 1367 may be found not to apply to any state claim at issue here, this Court would have jurisdiction under federal diversity jurisdiction, 28 U.S.C. § 1332, as the parties are diverse in citizenship and the amount in controversy exceeds $75,000.

16. This Court has personal jurisdiction over Defendants in this action under Va. Code Ann. §§ 8.01-328.1 subsections A(1), (2), (3) and (4), and subsection B, because:

> (a) Defendant Armor transacted business with Plaintiff, a Virginia corporation, in this Commonwealth, and contracted to supply its intellectual property to Plaintiff in this Commonwealth, and committed tortious injury by an act in this Commonwealth;
>
> (b) Defendant PDI transacted business with Plaintiff, a Virginia corporation, in this Commonwealth, and contracted to supply its intellectual property to Plaintiff in this Commonwealth, and committed and/or conspired to commit tortious injury by an act in this Commonwealth;
>
> (c) Defendant Mr. Poole transacted business with Plaintiff, a Virginia corporation, in this Commonwealth, and contracted to supply its intellectual property to Plaintiff in this Commonwealth, and committed and/or conspired to commit tortious injury by an act in this Commonwealth.

17. Venue is proper in the United States District Court for the Eastern District of Virginia pursuant to 28 U.S.C. § 1391 because Defendants conduct business in this District, are subject to personal jurisdiction in this District, and reside in this District within the meaning of 28 U.S.C. § 1391(c).

BACKGROUND

The Parties' Business Relationship and the License

18. Plaintiff AutoGrip, headquartered in Springfield, Virginia, distributes hand tools nationwide under its registered trademark, AUTO-GRIP®. AutoGrip's primary product is a self-adjusting locking plier tool, which Defendants allege practices one or more claims of the '719 and '072 Patents. AutoGrip also sells five other tools, one of which Defendants also allege practices one or more claims of the '458 Patent.

19. In or about February of 2014, AutoGrip entered into a sublicense with C.H. Hanson, Inc. ("Hanson"), an Illinois company that at the time was, on information and belief, the exclusive licensee of the Patents-in-Suit, with the right to sublicense.

20. Pursuant to the 2014 sublicense, in or about March 2014 AutoGrip purchased hand tools from Hanson's inventory, paying eight percent (8%) royalties to Hanson.

21. In September of 2014, AutoGrip filed for registration of its trademark for these hand tools. The registration was subsequently granted.

22. In or about February of 2016, Hanson informed AutoGrip that Hanson's license to the Patents-in-Suit was expiring as of October 1, 2016, and that Hanson would not seek to renew it. Hanson then proposed to make introductions and otherwise assist AutoGrip in becoming the new exclusive licensee to the Patents-in-Suit.

23. To that end, throughout the summer of 2016, Hanson and AutoGrip repeatedly communicated and met with Defendants Mr. Poole and PDI. In or about August and

September, 2016, AutoGrip, PDI and Mr. Poole, without Hanson, began negotiating a license agreement via teleconference and email.

24. In autumn of 2016, PDI and Mr. Poole indicated that the parties to license negotiations should include their new business partner, Defendant Armor, in negotiations.

25. At that time Armor held itself out as, and on information and belief in fact was, the agent of Mr. Poole and PDI with the authority to negotiate and enter into contracts on their behalf.

26. In October of 2016 AutoGrip had a conference call with Armor to negotiate a license under which, pending further negotiations toward a more detailed license, AutoGrip would be able to order and sell hand tools allegedly covered by the Patents-in-Suit.

27. In October and November of 2016, in a series of emails and phone calls, AutoGrip sought and received permission for a "temporary one-time licensing agreement" to order and sell hand tools allegedly covered by the Patents-in-Suit in exchange for an 8% royalty, to be paid by AutoGrip to the procurement company Asia Tech Source ("ATS"), and passed on by ATS to PDI. Ex. A.

28. In December 2016 AutoGrip had a teleconference with representatives of Mr. John Kenyon, who was presented to AutoGrip as the principal investor in Armor.

29. On or about January 3, 2017, Defendant Mr. Poole signed a contract with Defendant Armor under which Armor became the exclusive licensee of the Patents-in-Suit ("Armor-Poole License"). This exclusive license describes Defendant Poole as the exclusive owner of the Patents-in-Suit and gives Armor the right to sublicense the Patents-in-Suit, subject to Mr. Poole's consent, which may not be unreasonably withheld.

30. AutoGrip did not learn of the existence of the Armor-Poole License until detailed license negotiation discussions in approximately August of 2017. Until that point, Defendants continued to represent Armor as a business partner and agent of Mr. Poole and PDI.

31. In early 2017, AutoGrip and Defendants continued negotiations toward a written patent license.

32. In early 2017 the parties were aware that due to the months-long ramp-up time in the business-to-business tool industry, in the absence of a license effective during the parties' negotiations, AutoGrip would not be able to promptly begin making sales or paying royalties upon executing a written license. In or about April of 2017, Defendants thus granted Plaintiff an oral license during the parties' negotiations, so that sales and royalty payments to Defendants could begin as soon as possible.

33. Under the parties' oral license, AutoGrip would offer the allegedly patented tools for sale, sell and distribute the tools, and would pay, to Armor for the benefit of Armor, Poole and PDI, a royalty of 8% on sales of the tools plus 30% of AutoGrip's annual profits on such sales, or EBIT. The parties further agreed that Defendants retained the right to manufacture competing hand tools.

34. Reflecting this oral license, on or about April 24, 2017, Armor and AutoGrip signed a Letter of Intent ("LOI") setting forth "the principal terms" of the license to be executed by AutoGrip, as licensee, and Defendants Armor and PDI, referred to as "collectively, 'Licensor.'" LOI at p.1. The LOI provided that AutoGrip's counsel "shall prepare the initial draft of the Definitive [License] Agreement." *Id.* at ¶ 1.[1]

[1] The LOI's confidentiality clause precludes disclosure of the document itself, but not of its existence. For that reason, in an abundance of caution AutoGrip has not attached the LOI as an exhibit hereto.

35. Further reflecting this oral license, the LOI expressly provided that "***during*** the duration of this LOI, Licensee will incur at no cost to Licensor, … sales, marketing, merchandising… sourcing, procurement, … [and] supply chain… expenses." LOI at ¶ 7 (emphasis added).

36. As the parties had already agreed, the LOI provided for "a royalty of 8%" to be paid by AutoGrip to Armor, as well as "a 30% share of EBIT profits." *Id.* at ¶ 2.

37. The LOI provided that it would terminate as of the earlier of "execution of the Definitive Agreement… [or] mutual agreement… [or] May 20, 2017." *Id.* at ¶ 3.

38. At an industry conference in or about the second week of May, 2017, AutoGrip's president, Dave Heiby, informed Armor and Mr. Poole that AutoGrip had closed a deal to sell allegedly patented hand tools to a company called Advance Auto. Defendants congratulated Mr. Heiby for this.

39. Because the LOI's May 20 termination date was approaching and the parties had not yet executed the "Definitive Agreement" referenced in the LOI, the parties executed a Letter of Intent Extension Agreement ("LOI Extension"), dated May 17, 2017, which extended the LOI. Ex. B.

40. In reliance on the parties' oral license, course of conduct, written LOI and LOI Extension, and Armor's oral approval of AutoGrip's having secured a deal to sell hand tools covered by the license, AutoGrip continued operating its business. Specifically, AutoGrip continued calling on customers to enter into new sales agreements, marketing its tools, placing orders with its procurement company to have the tools manufactured, and otherwise investing significant time, money, and other resources, as expressly provided in the LOI, into developing its business in such tools.

41. AutoGrip signed the LOI Extension on May 17, 2017 and sent it to Armor for signature. *See* Ex. B. Defendant Armor signed the LOI Extension nearly two weeks later, on May 30, 2017. *Id.* At that time Armor also made an addition to the LOI Extension, purporting to cause the LOI Extension to "terminate on November 20, 2017." *Id.*

42. In or about May of 2017, pursuant to the parties' LOI, AutoGrip had its counsel prepare a draft patent license reflecting the parties' agreed-upon terms (the "Draft Patent License") and sent it to Defendants for review.

43. The Draft Patent License included the same royalty terms as the LOI, together with the additional proviso that the 8% royalty would be paid quarterly and would be accompanied by royalty reports. The Draft Patent License also contained an express carve-out to exclusivity, whereby Defendants retained the right to manufacture competing tools.

44. Negotiations on the Draft Patent License continued over the summer and fall of 2017. Defendants requested the following additional license terms:

(a) Repeatedly, Defendants pressed for a provision under which AutoGrip would continue paying royalties after the Patents-in-Suit expired.

(b) By phone in late September 2017, and again by email dated September 28, 2017, Defendants insisted that AutoGrip disclose proprietary customer and pricing information including customer names, manufacturing costs, pricing to each customer, and contract provisions with each customer. Ex. C. AutoGrip explained that that information was proprietary and disclosing it would violate confidentiality provisions in AutoGrip's contracts with its vendors and customers. *Id.* However, Defendants continued to press for this information.

(c) Repeatedly, by phone and email, Defendants pressed AutoGrip to add mutual noncompetition provisions to divide customers, markets, and U.S. territories between them. AutoGrip explained directly to Mr. Poole/PDI and Armor that given the carve-out under which Defendants proposed to compete with AutoGrip in selling hand tools, such horizontal restraints could violate the Sherman Act, placing both parties to the license at risk of civil and even criminal liability for antitrust violations. Defendants nevertheless continued to press for these provisions. For example, on October 5, 2017, counsel for

Defendant Armor, who had been negotiating on Defendants' behalf and had signed the May 2017 LOI Extension on their behalf, sent AutoGrip's principal, Dave Heiby, an email. Ex. D. In this email he again pressed for such provisions, explaining that "Armor doesn't agree that limiting the territory of licensing rights is a *per se* violations [*sic*] of Antitrust laws" and warning that if AutoGrip did not accept Armor's demands, "we will likely not be able to move forward with this relationship." *Id.*

(d) Defendants also requested a provision that would prohibit AutoGrip from designing around the Patents-in-Suit for the duration of any contractual relationship. *See*, *e.g.*, Ex. E (12/1/17 email listing key contract terms, including that there would be "No IP workaround by Auto-Grip while the parties are under contract").

(e) Defendants also requested a provision under which Defendants, and not AutoGrip, would control manufacturing and quality control. *See*, *e.g.*, *id.* Defendants repeatedly pressed for such a provision despite AutoGrip's explanation that, as a trademark holder, it was required to maintain contractual responsibility for quality control, and contrary provisions would put AutoGrip's registered trademark at risk.

45. Pursuant to the parties' oral license and LOI, while Defendants reviewed the Draft Patent License, AutoGrip continued selling hand tools allegedly covered by the Patents-in-Suit. Some tools came from the Hanson inventory, on which royalties had already been paid, while others were newly manufactured and thus triggered AutoGrip's royalty obligations under the parties' oral license.

46. In or about September 2017, AutoGrip and its procurement company both informed Defendant Mr. Poole that pursuant to the deal AutoGrip had disclosed in or about May of 2017, AutoGrip had begun making sales to Advance Auto in the third quarter of 2017 and would be making a quarterly royalty payment thereon no later than October 31, 2017.

47. On or about October 12, 2017, AutoGrip made the quarterly royalty payment to Armor that it had discussed with Mr. Poole.

48. Pursuant to the parties' oral license, as reflected in the Draft Patent License, quarterly royalty payments and reports were due by the end of the month following the

close of each quarter. Accordingly, on or about October 12, 2017, AutoGrip, using bank information provided for this purpose by Armor, wired a royalty payment of $6,617.36 to Armor and also sent a royalty report. Ex. F (bank statements showing 3Q and 4Q royalty payments).

49. Armor accepted the payment and report.

50. In reliance upon the parties' oral license and LOI, and upon Armor's acceptance of the October 12, 2017 royalty payment and report, AutoGrip continued in its business of distributing hand tools allegedly covered by the Patents-in-Suit.

51. Without warning, on the evening of Friday, November 17, 2017, Armor's in-house counsel, CC'ing Defendants Mr. Poole and PDI, sent AutoGrip an email with the subject line, "Notice of Termination of LOI." The attached letter stated that effective November 20, 2017, the parties' April 24, 2017 LOI and its May 17, 2017 LOI Extension would be "terminated." Ex. G. However, the Notice of Termination went on to state that any business that AutoGrip conducted after November 20, 2017 would "be subject to further negotiations." *Id.*

52. AutoGrip's president, Dave Heiby, immediately reached out to Armor. On Monday, November 20, 2017, he spoke with his usual contact there, Charlie Hilsabeck, who on information and belief is or was Armor's Treasurer and CFO. Mr. Hilsabeck stated that he was glad Mr. Heiby had reached out so quickly because Mr. Hilsabeck was leaving the following day to spend Thanksgiving in Florida.

53. Mr. Hilsabeck then explained that the reason Armor had sent the November 17, 2017 email was that Armor believed AutoGrip was somehow blocking Armor from doing business with factories in China that could manufacture the tools, thereby preventing Armor from competing with AutoGrip, as the parties had agreed Armor could do under the carve-out to exclusivity set forth in the Draft License prepared by AutoGrip's counsel.

54. Mr. Heiby explained that AutoGrip had no power to block anyone from doing business with factories in China, and in any event did not want to and had not been trying to. Mr. Hilsabeck and Mr. Heiby concluded by agreeing to a temporary reprieve to, *inter alia*, allow time for discussions, and scheduled a phone meeting for immediately after the Thanksgiving holiday, on November 30, 2017.

55. The planned phone meeting took place on November 30, 2017, with Armor represented by Mr. Hilsabeck and Brian Chien, and AutoGrip represented by its president, Mr. Heiby.

56. During the November 30 phone meeting, which Mr. Heiby memorialized in written notes, Armor backtracked on and renounced the statements made in the November 17, 2017 email and stated that they would continue working with AutoGrip to finalize a deal.

57. Specifically, Mr. Chien reassured Mr. Heiby that he did not want to put AutoGrip out of business and that in the meantime AutoGrip could continue to do business "under the skeleton of the LOI." He further confirmed that AutoGrip could continue selling to existing customers and could continue calling on, and attempting to close deals with, potential customers in the markets AutoGrip had already been discussing possible deals with, including automobile aftermarket and wholesale.

58. The parties further agreed that the profit-sharing provision, which had begun as 30% of EBIT in the LOI and then been reduced to 30% of net income in the Draft License, "didn't make sense." The parties so agreed because the profit-sharing provision had originally been intended to provide an income stream to Defendant PDI, whom the parties had later agreed should not be a party to any final written license to AutoGrip because, as Armor had

finally informed AutoGrip on or about August 30, 2017, PDI had already granted an exclusive license with sublicensing rights to Armor in exchange for compensation directly from Armor.

59. In summary, during the November 30, 2017 phone call, in exchange for continued payments of the 8% royalty, AutoGrip and Armor extended the existing oral license and LOI, and/or entered into a new oral license and LOI Extension.

60. The following day, Armor sent an email stating that it would “not likely be able to enter into a licensing agreement with AutoGrip, as this will conflict with other licensing deals Armor is currently in the process of negotiating.” Ex. E.

61. Armor’s December 1 email did not purport to terminate the parties’ November 30 oral agreement. *Id.*

62. Armor’s December 1 email did not purport to repudiate or terminate any oral or implied licenses or other contracts between the parties. *Id.*

63. Armor’s December 1 email did not purport to end the parties’ business relationship. *Id.*

64. Armor’s December 1 email did not definitively foreclose the possibility of entering into a written license; rather, it stated only that Armor would “not likely be able to” do so. *Id.*

65. Armor’s December 1 email did not purport to terminate the parties’ negotiations toward a written agreement memorializing the terms of a future business relationship between the parties. *Id.*

66. To the contrary, in the December 1 email Armor’s counsel proposed, as “an alternative to a licensing deal… a distribution deal” under which AutoGrip would be permitted to continue distributing the tools. *Id.* To that end, Armor invited AutoGrip to attend a

meeting in California, which Armor proposed to take place on December 7, 2017, or "after the New Year" if that date was not feasible. *Id.*

67. In the December 1 email, Armor's counsel reiterated three of its previously expressed conditions for any deal: (1) horizontal restraints on competition, *e.g.*, "markets and/or customers that Auto-Grip would be allowed to pursue and not pursue"; (2) a prohibition on AutoGrip designing around the Patents-in-Suit ("No IP workaround by Auto-Grip while the parties are under contract"); and (3) a requirement that AutoGrip continue paying royalties even after the Patents-in-Suit expire ("Residue royalty payments after IP has run for a defined and mutually agreeable term"). *Id.* Armor also added a new condition under which "direct manufacturing" of the tools by AutoGrip would be prohibited. *Id.*

68. AutoGrip's principal, Dave Heiby, initially agreed to fly to San Diego for the proposed meeting. However, he developed a sinus infection and was advised by his doctor not to travel by plane for ten days. Accordingly, he so advised Armor and the parties agreed to speak by phone again in January.

69. In January of 2018, the mother of AutoGrip's principal Dave Heiby experienced a health crisis. Given this problem, in addition to the demands of running AutoGrip's business, communications between AutoGrip and Defendants were temporarily suspended.

70. Pursuant to the parties' existing license, as reflected in the LOI, the Draft Patent License and the parties' course of dealing, on or about January 24, 2018, AutoGrip wired the royalty payment for the fourth quarter of 2017 to Armor and sent the corresponding royalty report. This royalty payment was in the amount of $47,048.63. Ex. F at p.2.

71. Pursuant to the parties' November 30, 2017 agreement, AutoGrip did not pay, and its royalty report did not mention, any 30% of 2017 net income or EBIT amount.

72. Armor accepted the payment and report without comment.

73. On January 25, 2018, the mother of AutoGrip's principal Dave Heiby died. This again left Mr. Heiby too busy to reach out to Defendants. In any event, Defendants did not contact AutoGrip during the end of January, February, or March of 2018.

74. AutoGrip continued doing business in reliance on the parties' November 30, 2017 agreement, as well as on Armor's representation during the first week of December, 2017, that regardless of whether any future written contract would be a license or a distribution deal, AutoGrip was permitted to continue selling hand tools in exchange for the agreed-upon royalty, and would be permitted to do so in the future, whether as a licensee or a distributor.

75. AutoGrip did not hear from Defendants again until late in the evening of April 2, 2018, when Armor's counsel, CC'ing Mr. Poole, PDI and an Armor executive, emailed AutoGrip a cease-and-desist letter ("Cease-and-Desist"). Ex. H.

76. In direct contradiction to the parties' previous agreements and to Armor's acceptance of more than $50,000 in royalties and detailed royalty reports from AutoGrip over the previous six months, the Cease-and-Desist stated that it had "recently come to Armor's attention that Auto-Grip has continued to manufacture, sell and/or distribute tools containing and/or using" the Patents-in-Suit "without Armor's permission or authority." *Id.* It accused AutoGrip of "willfully infringing," threatened AutoGrip with liability "for enhanced damages and attorneys' fees," and demanded that AutoGrip essentially cease doing business. *Id.*

77. Despite the fact that Armor had already received regular royalty reports and royalty payments from AutoGrip, the Cease-and-Desist demanded that AutoGrip provide

Armor with the same information contained in said royalty reports (*e.g.*, number of products sold and "proceeds therefrom") and "pay suitable damages for the infringement." *Id.*

78. On or about April 16, 2018, AutoGrip received another copy of the April 2, 2018 Cease-and-Desist, this time by U.S. mail.

COUNT ONE

(Declaratory Judgment Against All Defendants that AutoGrip Does Not Infringe)

79. Plaintiff repeats and re-alleges the allegations set forth in all the preceding paragraphs as if fully set forth herein.

80. AutoGrip denies that it owes any amount to Defendants, inasmuch as AutoGrip has already paid all royalties that Defendants bargained for under the terms of the parties' LOI, LOI Extension, and oral and/or implied licenses, as well as those set forth in the sublicense between AutoGrip and the previous exclusive licensee of the Patents-in-Suit.

81. AutoGrip denies that it infringes the Patents-in-Suit, inasmuch as all of AutoGrip's sales of the Products were made pursuant to one or more of the following licenses:

(a) AutoGrip's sublicense with C.H. Hanson, the previous exclusive licensee of the Patents-in-Suit;

(b) The oral license that the parties bargained for and entered into in or about November of 2016;

(c) The oral license that the parties bargained for and entered into in or about April of 2017, whose terms were reflected in the April 24, 2017 LOI, the May 17, 2017 LOI Extension and Draft License, and the parties' course of dealing;

(d) The new oral license, or extension of the prior oral license, that the parties bargained for and entered into on or about November 30, 2017; and/or

(e) An implied license created by the parties' course of dealing, including AutoGrip's payment and Defendants' acceptance of quarterly royalties on AutoGrip's sales, and further reflected in Armor's December 1, 2017 email indicating that regardless of whether any eventual future written contract were a license or a distribution deal, AutoGrip would have the right to continue distributing the hand tools in exchange for the agreed-upon royalty.

82. AutoGrip further denies that the Patents-in-Suit are enforceable, inasmuch as Defendants have committed patent misuse by conditioning their execution of a written patent license on unreasonable or even illegal terms, including at least the following:

(a) Adding a provision that AutoGrip would continue paying royalties forever, even after the Patents-in-Suit's 2021 and 2023 expiration dates, in violation of longstanding U.S. Supreme Court authority. *See Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2405 (2015) (declining to overturn *Brulotte v. Thys Co.,* 379 U.S. 29 (1964) (holding that a patentee cannot continue to receive royalties for sales made after its patent expires)); *see also Va. Panel Corp. v. MAC Panel Co*., 133 F.3d 860, 869 (Fed. Cir. 1997) (recognizing "arrangements in which a patentee effectively extends the term of its patent by requiring post-expiration royalties" as "constituting *per se* patent misuse");

(b) Adding provisions for mutual noncompetition, customer and territorial divisions, and other horizontal restraints that would place AutoGrip at risk of civil and even criminal liability for violating federal antitrust laws. The "use of [intellectual property] licenses to effect a horizontal territorial division of a market is a *per se* violation of" the Sherman Act, as are "non-territorial customer restrictions." *Jack Winter, Inc. v. Koratron Co.*, 375 F. Supp. 1, 62-63, 71-72 (N.D. Cal. 1974) (finding patent unenforceable for patent misuse and citing, on antitrust issue, *United States v. Topco Assoc's*, 405 U.S. 596, 608-09 (1972) ("This Court has reiterated time and time again that 'horizontal territorial limitations… are naked restraints of trade with no purpose except stifling of competition" and "are *per se* violations of the Sherman Act"));

(c) Adding a provision that would prohibit AutoGrip from designing around the Patents-in-Suit, *i.e.*, would expressly extend Defendants' monopoly power beyond the scope of the Patents-in-Suit. Conditioning the execution of an express license on an agreement by the licensee not to "independently implement the idea" protected by the licensor's patent, even in a way that admittedly does not infringe the patent, is patent misuse. *See Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, at 978-79 (4th Cir. 1990) (applying patent misuse doctrine in a copyright misuse case) (citing *Compton v. Metal Prods., Inc.*, 453 F.2d 38, 45 (4th Cir. 1971), *cert. denied*, 406 U.S. 968 (1972) (holding that such license provisions constitute patent misuse);

(d) Adding a provision giving Defendants control over manufacturing quality, and continuing to insist on such a provision despite AutoGrip's explanation that such a provision could put AutoGrip's trademarks at risk of invalidation due to the requirement that trademark holders maintain quality control over products sold under their marks; and

(e) Requiring AutoGrip to turn over its proprietary customer lists, pricing information, and copies of its contracts with customers, and continuing to insist on such disclosures despite (i) AutoGrip's explanation that its contracts with customers contain confidentiality provisions that prevent AutoGrip from doing so; (ii) the irrelevance of such information to royalty calculations; and (iii) Defendants Mr. Poole and PDI's documented history of using such information to interfere with the contractual relations of licensees of PDI patents, *see SMC Corp. v. Lockjaw, LLC*, 481 F. Supp. 2d 918, 921-23, 930 (N.D. Ill. 2007) (enjoining Mr. Poole, one of his business entities, and "those in active concert" with them from further contacting customers of plaintiff, a licensee of PDI patents, where Mr. Poole and his entities "wrongfully sought to require [plaintiff] to turn over its customer lists and detailed… contact information" and their "ongoing interference with… customers" harmed plaintiff's business).

83. A justiciable controversy therefore exists between AutoGrip and Defendants concerning at least the following:

(a) The terms of the parties' oral and/or implied license;

(b) Whether AutoGrip has, as Defendants allege in the Cease-and-Desist, infringed any of the Patents-in-Suit;

(c) The amount, if any, owed for AutoGrip's sales of the Products; and

(d) Defendants' liability for patent misuse, and thus the enforceability of the Patents-in-Suit.

COUNT TWO

(Breach of Contract by Defendant Armor)

84. Plaintiff repeats and re-alleges the allegations set forth in all the preceding paragraphs as if fully set forth herein.

85. In or about autumn of 2016, Defendants Mr. Poole and PDI directed AutoGrip to continue negotiations toward the final written license with Defendant Armor.

86. On or about April 24, 2017, AutoGrip and Defendant Armor entered into a Letter of Intent ("LOI"), which was drafted by Defendant Armor.

87. The LOI contained a California choice-of-law provision.

88. Defendant Armor, holding itself out as the Licensor and as the agent of Defendants Mr. Poole and PDI, signed the LOI on April 26, 2017.

89. The LOI set forth the "the principal terms" of the "Definitive Agreement," or written patent license, that the parties were negotiating towards.

90. The LOI expressly provided that certain of its paragraphs were binding on the parties, specifically paragraphs 4 through 8 "and the requirement of this paragraph [¶ 1] regarding entry into negotiations."

91. Under California law, a contractual agreement to negotiate towards a contract is itself an enforceable contract, which is breached when a party fails to negotiate in good faith or refuses to negotiate at all. *See, e.g., Copeland v. Baskin Robbins USA*, 96 Cal. App. 4th 1251, 1257-58, 1260-61 (Cal. App. 2002).

92. Good faith requires a negotiating party to refrain from "engaging in conduct which… frustrates the other party's rights to the benefits of the contract," and to "do everything the contract presupposes the party will do to accomplish the agreement's purpose." *Thrifty Payless, Inc. v. The Americana at Brand, LLC*, 218 Cal App. 4th 1230, 1244 (Cal. App. 2013).

93. Under California law, whether the Defendants negotiated in good faith is a question of fact for the jury. *Copeland*, 96 Cal. App. 4th at 1261.

94. The LOI provided that "as soon as practicable following the acceptance and approval of this LOI by the Licensor, the Parties shall enter into negotiations with the

objective of executing the Definitive Agreement. Licensee's counsel shall prepare the initial draft of the Definitive Agreement."

95. As provided in the LOI, counsel for AutoGrip prepared the initial draft of the Definitive Agreement ("Draft License") and, on or about May 17, 2017, AutoGrip sent it to Defendant Armor.

96. The Draft License provided for the same 8% royalty rate that Armor had set forth in the LOI.

97. The Draft License also reflected additional terms that Armor had requested in negotiations that the parties had conducted under the LOI. These additional terms included:

(a) Adding Defendant PDI as a party to the license;

(b) Adding a carve-out to the license's exclusivity provisions in order to permit all three Defendants to make and sell hand tools allegedly covered by the patents, *i.e.*, to compete with AutoGrip;

(c) Providing for quarterly payment of royalties and quarterly furnishing of royalty reports.

98. Paragraph 7 of the LOI provided that, with the exception of certain provisions that would survive any termination, the LOI would "terminate… upon the earlier of (i) execution of the Definitive Agreement… (ii) mutual agreement" of the parties, or "(iii) May 20, 2017."

99. The LOI did not provide for unilateral or at-will termination by either party.

100. Due to the looming May 20 automatic termination date of the LOI, on or about May 17, 2017, together with the Draft License, AutoGrip also sent Armor a one-page signed agreement to extend the LOI ("LOI Extension"), which Armor signed. Ex. B.

101. Neither the LOI nor the LOI Extension prohibited oral modification of those contracts. *See, e.g.*, Ex. B.

102. Despite being contractually bound to negotiate towards a "Definitive Agreement" (written patent license) with AutoGrip, and to do so in good faith, Defendant Armor subsequently failed to negotiate in good faith and then abruptly ceased to negotiate at all.

103. Auto-Grip complied with the LOI by paying for its counsel to draft a detailed Draft License setting forth (1) the principal terms set forth in the LOI and (2) all additional requests that Armor had made as of the drafting date, and sending the Draft License to Armor on or about May 17, 2017.

104. Despite AutoGrip's good-faith compliance with its obligations under the LOI, Armor did not "do everything the contract presupposes the party will do to accomplish the agreement's purpose." *Thrifty*, 218 Cal App. 4th at 1244.

105. For example, Armor never sent back a "redline" (an edited and/or commented upon version) of the Draft License. Armor also never suggested or otherwise sought to negotiate any changes to the existing provisions of the Draft License (*e.g.*, royalty amounts), with just one exception. Specifically, Armor's only stated objection to the existing provisions of the Draft License was that it was styled as an exclusive license to AutoGrip, which Armor claimed was in conflict with the stated desire of all three Defendants to retain the right to practice the patents themselves. AutoGrip therefore pointed out that the Draft License contained, in Paragraph 1.01, a carve-out to exclusivity under which Armor, Mr. Poole and PDI retained, as they had requested, the right to practice the patents themselves.

106. Despite the parties' agreement on the essential terms of the license (namely, the parties, the patents to be included, the permissions granted to AutoGrip, the

royalties to be paid, and the carve-out permitting all three Defendants to compete with AutoGrip), Armor did not sign the Draft License. Instead, Armor conditioned its signing of a written license upon AutoGrip's willingness to add unreasonable and even illegal terms, such as:

(a) An agreement by AutoGrip to continue paying royalties after expiration of the patents, in violation of the law;

(b) An agreement by AutoGrip to enter into horizontal restraints on competition that could expose AutoGrip to civil and criminal liability for antitrust violations;

(c) An agreement by AutoGrip to grant Armor control over manufacturing and quality control, which would have exposed AutoGrip to the potential loss of its trademarks due to the requirement that trademark owners maintain quality control over products bearing their trademarks; and

(d) The disclosure by AutoGrip of customer information that AutoGrip was contractually bound, under the terms of its contracts with customers, not to disclose.

107. Armor unreasonably and in bad faith continued to insist on such conditions even after AutoGrip explained why they were illegal and/or unreasonable.

108. In addition, on information and belief, Armor sought AutoGrip's customer information during negotiations in bad faith. Specifically, on information and belief, Armor sought that information so that Armor could solicit AutoGrip's customers, even though doing so would violate both Armor's good-faith obligations under the LOI and the parties' Non-Disclosure Agreement ("NDA"), which NDA is discussed further below.

109. In addition, Defendants were aware of and encouraged AutoGrip to continue "landing" customers and selling allegedly patented tools while the parties negotiated toward a final written license. Defendants were also aware that in order to land customers and sell tools, AutoGrip had to make investments of time and resources and enter into binding contracts with its customers, any breach of which could expose AutoGrip to financial liability

and reputational harm. Finally, Defendants continued to accept royalty payments from AutoGrip during and after the term of the LOI.

110. Despite being aware that AutoGrip had invested and was still investing time and resources, and had entered into contracts and contract negotiations with customers in reliance on Armor's commitment to negotiate in good faith toward a final written patent license, and despite accepting royalty payments for tool sales that Armor had licensed, encouraged and approved, on November 17, 2017, Armor sent AutoGrip an email that simultaneously (1) purported to terminate the LOI as of November 20, 2017; (2) purported to abruptly and unilaterally terminate any "express or implied" contracts between Armor and AutoGrip as of the same date; (3) ratified and confirmed that AutoGrip's sales prior to November 20, 2017 were made with Armor's permission; and (4) despite the purported termination of the LOI negotiation agreement "with no further extensions," stated that future business between the parties "will be subject to further negotiations." Ex. G.

111. Armor's sending of the November 17, 2017 email violated the covenant of good faith and fair dealing.

112. By conference call on November 30, 2017, Armor and AutoGrip discussed the situation and agreed to essentially return to the status quo of their prior course of dealing and contractual relationship.

113. Despite its contractual commitment in the LOI to negotiate in good faith toward a license between the parties, by email dated December 1, 2017, Armor admitted that during the term of the parties' LOI, Armor had been negotiating multiple other potential licensing deals that it believed conflicted with the one it had been negotiating with AutoGrip. *See* Ex. E.

114. In its December 1, 2017 email, despite the parties' LOI and their oral agreement of November 30, 2017, Armor indicated that it intended to continue negotiating the aforementioned competing and conflicting agreements and that, if those negotiations came to fruition, they would "likely" prevent Armor from entering into the exclusive licensing deal that the parties had been negotiating under the LOI. *Id.*

115. To the extent that Armor now argues that the November 17, 2017 email did, in fact, terminate the parties' business relationship, the parties' negotiations, and/or AutoGrip's right to continue doing business pursuant to, *inter alia*, the parties' course of dealing, that email, together with the December 1 email in which Armor admitted to having engaged in conflicting negotiations during the term of the parties' LOI, is evidence that Armor breached its duty of good faith and fair dealing.

116. AutoGrip has suffered or will suffer damages in the amount of at least $405,000 as a result of Defendants' breach.

COUNT THREE

(Breach of Oral and/or Implied License by All Defendants)

117. Plaintiff repeats and re-alleges the allegations set forth in all the preceding paragraphs as if fully set forth herein.

118. AutoGrip and Defendants Mr. Poole and PDI entered into a temporary oral license in or about November of 2016 to permit AutoGrip to satisfy customer demand while the parties negotiated a final written patent license.

119. In or about autumn of 2016, Defendants Mr. Poole and PDI directed AutoGrip to continue negotiations toward the final written license with Defendant Armor.

120. Although no Defendant so informed AutoGrip at the time, on information and belief, beginning in January, 2017, Armor had become the exclusive licensee of Defendants

Mr. Poole and PDI's patents. Thus, in fact, AutoGrip was negotiating with Armor for a sublicense.

121. On information and belief, under the terms of the license from Defendants Mr. Poole and PDI to Armor, Armor had the right to sublicense the patents. Although sublicensing required Mr. Poole's consent, by the express terms of the license his consent could not be unreasonably withheld.

122. Defendant Armor was aware at the time it drafted and signed the LOI that AutoGrip was already offering allegedly patented tools for sale under the oral license that Defendants Mr. Poole and PDI had granted to AutoGrip.

123. Accordingly, in or about April of 2017 Armor ratified and confirmed the existing oral license to AutoGrip, or in the alternative entered into a new oral license with AutoGrip, and directed AutoGrip to pay any royalties that became due thereunder to Armor.

124. The terms of the parties' oral license were consistent with the essential terms of the proposed Definitive Agreement, as set forth therein and in the LOI: permission for AutoGrip to market and sell tools allegedly covered by the Patents-in-Suit, on the condition that AutoGrip pay an 8% royalty on such sales to Armor.

125. The parties either entered into a new oral license, or agreed to continue operating under the previous oral license, on or about November 30, 2017. Under this license, in exchange for continued payments of the agreed-upon 8% royalty, Defendants granted AutoGrip permission to continue selling to existing customers and to continue calling on, and attempting to close deals with, potential customers in the markets AutoGrip had already been discussing possible deals with, including automobile aftermarket and wholesale.

126. The existence and terms of the parties' express oral license are confirmed by the parties' course of conduct, including Defendants' acceptance, both before and after November 30, 2017, of AutoGrip's 8% royalty payments and of the quarterly royalty reports disclosing AutoGrip's sales.

127. Alternatively, the parties' course of conduct, including Defendants' awareness of and consent to AutoGrip's business, as well as AutoGrip's quarterly sending of royalty payments and reports and Defendants' acceptance of same, created an implied license between the parties.

128. In reliance upon Defendants' representations and upon the parties' license, and in furtherance of the purpose of the license, AutoGrip continued to operate its business, make sales, timely pay quarterly royalties of 8% and send quarterly royalty reports as the parties had agreed.

129. Defendant Armor received and accepted AutoGrip's quarterly payments of 8% royalties, which for the third and fourth quarters of 2017 totaled $53,665.99.

130. Defendant Armor also received and accepted AutoGrip's quarterly royalty reports, which set forth AutoGrip's sales and royalty calculations.

131. On information and belief, in accepting AutoGrip's royalty payments and reports, Armor acted on its own behalf and as agent and representative of, or with the knowledge and consent of, Defendants PDI and Mr. Poole.

132. Notwithstanding AutoGrip's compliance with all its obligations under the license, as well as Armor's receipt and acceptance of AutoGrip's royalty payments and reports, and AutoGrip's reliance upon Defendants' representations, the license and/or the parties' course

of dealing, Armor improperly terminated or purported to terminate the parties' license by sending the April 2, 2018 Cease-and-Desist. Ex. H.

133. In addition, notwithstanding the license permitting AutoGrip to manufacture, sell and distribute the Products, in the Cease-and-Desist Armor accused AutoGrip of willfully infringing the Patents-in-Suit by "continu[ing] to manufacture, sell and/or distribute" the Products. *Id.*

134. On information and belief, in sending the April 2, 2018 Cease-and-Desist, Armor acted on its own behalf and as agent and representative of, or with the knowledge and consent of, Defendants PDI and Mr. Poole.

135. Defendants' improper termination, as well as Defendants' threats of patent infringement litigation, constitute breaches of the parties' license.

136. All contracts are governed by an implied duty of good faith and fair dealing.

137. Defendants' improper termination, threats of patent infringement litigation, and misleading statements in the Cease-and-Desist suggesting that Defendants had not been aware of AutoGrip's sales and had not been paid for the same, when in fact Defendants were aware and had been paid, constitute breaches of their implied duty of good faith and fair dealing.

138. AutoGrip has suffered or will suffer damages in the amount of at least $600,000 as a result of Defendants' breaches.

COUNT FOUR

(Breach of Nondisclosure Agreement by Defendant Armor)

139. Plaintiff repeats and re-alleges the allegations set forth in all the preceding paragraphs as if fully set forth herein.

140. On or about April 26, 2017, Defendant Armor and Plaintiff AutoGrip entered into a Non-Disclosure Agreement ("NDA"). *See* Ex. I.

141. The NDA provided that it would continue for a term of one (1) year, and that if either party terminated the NDA, then "all obligations of confidentiality, non-disclosure, and non-solicitation shall survive… for a period of twenty-four (24) months from the effective date of termination or expiration." *Id.* at ¶ 6.

142. The NDA provided in its Recitals that the parties were entering into the NDA because, *inter alia*, AutoGrip "may disclose or may have already disclosed… certain confidential… customer or other business information which [AutoGrip] desires [Armor]… to treat as confidential, and, further, to safeguard and protect the same from unauthorized disclosure and/or solicitation." Ex. I at 1. This information was expressly defined as "Confidential Information" to which the NDA pertained. *Id.*

143. The NDA further defined "Confidential Information" to include "any customer's identity, customer lists, financial data, … marketing programs… [and] billing data," and that all such information "shall be deemed valuable, proprietary and trade secret information." *Id.* at ¶ 2.

144. The NDA further provided that Armor "shall take all reasonable measures to protect the secrecy of and avoid disclosure and unauthorized use of Confidential Information." *Id.* at ¶ 3.

145. Further illustrating the only permissible uses by Armor of any Confidential Information that Armor received, the NDA provided that Armor "shall not disclose any Confidential Information to [its own] employees, agents, independent contracts and/or other

affiliates, except" as "required… in order to evaluate or engage in discussions concerning the contemplated business opportunity or relationship" between Armor and AutoGrip. *Id.* at ¶ 3.

146. Despite having contractually bound itself to "avoid… unauthorized use of Confidential Information" including customer names and billing information, and to safeguard AutoGrip's customers from "unauthorized… solicitation," on or about April 6, 2018, Armor, without authorization, used a customer name and billing information disclosed to it by AutoGrip to cause reputational harm to AutoGrip and to solicit one of AutoGrip's customers.

147. Specifically, by letter dated April 6, 2018, Armor sent a letter to AutoGrip's customer, Advance Auto, in Roanoke, Virginia. *See* Ex. J. This letter listed four hand tools that Armor believed AutoGrip to have sold to Advance Auto, stated that Armor believed the tools infringed the Patents-in-Suit, and invited Advance Auto, "in advance of any legal proceedings between Armor and Auto-Grip," to contact Armor in order "to discuss the possibility of reaching an alternative arrangement so as to avoid any disruption to Advance's business." *Id.*

148. By letter dated April 27, 2018, Advance Auto informed AutoGrip that Armor had sent the April 6 letter at Exhibit J.

149. By executing the NDA, Armor "acknowledge[d] and agree[d] that monetary damages may not be a sufficient remedy for unauthorized disclosure of Confidential Information, or for breach of [Armor's] obligation to refrain from the solicitation of… customers of" AutoGrip. Ex. I at ¶ 7.

150. Accordingly, Armor agreed that AutoGrip would be "entitled, without waiving any other rights or remedies, to such injunctive or equitable relief as may be deemed proper by a court… in addition to… any other relief which may be awarded." *Id.*; *see also id.* at ¶

12 ("in the event of… breach [by Armor], intentional or otherwise, … of any of the provisions of this [NDA], [AutoGrip] shall be entitled to institute and prosecute proceedings at law or in equity" and to obtain "any other injunctive or equitable relief" therefor).

151. Armor further agreed that AutoGrip "shall be entitled to an award of costs and attorney fees in any successful suit brought in connection with" the NDA. *Id.* at ¶¶ 12 and 11 ("In the event that any action or proceeding is commenced by [AutoGrip] for the purpose of enforcing any provision of this [NDA]… if [AutoGrip] is successful in or substantially prevails… it shall be entitled… to receive… its costs and attorney's fees").

152. AutoGrip has suffered or will suffer damages in the form of costs and attorney's fees, in an amount to be determined, as a result of Armor's breach.

153. AutoGrip has suffered damages in the form of reputational harm and lost customer goodwill, for which monetary damages may not be a sufficient remedy, as a result of Armor's breach.

COUNT FIVE

(Breach of Implied Covenant of Good Faith and Fair Dealing)

154. Plaintiff repeats and re-alleges the allegations set forth in all the preceding paragraphs as if fully set forth herein.

155. As a matter of law, all contracting parties owe each other a duty of good faith and fair dealing.

156. Defendants breached the duty of good faith and fair dealing by sending the Cease-and-Desist threatening AutoGrip with patent infringement litigation despite (i) the existence of an oral and/or implied license; (ii) AutoGrip's full compliance with all its obligations thereunder; and (iii) Defendants' knowledge that AutoGrip had made investments

and entered into contracts with third parties in reliance upon the parties' license and upon Defendants' representations.

157. Defendants also breached the duty of good faith and fair dealing by sending the April 6, 2018 letter to AutoGrip's customer Advance Auto, when Defendants had known of and consented to AutoGrip's sales to Advance Auto, had in fact congratulated AutoGrip on closing a deal for such sales in or about May of 2017, and had been paid royalties thereon.

158. Defendants' actions in conjuring up false accusations of infringement despite the existence of, and AutoGrip's compliance with, the license violate the spirit of the bargain and constitute bad faith.

159. Defendants' actions in attempting to solicit AutoGrip's customer Advance Auto and to damage AutoGrip's reputation with that customer violate the spirit of the bargain and constitute bad faith.

160. Defendants' actions in accepting the benefits of the parties' bargain, including quarterly royalty payments, while attempting to prevent AutoGrip from realizing the benefits of the bargain, violate the spirit of the bargain and constitute bad faith.

161. Defendants' misuse of the Patents-in-Suit violates the spirit of the bargain and constitutes bad faith.

162. Defendants, while continuing to collect royalties, denied Auto-Grip the benefit of a written license by making unreasonable and even illegal demands as a condition of signing any written license.

163. On information and belief, in sending the Cease-and-Desist letter and the April 6, 2018 letter to Advance Auto, Armor acted on its own behalf and as agent and representative of, or with the knowledge and consent of, Defendants PDI and Mr. Poole.

164. AutoGrip has suffered or will suffer damages in the amount of at least $600,000 as a result of Defendants' breach.

COUNT SIX

(Business Defamation)

165. Plaintiff repeats and re-alleges the allegations set forth in all the preceding paragraphs as if fully set forth herein.

166. Defendant Armor sent a defamatory letter to AutoGrip's customer, Advance Auto, falsely alleging that AutoGrip was illegally selling products that infringed the Patents-in-Suit without permission from, or payment to, Armor. *See* Ex. J.

167. On information and belief, in sending the letter to Advance Auto, Armor acted on its own behalf and as agent and representative of, or with the knowledge and consent of, Defendants PDI and Mr. Poole.

168. Defendants' April 6, 2018 letter to Advance Auto tends to, and was made with the intent to, impugn AutoGrip's honesty and integrity; prejudice AutoGrip in its business or trade; and harm AutoGrip's reputation so as to deter third party Advance Auto from doing business with AutoGrip.

169. Defendants' statement was made with the intent to deter Advance Auto from doing business with AutoGrip, and to improperly profit from AutoGrip's efforts in developing its business relationship with its customer by "poaching" AutoGrip's customer after AutoGrip had invested the time, effort and resources in closing the deal and maintaining customer satisfaction. Indeed, Armor's letter expressly invites Advance Auto to cease doing

business with AutoGrip and instead to procure allegedly equivalent products from Armor. *See* Ex. J.

170. At the time the defamatory statements were made, Defendants knew or should have known that AutoGrip had, less than one year earlier, disclosed its negotiations and subsequent contract with Advance Auto to Defendants, and that Defendants had not only consented thereto but had congratulated AutoGrip on landing the deal.

171. At the time the defamatory statements were made, Defendants knew or should have known that AutoGrip had informed them in or about September of 2017 that sales to Advance Auto had begun; that AutoGrip had begun making royalty payments thereon in or about October of 2017; and that Defendants had consented to such sales and accepted such royalty payments.

172. At the time the defamatory statements were made, Defendants knew or should have known that given their knowledge and approval of AutoGrip's contract with Advance Auto, Defendants were estopped from claiming that AutoGrip's sales to Advance Auto were made without Defendants' license and permission.

173. At the time the defamatory statements were made, Defendants knew or should have known that an express oral license or an implied license existed between Defendants and AutoGrip, and that AutoGrip's sales to Advance Auto (as well as AutoGrip's royalty payments to Armor) were made pursuant to that license.

174. At the time the defamatory statements were made, Defendants knew or should have known that AutoGrip, in entering into its contract with Advance Auto and beginning the manufacturing and sales cycle pursuant to that contract, had acted in reliance upon the parties' express oral and/or implied license, and in reliance upon Defendants' knowledge and

approval of AutoGrip's negotiations with Advance Auto. Accordingly, Defendants knew or should have known that they were estopped from claiming that AutoGrip's sales to Advance Auto were made without Defendants' license and permission.

175. Defendants' defamatory statements to Advance Auto have caused damage to AutoGrip in at least the forms of lost customer goodwill and legal expenses.

COUNT SEVEN

(Business Conspiracy in Violation of Va. Code 18.2-499 and 18.2-500)

176. Plaintiff repeats and re-alleges the allegations set forth in all the preceding paragraphs as if fully set forth herein.

177. At an industry conference in or about May of 2017, AutoGrip informed Armor and Mr. Poole that AutoGrip had closed a deal to sell allegedly patented hand tools to Advance Auto. Defendants congratulated AutoGrip for this.

178. In or about September 2017, AutoGrip informed Defendant Mr. Poole that pursuant to the deal AutoGrip had disclosed in or about May of 2017, AutoGrip had begun making sales to Advance Auto in the third quarter of 2017 and would be making a quarterly royalty payment thereon no later than October 31, 2017.

179. On or about October 12, 2017, AutoGrip paid those royalties to Armor.

180. Despite knowing of these sales, consenting to them and accepting royalties for them, some six months later Defendant Armor, in combination with Defendants PDI and Mr. Poole, cooperated and conspired for the purpose of willfully and maliciously injuring AutoGrip in its business in at least the following ways:

(a) Defaming AutoGrip's business by sending a letter, on or about April 6, 2018, to the Virginia headquarters of AutoGrip's customer, Advance Auto, which letter falsely alleged that AutoGrip was illegally selling products that infringed the Patents-in-Suit without consent from or payment to Armor;

(b) Attempting to tortiously interfere with AutoGrip's contract with Advance Auto, which contract was formed in Virginia;

(c) Improperly, without lawful justification, and in violation of the NDA, soliciting AutoGrip's customer, Advance Auto; and

(d) Improperly, without lawful justification, and in violation of the NDA, misusing confidential, trade secret customer information disclosed by AutoGrip under the NDA, to AutoGrip's detriment, by falsely informing AutoGrip's customer, via letter sent to the customer's Virginia headquarters, that AutoGrip was infringing the Patents-in-Suit.

181. Defendants' actions have caused damage to AutoGrip in at least the forms of lost customer goodwill, reputational harm and legal expenses.

JURY DEMAND

AutoGrip demands a trial by jury on all of its claims that permit trial by jury.

PRAYER FOR RELIEF

WHEREFORE, AutoGrip respectfully requests that this Court award the following relief:

1. Money damages, including costs and attorney's fees, in an amount to be determined at trial;

2. A declaration that the parties' licenses to the Patents-in-Suit are binding and enforceable;

3. A declaration that Defendants' conditioning their execution of a written license on AutoGrip's compliance with illegal and/or unreasonable demands constitutes patent misuse, rendering the Patents-in-Suit unenforceable;

4. An injunction ordering Armor and its owners, officers, employees, contractors, business partners and affiliates to refrain from contacting AutoGrip's customers or otherwise misusing AutoGrip's confidential business information; and

5. All such other relief as this Court deems just and appropriate.

Dated: July 11, 2018

Respectfully submitted,

By: /s/ R. Frederic Henschel
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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on July 11, 2018, I served the foregoing Amended Complaint by ECF, which is valid service on all counsel of record.

By: /s/ R. Frederic Henschel
R. Frederic Henschel
VA I.D. No. 44893