

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION**

LUNAREYE, INC.	§	
	§	
vs.	§	
	§	Case No. 9:05CV188
INDEPENDENT WITNESS, INC.,	§	
BP AMERICA PRODUCTION COMPANY	§	Jury Demanded
and BP AMERICA, INC.	§	

PLAINTIFF'S FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

COMES NOW, LUNAREYE, INC. (hereinafter "Plaintiff" or "LunarEye"), complaining of INDEPENDENT WITNESS, INC., BP AMERICA PRODUCTION COMPANY and BP AMERICA, INC., collectively referred to as "Defendants", and for cause of action would respectfully show the following:

I. PARTIES

1. Plaintiff is a Texas corporation with its principal place of business in Liberty County, Texas.
2. Defendant INDEPENDENT WITNESS, INC., (hereinafter "IWI") is a Utah Corporation with its principal place of business in Salt Lake City, Utah. IWI has answered and appeared through counsel.
3. Defendant BP AMERICA PRODUCTION COMPANY (hereinafter "BPAP") is a Delaware Corporation, authorized to do business in Texas with its principal place of business in Texas. BPAP has answered and appeared through counsel.
4. Defendant BP AMERICA, INC. (hereinafter "BP") is a Delaware Corporation, authorized to do business in Texas with its principal place of business in Texas. BP has answered and appeared through counsel.

II. JURISDICTION & VENUE

5. This Court has jurisdiction over LunarEye's patent infringement claims pursuant to the patent laws of the United States, 35 U.S.C. §§ 1 et seq., and pursuant to 28 U.S.C. § 1338.

6. This Court has supplemental jurisdiction over LunarEye's various state common-law claims pursuant to 28 U.S.C. § 1367(a). Plaintiff's common-law claims are inextricably intertwined with the claims within the Court's original jurisdiction in that they form a part of the same case or controversy under Article III of the United States Constitution. All parties have stipulated to the Court's supplemental jurisdiction.

7. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b), 1391(c) and 1400(b) because LunarEye has regularly conducted business in this judicial district and certain of the acts complained herein occurred in this judicial district.

III. FACTS

8. This action arises in part out of IWI's infringement, and BPAP and BP's inducement of such infringement, of four (4) patents owned by LunarEye.

A. Course of Proceedings.

9. This case relates to the case styled LunarEye, Inc. v. Independent Witness, Inc., BP America Production Company and BP America, Inc., Case No. CV 68,955, in the 253rd Judicial District of Liberty County, Texas (the "State Court Case"). The State Court Case was non-suited by LunarEye, and is no longer pending. This case was filed in this Court due to this Court's exclusive jurisdiction over Plaintiff's patent claims.

B. Background Facts

10. This case is brought to redress IWI's outright theft of Plaintiff's patents and intellectual property, IWI's duplicity in performance of its duty as a joint-venturer and partner, and BPAP and BP's actions, both directly and in concert, with IWI to deprive Plaintiff of the fruits of its patents, intellectual property, and contractual and common-law relationships.

11. In or around October of 2001, LunarEye president, Alvin C. Allen, Jr. ("Allen"), made an introduction with IWI. This meeting occurred a few days after Allen was awarded the first of his patents, which are described in more detail below.

12. From October of 2001 until February of 2002, LunarEye, IWI, and a company called Sabioso, Inc, f/k/a Productive Data Systems, Inc. ("Sabioso") discussed strategies for collectively contributing their various technology assets to create a unified solution to allow fleet managers to monitor their vehicles and acquire data during both regular operation and mishap situations. The relationship with LunarEye is succinctly described in an IWI letter to a potential customer:

As the Vice President of Sales and Marketing of Independent Witness, I would like to provide a testimonial on the tracking, locating, tracing and asset management device produced by the LunarEYE Corporation (LunarEYE). Independent Witness has a strategic partnership with LunarEYE and produces a device that when merged with the LunarEYE product provides a wide array of event, data and programmable reports with a unique power management system that has current field strength of up to five years.

13. The "strategic partnership" between LunarEye and IWI was formalized on or about February 7, 2002, by and through the parties' Memorandum of Understanding (the "MOU"). A true and correct copy of the MOU is attached hereto as Exhibit A.

14. The MOU formalized LunarEye and IWI's intent to form a joint venture partnership, and included an explicit agreement to share profits, losses, management responsibilities, and to

combine for a common business enterprise. The MOU also explicitly recites that each party retains full ownership and control of its own intellectual property. [MOU at ¶ 6.2, p. 5].

15. The parties decided to market their joint venture as “Guardian Technologies,” and developed voluminous marketing materials and a specific logo for this purpose.

16. In or around December of 2002, IWI employee Dave Clark and Allen met with BPAP/BP employee Sheehan Gallagher to discuss a potential sale of Guardian Technologies to BPAP/BP. In Clark’s January 3, 2003, letter to Gallagher, Clark specifically referred to Guardian Technologies and IWI’s combination with LunarEye and Sabioso.

17. Also on January 3, 2003, the parties collectively submitted a document to BPAP/BP entitled “Global Safeguard Monitoring Proposal.” In IWI’s presentation to BPAP/BP, it utilized a PowerPoint presentation describing a “strategic partnership” between IWI, LunarEye, and Sabioso for creation and implementation of Guardian Technologies. That same presentation made clear that LunarEye owned the patents relating to its portion of the Guardian Technologies solution.

18. BPAP/BP issued a formal Request for Proposal (“RFP”) to Global Safeguard as the potential bidder.

19. In or around July of 2003, IWI deliberately and without the knowledge or consent of its joint venture partners submitted a RFP for the work in question solely in its own name, totally omitting Global Safeguard or LunarEye.

20. Through the Summer of 2003 and into September, IWI made continued representations and statements to Plaintiff professing its commitment to the joint venture partnership.

21. On September 22, 2003, BPAP and IWI entered into a Master Supply Agreement (the “BP Agreement”), contract BPM-03-01586.

22. It was discovered in October of 2003 by LunarEye and Sabioso that IWI had substituted its name in place of Guardian Technologies.

23. Even after Plaintiff's discovery of IWI's misappropriation of the BPAP/BP business opportunity, IWI continued to mislead and induce LunarEye's continued performance by promises of license agreements by which IWI could legally avail itself of LunarEye's patented intellectual property. However, these later agreements were never executed.

24. LunarEye determined it was in all parties mutual best interest to continue to grant its support to IWI in the implementation and testing of the Guardian Technologies device with BPAP/BP, and continued to fully perform its contractual obligations under the MOU.

25. LunarEye, acting in reliance on IWI's contentions and continued representations that LunarEye would still participate in the revenues associated with the BP opportunity, worked to develop additional technologies. These efforts eventually produced a "BP Board," which included the patented technologies discussed below, in addition to the new features.

26. IWI, through its continued work with LunarEye, had complete access to the BP Board, together with all firmware developed by LunarEye for use on the BP Board. This firmware was predominantly written by LunarEye engineer Dennis Jump, and e-mailed directly to IWI officer Corey Catten.

27. Also in October of 2003, IWI directed its employee, Mark Wood, to secretly replicate the LunarEye device. Wood was given the V.2.10 version of the LunarEye device, which he disassembled and analyzed. He was instructed to replicate the functionality of the LunarEye device, and to also meet the additional specifications imposed by BP/BPAP (e.g. seat-belt alarms, emergency

switch, etc). Wood and the secret IWI design team had full access to LunarEye's hardware, firmware, and design specifications.

28. On December 14, 2003, in the midst of IWI's secret plot to replicate the LunarEye device, while simultaneously inducing LunarEye to continue to provide its trade secrets and support to the project, IWI president Luther Perkins crystallized IWI's plot to steal LunarEye's intellectual property while fraudulently inducing continued performance:

From: luther ([luther@iwiwitness.com])
Sent: Sunday, December 14, 2003 9:54 PM
To: Evan Hill (ehill@iwiwitness.com)
Subject: Lunar Agreement

Evan,

Can you give me the status of the LunarEye agreement? What is your feelings about stringing this out by negotiating the LOC ever if we have to compromise a bit on price, doing so, will allow us to prolong the agreement until after the one hundred are installed?

29. Unaware of its partners' fraudulent designs, LunarEye fully supported and participated in these pilot tests, which were conducted during December of 2003 to February of 2004.

30. On February 9, 2004, IWI disclosed to its investors its plan to divert the entire BP "value chain" away from its partners.

We continue to fulfill on **British Petroleum's \$1.1 million purchase order** for the initial 750 driver monitor units of a potential 15,000 unit order. We have installed 103 units in a pilot phase. The three areas for the pilot phase are Longview, TX, Farmington, NM, and Wamsutter, WY.

The revenue opportunity over the next quarter is around \$2.0 million, with net margins around 20%. Our partners are Lunar Eye and Sabioso. However, we have built out own portal to replace Sabioso's functions and we are testing our own GPS/Wireless/Satcom product to bring all pieces of the value chain into Independent Witness. Additional revenue opportunities from the increasingly valuable database grow and add to the value chain as more BP vehicles come on line.

31. On or about March 11, 2004, BPAP/BP called a meeting to address the obvious rift that had developed between IWI, LunarEye, and Sabioso.

32. BPAP/BP first met with LunarEye, and Allen told BPAP/BP that IWI did not have authority to use LunarEye's patented technology, and that IWI had misrepresented LunarEye as the source of problems in the test pilot program.

33. Also on March 12, 2004, IWI president Luther Perkins faxed a letter to Allen stating IWI was terminating LunarEye as a vendor on the BP Agreement.

34. Thereafter, upon information and belief, IWI has continued to illegally avail itself of LunarEye's patented technologies and otherwise protected intellectual property in its performance under the BP Agreement.

B. Patent Infringement Allegations.¹

35. On October 2, 2001, U.S. Patent No. 6,297,768 B1, entitled "TRIGGERABLE REMOTE CONTROLLER" ("the '768 patent"), was duly and legally issued to inventor Alvin C. Allen, Jr. A true and correct copy of the '768 patent is attached hereto as Exhibit B.

36. On November 5, 2002, U.S. Patent No. 6,476,763 B2, entitled "TRIGGERABLE REMOTE CONTROLLER" ("the '763 patent"), was duly and legally issued to inventor Alvin C. Allen, Jr. A true and correct copy of the '763 patent is attached hereto as Exhibit C.

37. On November 19, 2002, U.S. Patent No. 6,484,035, entitled "APPARATUS AND METHOD FOR TRIGGERABLE LOCATION REPORTING" ("the '035 patent"), was duly and

¹ Plaintiff has maintained all patent infringement allegations for the simple reason that IWI has failed to produce all iterations of its offending device, making it impossible for Plaintiff to determine whether patents other than the 035 patent are implicated.

legally issued to inventor Alvin C. Allen, Jr. A true and correct copy of the '035 patent is attached hereto as Exhibit D.

38. On March 23, 2004, U.S. Patent No. 6,710,738 B2, entitled "TRIGGERABLE REMOTE CONTROLLER" ("the '738 patent"), was duly and legally issued to inventor Alvin C. Allen, Jr. A true and correct copy of the 738 patent is attached hereto as Exhibit E.

39. LunarEye is the owner by assignment of the '768, '763, '035, and '738 patents with full and exclusive right to bring suit to enforce these patents.

40. The '768, '763, '035, and '738 patents relate generally to a triggerable location-reporting apparatus comprising: (a) a location-signal generating device configured to produce a location signal including location data when enabled; (b) a data selecting device for selecting less than all of the location data to include in the location signal; (c) a telemetry transmitter coupled to the data selecting device configured to transmit the location signal when enabled; (d) an enable controller configured to enable the location-signal generating device and the telemetry transmitter when it receives a trigger signal to then disable it; and (e) wherein the data selecting device reorders the selected data location.

41. On information and belief, IWI has been and is infringing, contributing to infringement, and inducing BPAP and BP to infringe the '768, '763, '035, and '738 patents by making, using, offering for sale, selling or importing, or reverse-engineering devices that incorporate items protected by the '768, '763, '035, and '738 patents. BP and BPAP have been and continue to infringe the '768, '763, '035, and '738 patents by making or using devices that incorporate the technology embodied in the '768, '763, '035, and '738 patents. The Defendants' acts of infringement have occurred within this district and elsewhere throughout the United States.

42. On information and belief, IWI has willfully infringed the '768, '763, '035, and '738 patents by continuing its acts of infringement after being on notice of these patents.

43. On information and belief, BPAP and BP acted in concert with IWI to infringe the '768, '763, '035, and '738 patents.

IV. CAUSES OF ACTION

A. PATENT INFRINGEMENT.

44. LunarEye repeats and re-alleges the allegations of paragraphs 1 through 43 above as if fully set forth herein.

45. In violation of 35 U.S.C. § 271, IWI has infringed and its continuing to infringe, literally and/or under the doctrine of equivalents, the '768, '763, '035, and '738 patents by practicing one or more claims of the '768, '763, '035, and '738 patents in its manufacture, use, offering for sale, sale and/or importation of electronic devices in use for the BP Agreement.

46. IWI's acts have been willful and with full knowledge of the legally protected status of the '768, '763, '035, and '738 patents.

47. In violation of the 35 U.S.C. 271, BP and BPAP have infringed and continue to infringe, literally and/or under the doctrine of equivalents, one or more of the claims of the '768, '763, '035, and '738 patents by making or using devices in accordance with the BP Agreement.

48. BP and BPAP's acts have been willful and with full knowledge of the legally protected status of the '768, '763, '035, and '738 patents.

49. BPAP/BP has acted in concert with IWI, has acted affirmatively to induce IWI to infringe upon the '768, '763, '035, and '738 patents, has otherwise contributed to the infringement, and is therefore jointly and severally liable with IWI for all of LunarEye's damages.

50. LunarEye has been damaged by the Defendants' infringement and, unless each Defendant obtains a license to the '768, '763, '035, and '738 patents or is enjoined by the Court, the Defendants will continue their infringing activity and LunarEye will continue to be damaged.

B. BREACH OF JOINT VENTURE/PARTNERSHIP AGREEMENT

51. LunarEye repeats and re-alleges the allegations of paragraphs 1 through 50 above as if fully set forth herein.

52. IWI and LunarEye agreed by and through the MOU to (i) share profits; (ii) share losses; (iii) share management responsibilities; and (iv) combine for a common business purpose. IWI breached this agreement through its various misrepresentations, and through the "termination letter" of March 12, 2004. LunarEye fully performed its agreement and IWI did not. LunarEye suffered damages as a result of this breach.

53. LunarEye is entitled to reasonable attorney's fees pursuant to TEX. CIV. PRAC. & REM. CODE ANN. § 38.001.

54. All conditions precedent have been performed or have occurred.

C. BREACH OF FIDUCIARY DUTY

55. As a joint venturer and partner to LunarEye, IWI owed LunarEye a fiduciary duty of candor, fairness, and to refrain from usurpation of business opportunities. IWI's actions in stealing the BP opportunity constitute a clear case of breach of fiduciary duty.

56. IWI is therefore obliged to disgorge all fees, revenue, or any other remuneration from the BP Agreement to its joint venture/partner, LunarEye.

D. PROMISSORY ESTOPPEL/DETRIMENTAL RELIANCE/QUANTUM MERUIT/UNJUST ENRICHMENT.

57. LunarEye justifiably relied to its detriment on IWI's claims that LunarEye was a joint venture/partner with IWI.

58. LunarEye performed valuable services in developing additional technologies for the BP opportunity, and IWI accepted the benefit of those services. LunarEye is entitled to receive the reasonable value of the services it performed and the technology that was misappropriated, together with its out-of-pocket costs and expenses incurred.

59. IWI has been unjustly enriched by accepting the benefit of LunarEye's work and providing no compensation.

60. All conditions precedent have been performed or have occurred.

E. FRAUD

61. IWI represented to LunarEye that IWI and LunarEye were joint venturers/partners, and that they would share in the profits of the BP opportunity. LunarEye relied on these representations, which were false when made, or were made recklessly as to the truthfulness of the statements. As a direct and proximate result of these false statements, LunarEye has been damaged.

F. NEGLIGENT MISREPRESENTATION

62. IWI represented to LunarEye that IWI and LunarEye were joint venturers/partners, and that they would share in the profits of the BP opportunity. These representations were made in the course of IWI's business; IWI, through its agents, supplied apparently false information for the guidance of LunarEye; IWI did not exercise reasonable care or competence in obtaining or

communicating the information to LunarEye; LunarEye justifiably relied on this representation; and LunarEye was damaged as a direct and proximate result.

G. TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONSHIP.

63. There was a reasonable probability that LunarEye would have entered into a business relationship with BPAP/BP, IWI intentionally interfered with that relationship, IWI's conduct was independently tortious and unlawful, the interference was the proximate cause of LunarEye's injury, and LunarEye suffered damage as a result.

H. CONSPIRACY.

64. BPAP/BP was put on notice of IWI's illegal and tortious acts in the March 11, 2003 meeting. Despite clear notice, BPAP/BP continued to work with IWI, and does to this day. As such, BPAP/BP has conspired with IWI for the conduct alleged herein, and is jointly and severally liable for all damages.

I. MISAPPROPRIATION OF TRADE SECRETS.

65. IWI, through its confidential and fiduciary relationship with LunarEye, acquired access to LunarEye's patented technology. In addition, IWI acquired access to LunarEye's significant modification and work to its patented technology in the development of the BP Board. IWI, without permission or legal authority from LunarEye, misappropriated this technology for use in the BP Agreement. As a direct result of this misappropriation, LunarEye has been damaged.

66. This trade secret material was comprised of dozens of iterations of firmware, all of which was designed by LunarEye, and then sent to IWI for use in the ongoing development of the BP Board. Most of these files were created by LunarEye engineer Dennis Jump, and directly e-mailed to IWI employee Corey Catten in 2003 and early 2004. This firmware, together with the

V.2.10 version of the LunarEye VDR, were all in the possession of IWI during the time period when it utilized Mark Wood to covertly replicate LunarEye's technology.

67. As a matter of Texas law IWI's wrongful use of LunarEye's technology has caused irreparable injury, and barring a license agreement or an injunction by this Court, such irreparable injury will continue.

F. BUSINESS DISPARAGEMENT

68. Throughout 2003 and March of 2004, IWI made repeated false publications of LunarEye's products and capability to support them. On several occasions BP vehicles encountered driving conditions that should have triggered a transmission, but did not. IWI communicated to BP that this was due to problems with the LunarEye portion of the VDR, when in truth it was due to IWI's witness overloading system memory with false events. IWI's lead engineer, Mark Wood, indicated the Witness' propensity for issuing "false positives" had plagued the system since its inception, but were ignored in an effort to "make a buck."

69. The false publications were witnessed by Mike Mitchell of Sabioso, who characterized IWI's assessment of LunarEye's responsibility for problems as "ridiculously disproportionate."

70. IWI published this false information with malice and in an effort to convince BP to accede to the wrongful termination of LunarEye from the VDR project.

71. IWI had no privilege to publish the false remarks;

72. The publication caused LunarEye special damages in the form of losing the VDR project.

G. EXEMPLARY DAMAGES

73. Plaintiff requests exemplary damages for all causes of action for which exemplary damages are available pursuant to Texas law.

VI. JURY DEMANDED

74. Pursuant to Fed. R. Civ. P. 38(b), Plaintiff demands a trial by jury of all issues raised by this Complaint which are triable by jury.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays for the following relief:

1. A preliminary and permanent injunction against IWI, its officers, agents, servants, employees, attorneys, all parent and subsidiary companies, all assignees and successors in interest and those persons in active concert or participation with IWI, including BPAP/BP, and enjoining them from continuing acts of infringement of LunarEye's patents;
2. All actual damages;
3. A trebling of said damages pursuant to 35 U.S.C. §204;
4. Attorney's fees pursuant to 35 U.S.C. §205 and TEX. BUS & COM. CODE Ann. §38.001;
5. All costs of court; and
6. Any such other relief that this Court deems just and proper.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that pursuant to the Fed. R. Civ. P., a true and correct copy of the foregoing First Amended Complaint was served on all known counsel of record via facsimile, certified mail, regular mail and/or electronic mail on this 28th day of June, 2006.



E. Armistead Easterby