

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

NEXANS INC.,

Plaintiff,

v.

GENERAL CABLE TECHNOLOGIES
CORPORATION AND GENERAL CABLE
INDUSTRIES, INC.,

Defendants.

GENERAL CABLE TECHNOLOGIES
CORPORATION AND GENERAL CABLE
INDUSTRIES, INC.,

Counterplaintiffs,

v.

NEXANS INC.,

Counterdefendant

Case No. 2:07-cv-2296 (EL)

JURY TRIAL DEMANDED

FILED

APR 22 2008

MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

FIRST AMENDED COMPLAINT

Plaintiff Nexans Inc. ("Nexans"), by and through its attorneys, hereby alleges as follows:

1. This is a complaint for declaratory judgment of invalidity and non-infringement of the claims of U.S. Patent No. 5,767,441 ("the '441 Patent"), which, on information and belief, is currently assigned to Defendant General Cable Technologies Corporation ("GCTC"). On information and belief, Defendant General Cable Industries, Inc. ("GCI") is an exclusive licensee of the '441 Patent having the sole right to bring an infringement action with respect to the '441 Patent. (GCTC and GCI are herein collectively referred to as "General Cable"). A true and

correct copy of the '441 Patent is attached hereto at Exhibit A.

THE PARTIES

2. Plaintiff Nexans is a Delaware corporation having a principal place of business at 132 White Oak Road, New Holland PA 17557.

3. Nexans is informed and believes that the General Cable Defendants are Delaware corporations having a principal place of business at 4 Tesseneer Drive, Highland Heights, Kentucky 41076, and an affiliate office located at 3101 Pleasant Valley, Blvd., Altoona, Pennsylvania 16603.

JURISDICTION AND VENUE

4. Nexans seeks declaratory relief under the Declaratory Judgment Act, Title 28, United States Code Sections 2201 and 2202. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1338.

5. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and (c) and 1400(b) in that a substantial part of the acts and omissions giving rise to the claim occurred in this District, and Nexans resides in this District.

ALLEGATIONS

6. Nexans is informed and believes, and based thereon alleges, that GCTC is the current assignee of the '441 Patent, and GCI is an exclusive licensee of the '441 Patent with the sole right to bring an infringement action with respect to that patent.

7. Since January 2007, General Cable has asserted that Nexans had infringed and was continuing to infringe the '441 Patent through Nexans' manufacture and sale of certain electrical communications cables allegedly employing "pre-twist" technology.

8. Since General Cable first asserted that Nexans has infringed the '441 Patent,

representatives from both parties have met and exchanged communications addressing General Cables' allegations. Nexans has informed General Cable that the '441 Patent is invalid and not infringed, and based on the evidence presented to General Cable, has insisted that General Cable withdraw its accusations of infringement of that patent. General Cable has refused to do so.

9. As a result, an actual and justiciable controversy has arisen and now exists between General Cable and Nexans regarding the infringement, validity and enforceability of the '441 Patent. At the time of the original complaint, Nexans had a reasonable apprehension that it would be sued for infringement of the '441 Patent by General Cable, and in fact General Cable has subsequently counterclaimed for infringement of the '441 Patent in this action.

**COUNT I –
DECLARATORY JUDGMENT OF INVALIDITY**

10. Paragraphs 1 through 9 above are hereby realleged as if fully set forth herein.

11. The claims of the '441 Patent are disclosed and enabled by several prior art references which pre-date the filing of the '441 Patent

12. As a result, the claims of the '441 Patent are invalid pursuant to at least 35 U.S.C. §§ 102 and 103.

13. The claims of the '441 patent are also invalid pursuant to 35 U.S.C. § 112.

14. Nexans therefore asks this Court to enter a declaratory judgment declaring that one or more claims of the '441 Patent are invalid.

**COUNT II –
DECLARATORY JUDGMENT OF NON-INFRINGEMENT**

15. Paragraphs 1 through 14 above are hereby realleged as if fully set forth herein.

16. Defendant General Cable has specifically accused at least Nexans' LANmark-2000 products of infringing claims 12-14 and 22-24 of the '441 Patent.

17. Nexans has never infringed, is not currently infringing, and does not threaten to infringe any valid claim of the '441 Patent.

18. Nexans therefore asks this Court to enter a declaratory judgment declaring that Nexans has not been, is not, and does not threaten to infringe the '441 Patent.

**COUNT III –
DECLARATION OF UNENFORCEABILITY**

19. Paragraphs 1 through 18 above are hereby realleged as if fully set forth herein.

20. General Cable, as the assignee made of record, filed United States Patent Application Serial No. 582,699 (“the ‘699 Application”) with the United States Patent Office (“PTO”) on January 4, 1996. The ‘699 Application issued as the ‘441 Patent on June 16, 1998.

A. FAILURE TO DISCLOSE KNOWN MATERIAL PRIOR ART TO THE PTO

21. All patent applicants, their attorneys and those substantively involved in the prosecution owe an uncompromising “duty of candor and good faith” to the PTO.

22. This duty of candor is set forth in 37 C.F.R. § 1.56. When the ‘441 patent was filed, this section provided as follows:

(a) A patent by its very nature is affected with a public interest. The public interest is best served, and the most effective patent examination occurs when, at the time an application is being examined, the Office is aware of and evaluates the teachings of all information material to patentability. Each individual associated with the filing and prosecution of a patent application has a duty of candor and good faith in dealing with the Office, which includes a duty to disclose to the Office all information known to that individual to be material to patentability as defined in this section. The duty to disclose information exists with respect to each pending claim until the claim is cancelled or withdrawn from consideration, or the application becomes abandoned. Information material to the patentability of a claim that is cancelled or withdrawn from consideration need not be submitted if the information is not material to the patentability of any claim remaining under consideration in the application. There is no duty to submit information which is not material to the patentability of any existing claim. The duty to disclose all information known to be material to patentability is deemed to be satisfied if all information known to be material to patentability of any claim issued in a patent was cited by the Office or submitted to the Office in the manner prescribed by §§

1.97(b)-(d) and 1.98. However, no patent will be granted on an application in connection with which fraud on the Office was practiced or attempted or the duty of disclosure was violated through bad faith or intentional misconduct. The Office encourages applicants to carefully examine:

- (1) Prior art cited in search reports of a foreign patent office in a counterpart application, and
- (2) The closest information over which individuals associated with the filing or prosecution of a patent application believe any pending claim patentably defines, to make sure that any material information contained therein is disclosed to the Office.

(b) Under this section, information is material to patentability when it is not cumulative to information already of record or being made of record in the application, and

- (1) It establishes, by itself or in combination with other information, a *prima facie* case of unpatentability of a claim; or
- (2) It refutes, or is inconsistent with, a position the applicant takes in:
 - (i) Opposing an argument of unpatentability relied on by the Office, or
 - (ii) Asserting an argument of patentability.

A *prima facie* case of unpatentability is established when the information compels a conclusion that a claim is unpatentable under the preponderance of evidence, burden-of-proof standard, giving each term in the claim its broadest reasonable construction consistent with the specification, and before any consideration is given to evidence which may be submitted in an attempt to establish a contrary conclusion of patentability.

23. Information is also material to patentability when there is a substantial likelihood that a reasonable examiner would have considered the information important in deciding whether to allow the application to issue as a patent.

24. General Cable, its attorneys and/or those substantively involved in the prosecution of the '441 Patent breached this duty of candor and good faith on multiple separate and independent bases.

1. General Cable Intentionally Withheld Material Prior Art Search Results From the PTO

25. Prior to filing the '699 Application, William J. Brorein (now deceased), one of the named inventors of the '441 Patent, conducted a prior art search relating to the alleged inventions claimed in the '441 Patent.

26. Mr. Brorein's patent search uncovered one or more prior art references which disclosed communications cables that incorporated pre-twisted electrical conductors, such as, for example, pre-twisted electrical conductors used in star quad communication cables.

27. The prior art uncovered by Mr. Brorein's patent search was material to the patentability of the '441 patent.

28. The results of Mr. Brorein's prior art search were discussed with other individuals at General Cable who were substantively involved in the prosecution of the '441 Patent prior to the filing of the '699 Application.

29. Those individuals included at least Jeffrey Poulsen and Tom McLaughlin.

30. At least Mr. Poulsen understood that the prior art references discovered by Mr. Brorein were related to the invention claimed in the '441 Patent.

31. Contrary to the duty of disclosure under 37 C.F.R. § 1.56, at no point during the prosecution of the '441 Patent did General Cable, its attorneys and/or those substantively involved in the prosecution of the '441 Patent disclose the prior art references discovered by Mr. Brorein's prior art search to the PTO.

32. Upon information and belief, these prior art references were intentionally withheld from the PTO to deceive the PTO into granting the '441 patent with claim scope broader than General Cable, its attorneys and/or those substantively involved in the prosecution of the '441 patent knew that they were entitled to. Evidence of this intent includes the failure to

disclose the prior art references discovered by Mr. Brorein to the prosecuting attorneys, approving the prosecuting attorneys to conduct a prior art search for communication cables in which only one conductor is pre-twisted, and the failure to disclose these prior art references despite being placed on notice by the examiner that the prior art actually disclosed to the PTO was not relevant.

2. General Cable Intentionally Withheld Material Prior Art Cables From the PTO

33. The manufacture, sale and use of communication cables which incorporated pre-twisted electrical conductors was also known to General Cable prior to the filing date of the '699 Application.

34. Upon information and belief, General Cable manufactured and sold communication cables that incorporated pre-twisted electrical conductors prior to the filing date of the '699 Application.

35. The prior manufacture, sale and use of communication cables which incorporated pre-twisted electrical conductors was material to the patentability of the '441 Patent.

36. The prior manufacture, sale and use of communication cables which incorporate pre-twisted electrical conductors was discussed among at least the aforementioned individuals (Messrs. Brorein, Poulsen and McLaughlin) who were substantively involved in the prosecution of the '441 Patent prior to the filing of the '699 Application.

37. At least Mr. Poulsen understood that the prior manufacture, sale and use of communication cables that incorporated pre-twisted electrical conductors was related to the invention claimed in the '441 Patent.

38. Contrary to the duty of disclosure under 37 C.F.R. § 1.56, at no point during the

prosecution of the '441 Patent did General Cable, its attorneys and/or those substantively involved in the prosecution of the '441 Patent disclose the prior manufacture, sale and use of communication cables that incorporated pre-twisted electrical conductors to the PTO.

39. Upon information and belief, the prior manufacture, sale and use of communications cables that incorporated pre-twisted electrical conductors was intentionally withheld from the PTO to deceive the PTO into granting the '441 Patent with claim scope broader than General Cable, its attorneys and/or those substantively involved in the prosecution of the '441 patent knew that they were entitled to. Evidence of this intent includes the failure to disclose the prior art pre-twisted communication cables to the prosecuting attorneys, approving the prosecuting attorneys to conduct a prior art search for communication cables in which only one conductor is pre-twisted, and the failure to disclose the prior art pre-twisted communication cables despite being placed on notice by the examiner that the prior art disclosed to the PTO was not relevant.

3. General Cable Intentionally Withheld Material Prior Art Equipment for Manufacturing the Claimed Pre-Twisted Cables From the PTO

40. Equipment used to manufacture communication cables which incorporate pre-twisted electrical conductors was commercially available and known to General Cable, its attorneys and/or those substantively involved in the prosecution of the '441 Patent prior to the filing date of the '699 Application.

41. Among the commercially available equipment that General Cable, its attorneys and/or those substantively involved in the prosecution of the '441 Patent believed could be used for pre-twisting electrical conductors prior to the filing of the '699 Application were neutralizing pay-offs that were specifically designed to manufacture cable pairs which General Cable now contends infringe the '441 Patent.

42. Upon information and belief, the commercial availability of neutralizing pay-offs for pre-twisting electrical conductors was known to the applicants, their attorneys and/or those substantively involved in the prosecution of the '441 Patent from at least as early as March 1993.

43. Upon information and belief, on or about March 1993, one or more of General Cable, its attorneys, and/or those substantively involved in the prosecution of the '441 Patent received advertising material from Watson Machinery Co. which included an advertisement describing neutralizing pay-offs for electrical conductors.

44. The prior commercial availability of equipment for manufacturing communication cables which incorporated pre-twisted electrical conductors, including neutralizing pay-offs, was material to the patentability of the '441 patent.

45. Contrary to the duty of disclosure under 37 C.F.R. § 1.56, at no point during the prosecution of the '441 Patent did General Cable, its attorneys and/or those substantively involved in the prosecution of the '441 Patent disclose the existence of commercial equipment for the manufacture of communication cables that incorporated pre-twisted electrical conductors to the PTO.

46. Upon information and belief, the prior commercial equipment for the manufacture of communication cables that incorporated pre-twisted electrical conductors was intentionally withheld from the PTO to deceive the PTO into granting the '441 patent with claim scope broader than General Cable, its attorneys and/or those substantively involved in the prosecution of the '441 patent knew that they were entitled to. Evidence of this intent includes the failure to disclose the prior commercial equipment to the prosecuting attorneys, approving the prosecuting attorneys to conduct a prior art search for communication cables in which only

one conductor is pre-twisted, and the failure to disclose the prior commercial equipment despite being placed on notice by the examiner that the prior art disclosed to the PTO was not relevant.

B. THE FILING OF INTENTIONALLY FALSE AND/OR MISLEADING STATEMENTS TO THE PTO

1. False and/or Misleading Statements to the PTO Regarding the Filing of the Supplemental IDS After the Notice of Allowability

47. 37 C.F.R. § 1.97(d) governs information disclosure statements (“IDS”) filed subsequent to the issuance of a Notice of Allowability. Among other things, 37 C.F.R. § 1.97(d) requires a certification under paragraph (e) of section 1.97. During the relevant time period discussed below, 37 C.F.R. § 1.97(e) provided as follows:

(e) A statement under this section must state either:

(1) That each item of information contained in the information disclosure statement was cited in a communication from a foreign patent office in a counterpart foreign application not more than three months prior to the filing of the information disclosure statement; or

(2) That no item of information contained in the information disclosure statement was cited in a communication from a foreign patent office in a counterpart foreign application, and, to the knowledge of the person signing the statement after making reasonable inquiry, no item of information contained in the information disclosure statement was known to any individual designated in § 1.56(c) more than three months prior to the filing of the information disclosure statement.

48. During prosecution of the ‘441 Patent General Cable’s attorneys submitted a Supplemental IDS which they falsely and/or misleadingly certified as being in compliance with 37 C.F.R. § 1.97(d)

49. On January 3, 1997, General Cable filed an international counterpart to the ‘441 Patent – PCT Application No. PCT/US97/00029 (“the PCT Application”) – which claimed priority to the ‘699 Application.

50. The PCT Application was filed by Steven Goldstein acting as attorney for the

General Cable. As of at least January 1997, Mr. Goldstein was also the attorney of record acting on the prosecution of the '699 Application.

51. On September 9, 1997, the European Patent Office mailed an International Search Report for the PCT Application to Mr. Goldstein. Mr. Goldstein received that International Search Report shortly thereafter.

52. The International Search Report disclosed the existence of several prior art patents, including U.S. Patent Nos. 4,100,721 ("the '721 Patent") and 4,182,105 ("the '105 Patent").

53. Mr. Goldstein understood that, under the relevant provisions of the CFR, this prior art was required to be disclosed to the PTO within 3 months of receipt of the International Search Report in order to be considered by the PTO.

54. By Mr. Goldstein's own admission, the '721 and '105 Patents "disclose cables which incorporate pre-twisted electrical conductors within them." (January 13, 1998 Supplemental Information Disclosure Statement.)

55. The '721 and '105 Patents were material to the patentability of the '441 Patent.

56. On November 6, 1997, nearly two months after the mailing of the International Search Report, the PTO issued a Notice of Allowability in the '699 Application.

57. At no point prior to the issuance of the Notice of Allowability did General Cable, its attorneys and/or those substantively involved in the prosecution of the '441 Patent disclose the existence of the '721 or '105 Patents, or the International Search Report, to the PTO.

58. Subsequent to the issuance of the Notice of Allowability, a Written Opinion from the International Preliminary Examination Authority concerning the PCT Application was mailed to Mr. Goldstein on November 28, 1997 ("the November 1997 Opinion").

59. The November 1997 Opinion concluded, among other things, that the PCT Application lacked inventive step over the '721 and '105 Patents.

60. On January 13, 1998, over four months after the mailing of the International Search Report, Mr. Goldstein mailed a Supplemental Information Disclosure Statement ("the Supplemental IDS") to the PTO.

61. In the Supplemental IDS Mr. Goldstein disclosed the '721 and '105 Patents and attached a copy of the November 1997 Opinion. Contrary to 37 C.F.R. § 1.97, Mr. Goldstein did not disclose that he had first learned of the '721 and '105 Patents from the International Search Report, mailed in September 1997.

62. Instead, Mr. Goldstein included the following representation in the Supplemental IDS:

Applicants certify that each item listed below was cited in the written opinion, under PCT Rule 66, in the PCT application which corresponds to the present application. Said opinion is dated November 28, 1997, and, therefore, the references are being submitted within three months of the date of said opinion. Accordingly, consideration of these references is appropriate under 37 C.F.R. § 1.97(d).

63. Mr. Goldstein knew that his obligation was to disclose when he first learned of the '105 and '721 Patents in order to comply with 37 C.F.R. § 1.97(d). However, Mr. Goldstein first learned of the '105 and '721 Patents more than three months prior to the date of the Supplemental IDS. Mr. Goldstein, therefore, understood that he could not disclose that he first learned of the '105 and '721 Patents through the International Search Report mailed on September 9, 1997 if he was going to comply with 37 C.F.R. § 1.97(d) so that the PTO would consider them accordingly..

64. Mr. Goldstein's certification of compliance with 37 C.F.R. § 197(d), and the attachment of the November 28, 1997 Opinion, therefore, was false and misleading and was

made, upon information and belief, with the intent to deceive the patent examiner into considering the material prior art contained in the Supplemental IDS after the Notice of Allowability.

65. The falsity of this representation was further concealed from the PTO: (a) by Mr. Goldstein's representation that the Supplemental IDS was being submitted within three months of the November 1997 Opinion because, as the Manual of Patent Examining Procedure ("M.P.E.P.") explains: "Certification by a registered practitioner or any other individual that the statement was filed within the 3-month period of either first citation by a foreign patent office or first discovery of the information will be accepted as dispositive of compliance with this provision in the absence of evidence to the contrary." (M.P.E.P. § 609(B)(2), 6th Ed., 3d Rev. (July 1997).); (b) by Mr. Goldstein's attachment of the November 1997 Opinion which, as the M.P.E.P. directs, the examiner was required to accept as establishing the date that the first communication from a foreign patent office was received: (*Id.* ("If an information disclosure statement includes a copy of a dated communication from a foreign patent office which clearly shows that the statement is being submitted within 3 months of the date of the communication, the copy will be accepted as the required communication.")); and (c) by the failure to disclose or otherwise reference the International Search Report to the PTO which would have demonstrated the untimeliness of the Supplemental IDS.

66. Upon information and belief, the false and/or misleading certification under 37 C.F.R. § 1.97 was made with intent to deceive the PTO into considering the Supplemental IDS after the Notice of Allowability. Evidence of this intent includes the fact that Mr. Goldstein cited to and attached the November 1997 Opinion in the Supplemental IDS, but, only 5 days earlier, on January 8, 1998, in U.S. Application Serial No. 003,942 – a divisional of the '699 Application

– Mr. Goldstein submitted an Information Disclosure Statement that disclosed the ‘105 and ‘721 Patents, and further referred to and attached a copy of the International Search Report in which those Patents were listed.

2. False and Misleading Statements to the PTO in the Supplemental IDS

67. Paragraphs 43 through 66 above are hereby realleged as if fully set forth herein.

68. Among the prior art disclosed in the Supplemental IDS was the ‘721 patent.

69. By Mr. Goldstein’s own admission, the ‘721 patent discloses “cables which incorporate pre-twisted electrical conductors within them.” (January 13, 1998 Supplemental IDS.) In order to distinguish the ‘721 patent, therefore, Mr. Goldstein argued that “The ‘721 patent disclosure is limited to cables comprised of four conductors would together in a star quad configuration wherein all four conductors are pre-twisted. It does not disclose the cable pairs required by the claims of the present application.” (*Id.*) (emphasis in original).

70. This statement was false and/or misleading. In particular, General Cable, its attorneys and/or those substantively involved in the prosecution of the ‘441 patent knew that star quads consisted of two cable pairs. For example, in U.S. Patent No. 4,467,138 entitled “Plural Conductor Communication Wire” issued to William J. Brorein on August 21, 1984 (the “‘138 Patent”), Mr. Brorein (the first-named inventor of the ‘441 Patent) described twisted pairs and star quads as both “contain[ing] two or more pairs of individually insulated wire conductors in twisted groups.” (‘138 Patent at col. 5, lines 48-50.) Moreover, in this same patent Mr. Brorein admitted that it was “obvious” to substitute a twisted pair with a star quad. (*Id.* at col. 4, lines 53-64.)

71. Upon information and belief, this false and/or misleading statements was made with intent to deceive the PTO into granting the ‘441 patent with claim scope broader than

General Cable, its attorneys and/or those substantively involved in the prosecution of the '441 patent knew that they were entitled to. Evidence of this intent includes the failure to timely cite the '721 Patent to the PTO, the false and/or misleading certification under 37 C.F.R. §1.97(d) and the failure to disclose Mr. Brorein's own patent directly contradicting the arguments made to the PTO to secure allowance of the '441 patent.

PRAYER FOR RELIEF

WHEREFORE, Nexans prays for Judgment as follows:

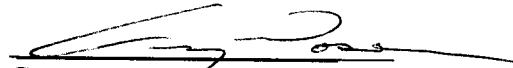
- A. That the Court issue a declaratory judgment that the claims of the '441 Patent are invalid;
- B. That the Court issue a declaratory judgment that Nexans has not infringed, is not infringing, and does not threaten to infringe the '441 Patent;
- C. That the Court issue a declaratory judgment that the '441 Patent is unenforceable due to inequitable conduct;
- D. That this case be deemed exceptional under 35 U.S.C. § 285, thereby entitling Nexans to its reasonable attorneys' fees;
- E. For costs of suit incurred herein; and
- F. For such other and further relief as this Court deems just and proper.

JURY DEMAND

Nexans demands a jury trial on all issues triable to a jury.

Respectfully submitted,

Dated: April 22, 2008



Gary A. Rosen (GAR-4397)
Law Offices of Gary A. Rosen, P.C.
1831 Chestnut Street, Seventh Floor
Philadelphia, PA 19103
Phone: (215) 972-0600
Fax: (215) 972-6006

James S. Blank (Admitted Pro Hac Vice)
Sabrina Y. Hassan (Admitted Pro Hac Vice)
Tzung-Lin Fu (Admitted Pro Hac Vice)
LATHAM & WATKINS LLP
885 Third Avenue, Suite 1000
New York, NY 10022-4802
Phone: (212) 906-1200
Fax: (212) 751-4864
James.blank@lw.com

Alexander E. Long (Admitted Pro Hac Vice)
LATHAM & WATKINS LLP
12638 High Bluff Drive, Suite 400
San Diego, CA 92130
Telephone: (858) 523-5400
Facsimile: (858) 523-5450
alexander.long@lw.com

ATTORNEYS FOR NEXANS INC.

CERTIFICATE OF SERVICE

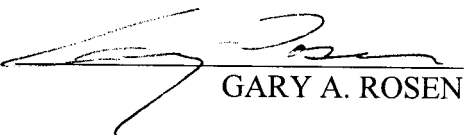
I certify that on April 22, 2008 the foregoing First Amended Complaint was served upon counsel for General Cable Technologies Corporation and General Cable Industries, Inc. by hand delivery:

Grant S. Palmer, Esquire
Blank Rome LLP
One Logan Square
130 North 18th Street
Philadelphia, PA 19103

FILED

APR 22 2008

MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk


GARY A. ROSEN