UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE: METHOD FOR PROCESSING ETHANOL BYPRODUCTS AND RELATED SUBSYSTEMS ('858) PATENT LITIGATION,	)	**1:10-ml-02181 LJM-DML**
THIS DOCUMENT RELATES TO:	)	
1:10-cv-8000-LJM-DML	)	

PLAINTIFF ICM, INC. FIFTH AMENDED COMPLAINT
FOR DECLARATORY JUDGMENT
JURY TRIAL REQUESTED

Plaintiff ICM, Inc. ("ICM"), for its Complaint against defendants GS CleanTech Corporation ("CleanTech") and GreenShift Corporation ("GreenShift") states and alleges as follows:

PARTIES

1. ICM is a Kansas Corporation having its principal place of business at 310 North First Street, Colwich, Kansas.

2. Defendant CleanTech is a Delaware Corporation having its principal place of business at 5950 Shiloh Road East, Suite N, Alpharetta, Georgia 30005. CleanTech is the owner of U.S. Patent Application Serial No. 11/122,859 (the "'859 patent application"), entitled "Method of Processing Ethanol Byproducts and Related Subsystems," which was filed on May 5, 2005. The '859 patent application claims priority to U.S. Provisional Application Serial No. 60/602,050, which was filed on August 17, 2004. The '859 patent application was published as U.S. Patent Application Publication No. 20060041152 on February 23, 2006 and subsequently

issued as U.S. Patent No. 7,601,858 (the "'858 Patent") on October 13, 2009. A true and correct copy of the '858 Patent is attached hereto as Exhibit A. CleanTech is also the owner of U.S. Patent Application Serial No. 11/241,231 (the "'231 patent application"), entitled "Methods of Processing Ethanol Byproducts and Related Subsystems," which published as U.S. Patent Application Publication No. 20060041153 on February 23, 2006 (the "'153 patent application publication"), and which issued as U.S. Patent No. 8,008,516 on August 30, 2011 (the "'516 Patent"). A true and correct copy of the '516 Patent is attached hereto as Exhibit B. CleanTech is also the owner of U.S. Patent No. 8,008,517, which also issued on August 39, 2011 (the "'517 Patent"). A true and correct copy of the '517 Patent is attached hereto as Exhibit D. The '516 Patent and the '517 Patent claim priority to the '859 patent application.

3. Defendant GreenShift is a Delaware Corporation having its principal place of business at 5950 Shiloh Road East, Suite N, Alpharetta, Georgia 30005. Upon information and belief, GreenShift is a holding company and owns 100% of Defendant CleanTech.

JURISDICTION AND VENUE

4. This is an action pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

5. The Kansas U.S. District Court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1338 and 1367.

6. The Kansas U.S. District Court has personal jurisdiction over Defendants because they transact business in this jurisdiction.

7. Venue lies in the Kansas U.S. District Court pursuant to 28 U.S.C. § 1391.

PRELIMINARY ALLEGATIONS

8. The present action involves an actual dispute between Plaintiff and Defendants over Plaintiff's right to sell and/or use equipment to practice corn oil recovery methods that are in part the subject of the claims of the '858 Patent and the '516 Patent and the '517 Patent.

9. Plaintiff ICM designs and builds ethanol production plants for customers and promotes, sells and installs centrifuge equipment to such customers for recovering oil from corn byproducts.

10. On or about July 15, 2009, Defendant GreenShift sent letters to certain customers of Plaintiff ICM (the "July 15 letters") falsely alleging ownership of the '859 and '231 patent applications and falsely notifying such customers of liability for installing systems and practicing corn oil recovery methods within the scope of published claims in the '859 and '231 patent applications under 35 U.S.C. § 154(d). The July 15 letters cited portions of section 154(d), but did not include sub-section (2), which excludes liability when the claims of the issued patent are not substantially identical to the claims that appear in the patent application as it is published. The July 15 letters asserted that the activity of each ICM customer "falls squarely within the scope of the published claims of the Greenshift Applications," and that each customer is "liable under 35 U.S.C. § 154(d) once these patent applications issue." Upon information and belief, GreenShift and/or CleanTech knew that the intended recipients of the July 15 letters were customers of ICM and that ICM had installed the centrifuge systems used in the corn oil recovery processes. GreenShift's and/or CleanTech's false statements were intended to cause ICM's customers to cease conducting business with ICM and to begin conducting business with Greenshift and/or CleanTech.

11. On or about August 6, 2009, ICM through its patent counsel notified Defendant GreenShift in writing that the July 15 letters to ICM customers falsely and materially misrepresented any liability under 35 U.S.C. § 154(d) by virtue of substantial amendments made to the claims of the '859 and '231 patent applications since the publication date of the '859 and '231 patent applications.

12. Thereafter, on or about October 7, 2009, Defendant GreenShift sent additional letters to several ICM customers, including Lifeline Foods LLC (the "October 7 letters"), alleging ownership of the '859 and '231 patent applications and notifying Lifeline Foods of liability for installing systems and practicing corn oil recovery methods within the scope of published claims in the '859 and '231 patent applications under 35 U.S.C. § 154(d). Upon information and belief, GreenShift knew that Lifeline Foods was a customer of ICM and was 49% owned by ICM. Upon information and belief, GreenShift and/or CleanTech knew that ICM had installed the centrifuge systems in Lifeline Foods' facility. ICM owns and operates the centrifuge systems installed in Lifeline Foods' facility to conduct the corn oil recovery processes.

13. At the time of the July 15 letters, Defendant GreenShift knowingly misrepresented itself as the owner of the '859 and '231 patent applications. At the time of the October 7 letters, Defendant GreenShift knowingly misrepresented itself as the owner of the '859 and '231 patent applications.

14. At the time of the July 15 letters and the October 7 letters, the claims pending in the '859 and '231 patent applications had been materially amended such that no claim in such patent applications was substantially identical to the claims pending in such patent applications at the time of publication. Defendant GreenShift knowingly and/or intentionally misrepresented that ICM's customers had liability under 35 U.S.C. § 154(d) in a manner calculated to interfere

with the business relationship and/or contractual relationship between ICM and its customers in regard to sales and installation of centrifuge systems for use in corn oil recovery processes.

COUNT I

UNFAIR COMPETITION UNDER THE LANHAM ACT (15 U.S.C. § 1125(a) AND KANSAS COMMON LAW AND TORTIOUS INTERFERENCE WITH CONTRACTUAL AND BUSINESS RELATIONSHIPS

15. The allegations of paragraphs 1-14 are incorporated by reference as if fully set forth herein.

16. Defendant GreenShift's false and material misrepresentations to ICM's customers constitute unfair methods of competition under the Lanham Act, interference with ICM's existing and prospective business and contractual relationships.

17. ICM has suffered injury as a result of GreenShift's unfair, deceptive and misleading acts in an amount in excess of $75,000.

COUNT II
FOR DECLARATORY JUDGMENT OF NON-INFRINGEMENT, PATENT INVALIDITY AND UNENFORCEABILITY

18. The allegations of paragraphs 1-17 are incorporated by reference as if fully set forth herein.

19. Defendant CleanTech alleges that ICM and its customers infringe each independent claim of the '858 patent.

20. None of the independent claims of the '858 patent identify a quantity of oil that must be obtained from the claimed method of each independent claim.

21. None of the independent claims of the '858 patent identify a rate at which oil must be obtained from the claimed method of each independent claim.

22. None of the independent claims of the ‘858 patent identify a commercial standard for performing the method claimed in each independent claim.

23. Prior to sending the July 15 and October 7 letters, and prior to commencing an action for patent infringement against ICM, neither CleanTech nor GreenShift knew the amount of oil that remained in the concentrated thin stillage stream leaving the centrifuge at any of ICM’s customers, including but not limited to, Cardinal Ethanol, Lincolnland Agri-Energy, Big River Resources Galva and Big River Resources West Burlington.

24. The ‘858 patent does not identify a standard for determining that the concentrated thin stillage stream leaving centrifuge 14 is substantially free of oil.

25. Defendants CleanTech and GreenShift’s acts defined above constitute direct allegations of patent infringement against ICM and its customers with respect to the ‘858 Patent and indirect patent infringement allegations against ICM with respect to the ’858 Patent by virtue of ICM’s promotion, sale and installation of centrifuge systems used in a corn oil recovery process used by ICM’s customers that Greenshift and CleanTech have asserted is the subject of claims of the ‘858 Patent. CleanTech has stated its intentions to assert the ‘516 Patent against ICM. CleanTech is also licensing the ‘516 Patent and the ‘517 Patent as part of a group of “Licensed Patent Rights,” and accordingly, is holding out the ‘516 Patent and the ‘517 Patent as patents for which a license is necessary if one desires to avoid liability for patent infringement. The ‘517 Patent includes claims that are highly similar to those in the ‘858 and ‘516 Patents. The only difference between claim 1 of the ‘517 Patent and claim 8 of the ‘858 Patent is the moisture content percentages present in the post-evaporation syrup stream, with claim 1 of the ‘517 Patent claiming broader moisture content parameters that overlap with the claimed moisture content parameters in claim 8 of the ‘858 Patent. CleanTech has alleged that ICM and its

customers infringe claim 8 of the ‘858 patent. Thus, there is an actual controversy between CleanTech and ICM as to whether ICM infringes at least claim 1 of the ‘517 Patent.

26. David Cantrell, a co-inventor of the ‘858 patent, delivered a letter dated July 31, 2003 to Agri-Energy, LLC (the “July 31, 2003 letter”). A true and correct copy of the July 31, 2003 letter is attached hereto as Exhibit C.

27. Prior to July 31, 2003, David Cantrell was in possession of test results that established that oil could be easily separated from concentrated thin stillage by mechanical processing.

28. In a Declaration to the U.S. Patent and Trademark Office dated November 5, 2010 in connection with U.S. Patent Application Serial No. 12/559,136 (now the ’517 Patent) and U.S. Patent Application Serial No. 11/241,231 (now the ‘516 Patent), David Cantrell stated that he hand delivered the July 31, 2003 Letter to Agri-Energy representatives during a meeting on August 18, 2003. CleanTech argued to the U.S. Patent and Trademark Office that because the July 31, 2003 Letter was not delivered to Agri-Energy prior to August 17, 2003, the Letter was not material to the above-noted patent applications that resulted in the ‘516 and ‘517 Patents.

29. In a Declaration to the U.S. Patent and Trademark Office dated July 10, 2012 in connection with U.S. Patent Application Serial No. 13/107,197, David Cantrell admitted that he delivered the July 31, 2003 letter to Agri-Energy via e-mail on August 1, 2003.

30. During the prosecution of the ‘859 patent application, CleanTech, through its officers David Cantrell and/or David Winsness, knowingly and intentionally withheld information from the U.S. Patent and Trademark Office regarding the August 1, 2003 delivery of the July 31, 2003 letter.

31. The withholding of the information set forth in paragraph 29 above was with the intention of deceiving the U.S. Patent and Trademark Office about a written offer by David Cantrell to Agri-Energy, to sell an oil recovery system for recovering oil from concentrated thin stillage via mechanical separation.

32. During the prosecution of the '231 patent application, CleanTech, through its officers David Cantrell and/or David Winsness, knowingly and intentionally withheld information from the U.S. Patent and Trademark Office regarding the August 1, 2003 delivery of the July 31, 2003 letter. Rather, David Cantrell provided a Declaration to the U.S. Patent and Trademark Office contending that the July 31, 2003 letter was hand delivered to Agri-Energy on August 18, 2003.

33. The withholding of the information set forth in paragraph 29 above was with the intention of deceiving the U.S. Patent and Trademark Office about a written offer by David Cantrell to Agri-Energy, to sell an oil recovery system for recovering oil from concentrated thin stillage via mechanical separation more than one year prior to the August 17, 2004 filing date of U.S. Provisional Application Serial No. 60/602,050.

34. Each of the claims of the '858 Patent, the '516 Patent and the '517 Patent is invalid and/or unenforceable for failure to satisfy the provisions of at least 35 U.S.C. §§ 101, 102, 103, 112 and 37 C.F.R. § 1.56.

35. Plaintiff ICM is entitled to a declaration of non-infringement of the '858 Patent, the '516 Patent, and the '517 Patent.

REQUEST FOR JURY TRIAL

36. Plaintiff requests a trial by jury on all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff ICM prays that:

A. The Court declare that GreenShift's acts constitute unfair methods of competition, interference with ICM's existing and prospective business and contractual relationships and award ICM its damages in an amount to be determined;

B. The Court declare invalid each of the claims of the '858 Patent, the '516 Patent and the '517 Patent;

C. The Court declare that the '858 Patent, the '516 Patent, and the '517 Patent is unenforceable by virtue of CleanTech's inequitable conduct;

D. The Court declare that each of the '858 Patent, the '516 Patent, and the '517 Patent is not infringed by ICM and/or its customers;

E. The Court issue an injunction against GreenShift, CleanTech and anyone acting in privity or concert with them from charging infringement or instituting any legal action for infringement of the '858 Patent, the '516 Patent, and the '517 Patent against ICM or anyone acting in privity with ICM, including the successors, assigns, agents, suppliers, manufacturers, contractors and customers of ICM;

F. ICM be awarded its costs in this action;

G. ICM be awarded attorneys' fees in this action pursuant to 35 U.S.C. § 285; and

H. ICM be awarded such other relief as the Court deems just and equitable.

DICKE, BILLIG & CZAJA, PLLC

Dated: July 30, 2012

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 30, 2012, a copy of the foregoing Plaintiff ICM, Inc. Fifth Amended Complaint for Declaratory Judgment was filed electronically. Notice of this filing will be sent to the parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/John M. Weyrauch