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EDVA Judge Allows Inequitable Conduct Claims to Go Forward but Dismisses Antitrust Counterclaims in Patent Infringement Suit

Virginia Rocket Docket Blog

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In *Bioness Inc. v. Aretech, LLC*, No. 1:22CV679-MSN-IDD, Bioness alleged infringement of 10 patents related to a rehabilitative body weight support device called the “Vector System.” In response, Aretech filed a counterclaim alleging inequitable conduct and anticompetitive conduct in violation of the Sherman Act. The court denied Bioness’ motion to dismiss the inequitable conduct claims but dismissed the antitrust counterclaims.

Inequitable conduct claims in a patent case must satisfy the pleading standard for pleading fraud under Fed. Civ. P. 9(b), which is typically difficult to do. To meet the pleading standard, a party must identify the specific “who, what, when, where and how” of a material misrepresentation or omission committed before the U.S. Patent Office (PTO). Since the accused infringer is not involved in the prosecution of the patent, it is often hard to allege such specific facts at the outset of a case.

In this case, Aretech alleged that Bioness withheld information regarding a powered conductor system made by Vahle, Inc. which Biomass had incorporated into its Vector System as well as information regarding a prior version of the Vector System that existed before Bioness filed its patent applications.

To successfully plead inequitable conduct, an alleged infringer must plead specific facts showing that: (1) the patentee knew of the prior art that was not disclosed to the PTO; (2) the prior art was material to patentability; and (3) the patentee withheld that information with a specific intent to deceive.

With regard to the allegations about the Vahle power conductor system, the court found that Aretech met the first requirement by alleging that Bioness had already been using the Vahle system when it submitted its patent application and by identifying fourteen individuals at Bioness who knew about the Vahle system at that time.

Bioness argued that Aretech could not show materiality because the alleged material elements were present in an earlier patent application before the PTO, and so the information about the Vahle system was cumulative. The court found, though, that it could not make the factual determination whether the information was cumulative on a motion to dismiss.

Finally, the court held that Aretech had sufficiently alleged a specific intent to deceive. The court cited to allegations that Bioness discloses a version of the Vahle system in a later child application, that Bioness was using

the Vahle system in its Vector System at the time of the patent application, and Vahle had announced that Bioness was using its system before the application.

As to the prior version of the Vector System, Aretech identified the specific individuals who withheld the information about the earlier system and showed striking similarities between the guide to the earlier system and Bioness' patent application. Those allegations led the court to find that it could be plausibly inferred that the patent applicant had directly copied portions of the guide into the application with disclosing the guide or the prior version of the Vector System to the PTO.

Like inequitable conduct, the pleading standards for antitrust counterclaims in a patent case are high, and here, Aretech's allegations failed to clear the bar. In contrast to its inequitable conduct allegations, the court found that Aretech's antitrust allegations were too conclusory to survive a motion to dismiss. Aretech, the court found, alleged only that if Bioness succeeded on its infringement claims, it would limit consumer choice and allow Bioness to reap monopoly profits. Aretech failed to make any allegation of relative market share and failed to show how removing Aretech's product from the market would harm competition. As a result, the court dismissed the antitrust counterclaims.

Undaunted, Aretech file a Motion for Leave to file amended counterclaims, but a few weeks later, the court stayed all deadlines in the case, and the parties filed a joint motion to dismiss the case on March 24.

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