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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91119020
Party	Plaintiff GO MEDICAL INDUSTRIES PTY LTD.
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Date	03/13/2006
Attachments	Update on Status of Civil Action.pdf (14 pages)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

GO MEDICAL INDUSTRIES PTY LTD	)	
	)	
Opposer,	)	OPPOSITION NO.
	)	
v.	)	91119020
	)	
MEDICAL MARKETING GROUP INC.	)	Paralegal Specialist:
	)	Eric McWilliams
Applicant.	)	

Update on Status of Civil Action

Opposer previously informed the Paralegal Specialist of a pending motion for JNOV in the civil proceeding that resulted in the suspension of this Opposition proceeding. The motion for JNOV was denied, and a copy of the associated Order and Opinion is attached. Accordingly, it is believed that this Opposition should be decided in the Opposer's favor.

Wendy L. Robertson
Attorney for Opposer

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of U.S. Application Serial No. 75/786,274
Mark: MMG O'NEIL
Filing Date: August 24, 1999

GO MEDICAL INDUSTRIES PTY, LTD., Opposer, v. INMED CORPORATION, Applicant.	Opposition No. 91119020

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing **UPDATE ON STATUS OF CIVIL ACTION** was served by first class mail, postage prepaid, upon counsel for Applicant, addressed as follows:

George A. Smith, Jr.
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Dated: March 13, 2006.

Holly S. Hawkins
HOLLY S. HAWKINS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GO MEDICAL INDUSTRIES PTY, LTD. and ALEXANDER G.B. O'NEIL, Plaintiffs, v. INMED CORPORATION d/b/a RUSCH, INTERNATIONAL, a wholly owned subsidiary of Teleflex, Inc., and ALPINE MEDICAL, INC. (formerly known as Medical Marketing Group, Inc.), Defendants.	CIVIL ACTION FILE NO. 1:01-CV-313-TWT

ORDER AND OPINION

This is an action for patent infringement, trademark infringement, and breach of contract. It is before the Court on Defendant Alpine's Motion for Judgment as a Matter of Law on Count III of Plaintiffs' First Amended Complaint [Doc. 301]. For the reasons set forth below, the Defendant's Rule 50(b) Motion is DENIED.

I. BACKGROUND

Plaintiff Dr. Alexander G.B. O'Neil is a resident of Subiaco, Australia. Dr. O'Neil is the inventor of the introducer tipped catheter described in United States

Patent No. 4,652,259 ("the '259 patent"), which he owns. Plaintiff Go Medical Industries, Pty, Ltd. ("Go Medical") is an Australian limited liability company founded by Dr. O'Neil. It manufactures and markets a urinary catheter of the type described in the '259 patent. Defendant Alpine Medical, Inc. ("Alpine") is a Georgia corporation with its principal place of business in Decatur, Georgia. Alpine was formerly known as Medical Marketing Group, Inc. ("MMG"). In February 2000, Defendant Inmed Corporation, d/b/a Rüsch International ("Rüsch"), purchased the assets of MMG.

The Plaintiffs obtained the United States patent on their introducer tipped catheter in 1987, with a priority filing date of 1979. The Plaintiffs initially sold their product in the United States through their United Kingdom distributor. This company sold about 20,000 of the catheters in the United States prior to 1988. MMG learned of the Plaintiffs' catheter in 1987, and inquired about becoming a distributor for the Plaintiffs' product. In 1988, Dr. O'Neil and MMG reached an agreement which gave MMG the exclusive right to distribute the Plaintiffs' introducer tipped catheter in the United States. The term of the agreement was for ninety-nine years. It provided that MMG and Go Medical would split the profits on a 50/50 basis. Initially, MMG purchased the catheters it distributed from the Plaintiffs. It is undisputed that there were quality assurance issues, including an FDA recall, with respect to the catheters shipped from Australia to MMG. As a result, MMG soon started manufacturing the catheters itself. MMG sold the catheters using a "MMG/O'Neil" trademark. The product was a huge success and the resulting sales began to dominate MMG's business. By 1999, MMG's sales of the MMG/O'Neil catheter had reached $20 million a year.

After a few years, MMG began paying Go Medical 7% of gross sales which it represented to be the equivalent of 50% of the profits. By the mid-1990s, MMG was pressuring Dr. O'Neil to modify the 1988 Agreement. In 1997, MMG and the Plaintiffs entered into an amendment to the 1988 Agreement. The 1997 Amendment provided for its termination upon the expiration of the '259 patent in March 2004. After that, Go Medical could sell its catheters in the United States market. Neither of the agreements made any reference to a licensing of the O'Neil name.

In 1992, C.R. Bard, Inc. ("Bard"), another medical device manufacturer, began marketing an introducer tipped catheter that competed with the MMG/O'Neil product. At the urging of MMG, the Plaintiffs filed suit in this district against Bard for patent infringement. In that case, Bard filed several motions for summary judgment. The district court granted Bard's motion for summary judgment on unenforceability for inequitable conduct. After that ruling at the trial court level, MMG stopped paying royalties under its patent license from the Plaintiffs. On appeal, the Federal Circuit disagreed with the district court, and reversed and remanded the case with instructions.

The case was then settled without a final resolution of the invalidity issue. After the settlement, MMG continued to withhold royalty payments. The Plaintiffs eventually sent a notice of termination of the patent license to MMG, and filed this lawsuit on February 1, 2001. After the termination notice, MMG and then Rüsch continued to use the "MMG/O'Neil" mark until June 2003.

In this lawsuit, the Plaintiffs asserted claims for patent infringement, trademark infringement, and breach of contract. The Defendants moved for summary judgment on the patent and trademark infringement claims. The Court granted summary judgment on the patent claims, holding that the Defendants infringed the Plaintiffs' patent, but that the patent was invalid due to prior art. The Court denied summary judgment on the trademark claim, holding that the conflicting claims to ownership of the O'Neil trademark for urinary catheters presented questions of fact to be decided at trial. The trademark and contract claims were tried before a jury in February 2004. As to the claim for breach of contract against MMG, the jury found in favor of the Plaintiffs for $6,156,571. As to the claim of trademark infringement against MMG, the jury found in favor of the Plaintiffs and awarded the sum of $350,838 as a reasonable royalty, $3,873,236 for unjust enrichment, and $19,000,000 in punitive damages. As to the claim of trademark infringement against Rüsch, the jury found in favor of the Plaintiffs for the sum of $2,672,419 as a reasonable royalty and $32,265,634 for unjust enrichment. After the return of the verdict, the Defendants separately challenged these awards.

In an Order dated January 25, 2005, the Court rejected as excessive the awards for reasonable royalties and unjust enrichment based upon the Plaintiffs' trademark infringement claims. The Court also held that the award of punitive damages against MMG was invalid as a matter of law. Applying the Lear doctrine, the Court reduced the award of damages for the Plaintiffs' breach of contract claim against MMG to $4,820,425. The award is comprised of two elements: $87,393 in attorneys fees stemming from the Bard litigation and $4,733,032, representing the amount by which 50% of Alpine's profits from 1991 through March 1999 exceeded the amounts paid to the Plaintiffs during the same period. On February 10, 2005, judgment was entered in favor of the Plaintiffs and against Defendant Alpine on Count III, the claim for breach of contract, for the sum of $4,820,425, plus interest.

Rule 50(b) of the Federal Rules of Civil Procedure governs the renewal of a motion for judgment as a matter of law. Where a court does not grant a motion for judgment as a matter of law made at the close of evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal issues raised by the motion. Fed. R. Civ. P. 50(b). During the course of the trial, Defendant Alpine made two motions for judgment as a matter of law on the Plaintiffs' breach of contract claim. The first was at the close of the Plaintiffs' case, and the second was prior to the submission of the case to the jury. Defendant Alpine has now filed a Rule 50(b) motion seeking an order modifying the Judgment entered in this case on February 10, 2005.

II. JUDGMENT AS A MATTER OF LAW STANDARD

Judgment as a matter of law is only appropriate where "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a). To determine whether there was sufficient evidence to support the jury's verdict, the Court reviews the evidence presented and draws all factual inferences and resolve all credibility determinations in favor of the non-movants. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."); Alexander v. Fulton County, Ga., 207 F.3d 1303, 1335 (11th Cir. 2000). If substantial conflicting evidence exists in the record, the Court shall not grant judgment as a matter of law.

III. DISCUSSION

Alpine moves for judgment as a matter of law, seeking complete relief from the damages awarded to the Plaintiffs under the Plaintiffs' breach of contract claim. Alpine bases its renewed motion for judgment as a matter of law on three distinct contentions: (1) that Subparagraph A4.a) of the 1997 Amendment compels the conclusion that Alpine and the Plaintiffs agreed to a compensation rate of 7% of gross sales; (2) that Subparagraph A4.d) of the 1997 Amendment limits any award of damages to only those damages incurred after November 20, 1997; and (3) that the Plaintiffs presented insufficient evidence to support the award of Bard litigation fees against Alpine.

A. Subparagraph A4.a) of the 1997 Amendment

Alpine contends that the language of the 1997 Amendment clearly and unambiguously states that the Plaintiffs were entitled only to 7% of gross sales of MMG/O'Neil catheter products. Construction of a contract is not permitted "when the language employed by the parties in the contract is plain, unambiguous and capable of only one reasonable interpretation." Kobatake v. E.I. DuPont De Nemours & Co., 162 F.3d 619, 624 (11th Cir. 1998) (quoting Sakas v. Jessee, 202 Ga. App. 838, 840 (1992)); see also Eastside Gardens of Snellville, LLC v. Sims, 248 Ga. App. 797, 800 (2001). Consequently, Alpine concludes that the Plaintiffs' claim for the difference between 50% of net profits and 7% of gross sales should never have been submitted to the jury for construction of the contract.

Subparagraph A4.a) of the 1997 Amendment states, in pertinent part:

> During the term of the Original Agreement, as amended, the parties agree that the net profit margin, after considering MMG's administrative, selling and overhead costs, on the MMG/O'Neil urinary catheter products coming within the scope of the '259 patent that are manufactured and sold by MMG shall be shared equally and that, for purposes of this agreement only, the parties define Go Medical USA's equal share of the net profit margin to be an amount equal to seven percent (7%) of the selling price of such MMG/O'Neil urinary catheter products. The parties agree that this amount represents Go Medical USA's 50% net profit share. Any amounts other than the aforementioned seven percent (7%) shall be due Go Medical USA only upon mutual agreement of both parties in writing after negotiation.

(Pl.'s Trial Ex. 170 at p. 1.) Alpine contends that this language limits Go Medical's share of the revenue generated by the MMG/O'Neil catheter products to 7% of gross sales. This is a perfectly reasonable interpretation of the provision. It is not, however, the only viable interpretation of Subsection A4.a). The subsection may also be read to equate a 50% share of net profits and a 7% share of gross sales. Indeed, the Amendment can be read to state that net profits "shall be shared equally" and that the portion of gross sales afforded to Go Medical can be considered a proxy for this equal share. Simply put, the 1997 Amendment is not clear and unambiguous – it is a muddled mess of contradictory provisions. In that respect, it mirrors the muddled mess that the parties' relationship had become by that time.

Recognizing that this provision was not so clear or unambiguous as to warrant bypassing the jury, the Court submitted the terms of the 1997 Amendment for construction by the jury. The Court instructed the jury to construe only those terms of the contract that the jury deems ambiguous or "fairly understood in more ways than one." (Trial Tr. at 1796.) The Court also instructed the jury that "[t]he cardinal rule in the construction of contracts is to ascertain the intention of the parties." (Id. at 1796.) The parties presented significant evidence at trial regarding the intent of the contracting parties. Testimony revealed that, prior to the 1997 Amendment, the parties used 7% of gross sales as an estimate of half of the net profits at MMG's request, as MMG found the calculation of net profits onerous. (See Trial Tr. at 173-174; 541-542.) MMG consistently represented 7% of gross sales to be equivalent to 50% of net profits. (Id.) Dr. O'Neil testified at trial that the 1997 Amendment "kept in the 50 percent profit share because we wanted a 50% profit share, and we refused to sign an agreement if John [Golden of MMG] . . . or his lawyers wanted that removed." (Id. at 243.) Evidence presented at trial provided a sufficient basis for the jury to determine that the parties did not intend for the 1997 Amendment to end the parties' obligation to share net profits equally. Consequently, judgment as a matter of law on the Plaintiffs' claim for breach of contract is not warranted.

B. Subparagraph A4.d) of the 1997 Amendment

Alpine also contends that a provision in the 1997 Amendment serves to discharge any debt that MMG may have owed to Go Medical at the time of the execution of the amendment. Alpine argues that any damages arising out of fees owed to Go Medical prior to November 20, 1997, conflict with the terms of the 1997 Amendment. The Court submitted the Plaintiffs' claim for damages to the jury. The Court charged the jury with instructions regarding accord and satisfaction. (Trial Tr. at 1797.) Presented with evidence regarding the formation of the 1997 Amendment and the relationship between the parties, the jury necessarily concluded that the 1997 Amendment did not constitute an accord and satisfaction or otherwise serve to discharge MMG's outstanding debts to Go Medical. This issue was decided by the jury based upon conflicting testimony and judgment as a matter of law on this claim is inappropriate.

C. Attorney's Fees for Bard Litigation

Alpine also seeks relief from the jury award of $87,393 as Alpine's share of fees incurred in the Bard litigation. Ordinarily, in order to recover attorney's fees, a party must demonstrate that the fees were reasonably incurred. This requirement, however, does not apply to cases where, as here, the award of attorney's fees is governed by a contractual provision. See Layfield v. Southeastern Constr. Coordinators, Inc., 229 Ga. App. 71, 72 (1997). Rather, the party seeking the fees under the contract need only show that the relevant fees were indeed incurred. Id. Go Medical's CEO Patsy Graieg testified that the insurance company paid approximately $90,000 toward the Bard litigation, leaving approximately $174,000

to be paid by Go Medical. (Trial Tr. at 634.) Ms. Graieg also testified that MMG never reimbursed Go Medical for its portion of these fees, as required by the 1997 Amendment. (Id. at 634.) The Plaintiff's damages expert David Kennedy, referencing relevant invoices, confirmed that the exact amount of the fees incurred in the Bard litigation was $174,786 and that MMG's portion of the expense was $87,393. (Id. at 1113-1114.) The jury was presented with sufficient evidence from which to find that MMG was responsible for splitting the costs of the Bard litigation and that such costs amounted to $174,786. The Plaintiffs did not need to prove -- and the jury did not need to determine -- that these costs were reasonable. The jury determination being supported by sufficient evidence, judgment as a matter of law on this issue is unwarranted.

IV. CONCLUSION

For the reasons set forth above, Defendant Alpine's Motion for Judgment as a Matter of Law on Count III of Plaintiffs' First Amended Complaint [Doc. 301] is DENIED.

SO ORDERED, this 5 day of August, 2005.

/s/Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge