

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

VERNON F. MINTON	§	
	§	Civil Action NO. _____
Plaintiff,	§	
	§	ECF
v.	§	
	§	JURY DEMANDED
JERRY W. GUNN, Individually,	§	
WILLIAMS SQUIRE & WREN, LLP,	§	
JAMES E. WREN, Individually,	§	
SLUSSER & FROST,L.L.P.,	§	
WILLIAM C. SLUSSER, Individually,	§	
SLUSSER WILSON & PARTRIDGE LLP,	§	
MICHAEL E. WILSON, Individually	§	
	§	
Defendants	§	

PLAINTIFF’S ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Plaintiff, Vernon F. Minton, who files this Original Complaint against Defendants, Jerry W. Gunn, Individually (“Gunn”), Williams Squire & Wren, LLP (“WSW”), James E. Wren, Individually (“Wren”), Slusser & Frost, L.L.P. (“Slusser & Frost”), William C. Slusser, Individually (“Slusser”), Slusser Wilson & Partridge LLP (“SWP”), and Michael E. Wilson, Individually (“Wilson”), Defendants, and for same would show the Court as follows:

**I.
PARTIES, JURISDICTION AND VENUE**

1. Plaintiff is an individual who resides in Tarrant County, Texas.
2. Gunn is an individual who may be served with process at 2206 Villa Rose Drive, Houston, Harris County, Texas 77062.

3. WSW is a Texas Limited Liability Partnership which may be served with process through one of its partners, James E. Wren, at Bridgeview Center, 2nd Floor, 7901 Fishpond Road, Waco, McLennan County, Texas 76710.

4. Wren is an individual who may be served with process at his place of business, Williams Squire & Wren, L.L.P., Bridgeview Center, 2nd Floor, 7901 Fishpond Road, Waco, McLennan County, Texas 76710.

5. Slusser & Frost is a Texas Limited Liability Partnership which may be served with process through one of its partners, William C. Slusser, at 4890 Three Allen Center, 333 Clay Street, Houston, Harris County, Texas 77002.

6. Slusser is an individual who may be served with process at his place of business, Slusser & Frost, L.L.P., 4890 Three Allen Center, 333 Clay Street, Houston, Harris County, Texas 77002.

7. SWP is a Texas Limited Liability Partnership and may be served with process through one of its partners, William C. Slusser or Michael E. Wilson at 4890 Three Allen Center, 333 Clay Street, Houston, Harris County, Texas 77002.

8. Wilson is an individual who may be served with process at his place of business, Slusser Wilson & Partridge LLP, 4890 Three Allen Center, 333 Clay Street, Houston, Harris County, Texas 77002.

9. Venue is proper in this Court in accordance with 28 USC§1391(a) in that a substantial part of the events or omissions giving rise to the claim occurred in this District.

10. Jurisdiction is proper in this Court pursuant to 28 USC§1338(a), the Texas Supreme Court's decision in *Minton v. Gunn*, 2011 Tex. Lexis 938, 55 Tex. Sup. Ct. J. 196 (Tex. 2011), and the decision of the United States Court of Appeals for the Federal Circuit in *Air Measurement*

Technologies, Inc. v. Akin Gump Strauss Hauer and Feld, LLP, 504 F.3d 1262 (Fed. Cir. 2007) and its progeny.

II. FACTUAL BACKGROUND

11. Plaintiff is an inventor. On January 11, 2000, U.S. Patent number 6,014,643 (the “643 Patent”) was issued to Plaintiff. The claims of the 643 Patent relate to a method and network for trading securities. The method generally requires that orders to purchase securities and orders to sell securities are gathered and transmitted over a public communications network to a data processing network where the orders are listed by price and quantity and the orders are displayed to individuals on a graphical interface.

12. On January 27, 2000, Plaintiff filed a complaint against the National Association of Securities Dealers, Inc. (the “NASD”) as Civil Action No. 9:00-CV-0009 in the United States District Court for the Eastern District of Texas, Lufkin Division, styled “Vernon F. Minton, Plaintiff v. National Association of Securities Dealers, Inc., Defendant” (the “Underlying Lawsuit”) asserting that the NASD had infringed and continued to infringe claims 1, 2, 3 and 4 of the 643 Patent. A copy of Plaintiff’s First Amended Complaint in the Underlying Lawsuit (filed prior to the NASD’s Answer Date) is attached hereto as Exhibit “A”, and incorporated herein by reference for all purposes.

13. After the NASD answered, Plaintiff replaced his original counsel and retained Defendants to represent him in the Underlying Lawsuit. On August 2, 2000, Defendants filed Plaintiff’s Second Amended Complaint, a copy of which is attached hereto as Exhibit “B” and incorporated herein by reference for all purposes. In the Second Amended Complaint, Plaintiffs added the NASDAQ Stock Market, Inc. (“NASDAQ”) as an additional defendant. The NASD and

NASDAQ answered the Second Amended Complaint by denying the claims made therein, and asserting several affirmative defenses, including that the 643 Patent was invalid for failure to comply with the operative requirements of Title 35 U.S.C., including but not limited to Sections 101, 102, 103 and/or 112.

14. The NASD and NASDAQ principally contended that the 643 Patent was invalid because of the “on-sale bar” contained in 35 U.S.C. §102(b), which states that “an inventor is not entitled to a patent if the invention was... on sale in this country more than one year prior to the date of the application in the United States.” To support this argument, the NASD and NASDAQ argued that Plaintiff developed the “TEXCEN” network and software program in the early-to-mid 1990’s. This system was an interactive trading system for broker execution, but not for customer execution. The NASD and NASDAQ argued that TEXCEN embodied the claimed invention of the 643 Patent. The NASD and NASDAQ went on to argue that the first sale or offer of sale of TEXCEN occurred more than one year prior to June 25, 1996 (the date the predecessor to the 643 Patent Application was filed with the Patent and Trademark Office), because Plaintiff made one or more direct attempts to commercially exploit TEXCEN. The NASD and NASDAQ argued that because the TEXCEN program clearly embodied all of the elements of the 643 Patent, the patent was invalid under the on-sale bar.

15. On July 18, 2001, the NASD and NASDAQ filed their Motion for Summary Judgment based on the on-sale bar provision. A copy of the Motion for Summary Judgment is attached hereto as Exhibit “C” and incorporated herein for reference for all purposes.

16. A fundamental defense to the on-sale bar is “experimental use”, which allows an invention to be marketed or sold for testing purposes, as long as it is not being primarily marketed

for purposes of profit. In fact, Plaintiff's offer to license TEXCEN was for experimental purposes. Despite this, Defendants neither pled experimental use as an affirmative defense to the on-sale bar nor did they respond to the Motion for Summary Judgment (the "Motion") with the experimental use argument, which would have created a material fact issue sufficient to defeat the Motion. Instead, Defendants attempted to argue that TEXCEN was different from the 643 Patent. These arguments were unsuccessful.

17. On September 18, 2001, the Court entered an order requiring further briefing on several issues. A copy of the Order is attached hereto as Exhibit "D", and incorporated herein by reference for all purposes. One of the issues that the Court was clearly concerned about was whether the 643 Patent was rendered obvious by the prior existence of TEXCEN. If that were so, the 643 Patent would be invalid over TEXCEN. Once again, the experimental use defense would have been sufficient to defeat the obviousness issue raised by the Court in the Underlying Lawsuit. Defendants failed to either plead it or brief it.

18. Pleading in the alternative, if the Motion had been denied, the overwhelming probability is that the Defendants in the Underlying Lawsuit would have settled with Plaintiff, whose damages were at least a hundred million dollars. If the Motion had been denied and the parties did not settle, Plaintiff would have prevailed in the Underlying Lawsuit and recovered past damages of at least a hundred million dollars and future royalties from the NASD, NASDAQ and others.

19. On February 1, 2002, the Court issued its Memorandum Opinion, a copy of which is attached hereto as Exhibit "E", and incorporated herein by reference for all purposes. In the Memorandum Opinion, all of Plaintiff's claims were dismissed with prejudice. The Court held that

the on-sale bar applied, and that the 643 Patent was rendered obvious by the combination of TEXCEN and a prior patent called *Adams*.

20. On February 20, 2002, Defendants filed Plaintiff's Motion for Reconsideration asserting for the first time the experimental use defense. It was too late. On July 15, 2002, the Court denied Plaintiff's Motion for Reconsideration.

21. Plaintiff thereafter took an appeal to the United States Court of Appeals for the Federal Circuit. The Federal Circuit affirmed the trial court's judgment against Plaintiff, and held that there was no justifiable basis for the tardiness in raising the experimental use issue. A copy of the Opinion of the United States Court of Appeals for the Federal Circuit is attached hereto as Exhibit "F", and incorporated herein by reference for all purposes.

III.
COUNT I.—NEGLIGENCE

22. Plaintiff incorporates herein by reference the factual allegations contained in paragraphs 1—21 above.

23. Defendants owed a duty to Plaintiff to represent him within the applicable standard of care in handling the Underlying Lawsuit. They breached their duty to Plaintiff in at least the following respects:

- a. Failing to timely plead and brief the experimental use defense in response to the claim of the on-sale bar by the NASD and NASDAQ; and
- b. Failing to timely plead and brief the experimental use defense in response to the Court's Order for briefing on the obviousness issue.

Each of these acts of negligence was a proximate cause of damages to Plaintiff, which are within the jurisdictional limits of this Court.

**IV.
CONCLUSION**

24. All conditions precedent to the granting of the relief herein have been satisfied. By the filing of this action, Plaintiff makes no election of remedies and no waiver of any rights, claims or defenses, but expressly reserves all such remedies, rights, claims and defenses, including but not limited to the right to amend and supplement this Petition as may be necessary and required by law.

25. Plaintiff demands trial by jury as to all issue.

WHEREFORE, PREMISES CONSIDERED, Plaintiff, Vernon F. Minton, prays:

1. That Defendants be cited to appear and answer herein;
2. For judgment against Defendants, jointly and severally, for Plaintiff's actual damages as may be proven at trial;
3. For pre- and post-judgment interest at the highest rates allowed by law;
4. For costs of court; and
5. For such other and further relief at law or in equity, general and specific, to which Plaintiff himself to be justly entitled.

Respectfully submitted,

JOHNSTON ♦ TOBEY, P.C.

By: /s/ Coyt Randal Johnston

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