

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

MAUNA KEA TECHNOLOGIES, INC., and
MAUNA KEA TECHNOLOGIES,

Plaintiffs,

v.

ANTICANCER, INC.,

Defendant.

Civil Action No. _____

DEMAND FOR JURY TRIAL

**COMPLAINT FOR DECLARATORY JUDGMENT
OF PATENT NON-INFRINGEMENT, INVALIDITY, AND UNENFORCEABILITY**

Plaintiffs Mauna Kea Technologies, Inc. and Mauna Kea Technologies (collectively “Mauna Kea”) for their Complaint against defendant Anticancer, Inc. (“AntiCancer”) allege as follows:

THE PARTIES

1. Plaintiff Mauna Kea Technologies, Inc. is a Delaware State corporation with its principal place of business at 660 Newtown-Yardley Road, Suite 107, Newtown, PA 18940.
2. Plaintiff Mauna Kea Technologies is a corporation organized and existing under the laws of France with its principal place of business at 9 rue d'Enghien, 75010 Paris, France.
3. Defendant AntiCancer, Inc. is a California State corporation with its principal place of business at 7917 Ostrow St., San Diego, CA 92111.

NATURE OF THE ACTION

4. This is a declaratory judgment action seeking a determination that Mauna Kea does not infringe any claim of U.S. Patent Nos. 6,232,523; 6,235,967; 6,235,968; 6,251,384; 6,649,159; 6,759,038; 6,905,831 (“Patents-In-Suit”).

5. This is a declaratory judgment action seeking a determination that one or more of the claims of the Patents-In-Suit is invalid.

6. This is a declaratory judgment action seeking a determination that infringement and damages claims arising from the Patents-In-Suit are barred in whole or in part by the doctrines of laches and/or estoppel.

7. Upon information and belief, AntiCancer is the owner by assignment of each of the Patents-in-Suit, which are attached hereto as exhibits A - G.

JURISDICTION AND VENUE

8. This is a complaint for declaratory relief under the patent laws of the United States, 35 U.S.C. §§ 1, *et seq.*

9. Mauna Kea seeks declaratory relief under 28 U.S.C. §§ 2201 and 2202.

10. This Court has subject matter jurisdiction under 35 U.S.C. §§ 1331 and 1338(a).

11. Venue is proper within this district pursuant to 28 U.S.C. § 1391(b) and (c).

12. This Court has personal jurisdiction over AntiCancer. AntiCancer has entered this district to assert its patent rights against Mauna Kea, which is located within this district. Upon information and belief, AntiCancer has conducted business in this district, including but not limited to, formation of a partnership within this district. Upon information and belief, such business activity relates to the inventions and technology covered by the Patents-In-Suit and to enforcement and/or licensing of one of more of the Patents-In-Suit.

THE SUBSTANTIAL CONTROVERSY BETWEEN THE PARTIES

13. AntiCancer has created an actual case or controversy through repeated assertions that Mauna Kea must obtain a license under at least six patents identified by AntiCancer as well as other unidentified AntiCancer patents.

14. Commencing in January 2006, AntiCancer, through its president, Robert Hoffman, asserted in a letter to Mauna Kea that it was necessary for Mauna Kea to have a license from AntiCancer in order to sell Mauna Kea's CellVizio imaging device. AntiCancer's letter asserted the following U.S. Patents: No. 6,232,523; No. 6,235,968; No. 6,251,384; No. 6,649,159; No. 6,759,038; No. 6,905,831; European Patent 0437488; as well as unidentified "pending world-wide patents." AntiCancer further asserted that the patents are directed in unlimited scope and breadth to "all other applications of In Vivo imaging with fluorescent proteins." Although U.S. patent No. 6,235,967 was not asserted in the January 2006 letter, it is part of the same family of patents as the others and covers the same general technology.

15. In response to a request by U.S. counsel for Mauna Kea for specificity with regard to the demand that Mauna Kea take a license, Dr. Hoffman wrote directly to the President of Mauna Kea on March 22, 2006, without copying Mauna Kea's U.S. counsel, reiterating AntiCancer's assertion that the specified patents and unidentified world-wide patent applications required Mauna Kea to take a license from AntiCancer.

16. Dr. Hoffman's letter of March 22, 2006 refused Mauna Kea's request for greater specificity but stated that the patents identified in his earlier letter of January 2006 "clearly cover the Cell-Vizio product and its applications."

17. On November 22, 2010, Mauna Kea's U.S. counsel received a letter from Dan Lawton, an attorney who introduced himself as AntiCancer's legal representative. In his letter, Mr. Lawton demanded answers to a set of ten questions in the nature of interrogatories or requests for admissions pursuant to Rule 36 of the Federal Rules of Civil Procedure. Although the letter stated that it was not the purpose of the letter to accuse Mauna Kea of any infringement of any patent, the letter set a deadline of December 3, 2010, for a "substantive" reply. Mr. Lawton's law

firm has filed at least three actions in U.S. District Court accusing other companies of infringing the same patents which AntiCancer is asserting against Mauna Kea.

COUNT I
(DECLARATORY JUDGMENT OF NON-INFRINGEMENT)

18. Mauna Kea realleges and incorporates herein the allegations of the preceding paragraphs of this Complaint as fully set forth herein.

19. Mauna Kea has not directly infringed, induced infringement, or contributed to infringement of any claim of the Patents-In-Suit either directly or under the doctrine of equivalents.

20. As a result of the acts described in the foregoing paragraphs, there exists a substantial controversy of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

21. A judicial declaration is necessary and appropriate so that Mauna Kea may ascertain its rights regarding patent Nos. 6,232,523; 6,235,967; 6,235,968; 6,251,384; 6,649,159; 6,759,038; and 6,905,831.

22. Mauna Kea is entitled to a declaratory judgment that it has not infringed and does not infringe any claim of patent Nos. 6,232,523; 6,235,967; 6,235,968; 6,251,384; 6,649,159; 6,759,038; 6,905,831.

COUNT II
(DECLARATORY JUDGMENT OF INVALIDITY)

23. Mauna Kea realleges and incorporates herein the allegations of the preceding paragraphs of this Complaint as fully set forth herein.

24. One or more claim of the Patents-In-Suit is invalid for failing to comply with the conditions of patentability set forth in 35 U.S.C. §§ 102, 103, and/or 112, and the rules,

regulations, and laws pertaining thereto, including without limitation at least U.S. Patent Nos. 6,251,384; 6,649,159; and 6759,038.

25. Mauna Kea is entitled to a declaratory judgment that one or more of the claims in the Patents-In-Suit are invalid.

COUNT III
**(DECLARATORY JUDGMENT OF UNENFORCEABILITY
DUE TO LACHES AND ESTOPPEL)**

26. Mauna Kea realleges and incorporates herein the allegations of the preceding paragraphs of this Complaint as fully set forth herein.

27. AntiCancer's delay in asserting its patents after its 2006 accusations of infringement is unreasonable and unexcused.

28. AntiCancer's actions in 2006 and its delay and failure to act from that time until its letter of November 22, 2010 have misled Mauna Kea to reasonably believe that AntiCancer does not assert its patents against Mauna Kea.

29. Mauna Kea has detrimentally relied on AntiCancer's actions in 2006 and its delay and failure to act from that time until its letter of November 22, 2010.

30. AntiCancer's actions in 2006 and its delay and failure to act since that time are economically and evidentially prejudicial to Mauna Kea.

31. AntiCancer is barred in whole or in part from asserting the Patents-In-Suit, or otherwise obtaining damages for any alleged infringement of the Patents-In-Suit, under the doctrine of laches and/or estoppel.

32. As a result of the acts described in the foregoing paragraphs, a substantial controversy exists of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

33. A judicial declaration is necessary and appropriate so that Mauna Kea may ascertain its rights regarding AntiCancer's ability to enforce the Patents-In-Suit or otherwise recover or obtain relief for any alleged infringement of the Patents-In-Suit.

RELIEF REQUESTED

WHEREFORE, plaintiffs Mauna Kea Technologies, Inc. and Mauna Kea Technologies requests this Court to enter judgment against defendant AntiCancer, Inc. and any parent corporation, subsidiary, affiliate, agent, employees, and all persons in active concert or participation with AntiCancer and to grant the following relief:

- a) A declaration that Mauna Kea has not infringed, either directly or indirectly, any claim of the Patents-In-Suit, either literally or under the doctrine of equivalents;
- b) A declaration that the claims of the Patents-In-Suit are invalid;
- c) A declaration that any past damages claimed by AntiCancer are barred by the doctrine of laches.
- d) A declaration that enforcement of the Patents-In-Suit, and all relief or recovery sought by AntiCancer regarding the Patents-In-Suit, are barred by the doctrine of estoppel;
- e) An award of Mauna Kea's fees and costs, including attorney's fees, pursuant to 35 U.S.C. § 285; and
- f) Such other relief as may be just and equitable.

December 3, 2010

By: 
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