IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. __:_____-CV-___-__

CYBER IMAGING SYSTEMS, INC.	)
	)
Plaintiff,	)
v.	)
	)
EYELATION, LLC and	)
BRAD KIRSCHNER individually,	)
	)
Defendants.	)
	)

COMPLAINT

Plaintiff, CYBER IMAGING SYSTEMS, INC., files this Complaint against Defendants, Eyelation, LLC and Brad Kirschner individually ("Kirschner"), and in support thereof, states as follows:

A. THE PARTIES, JURISDICTION AND VENUE

1. Plaintiff, CYBER IMAGING SYSTEMS, INC. ("Cyber") is a North Carolina corporation having its principal place of business at 8300 Falls of Neuse Road, Suite 110, Raleigh, North Carolina.

2. Defendant, Eyelation, LLC ("Eyelation") is an Illinois corporation having its principal place of business located in Tinley Park, Illinois.

3. Defendant Brad Kirschner ("Kirschner") is an individual residing in or near Tinley Park, Illinois.

4. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §1331 (federal question), §1332(a) (diversity of citizenship), and §1338(a) (question related to patents).

5. Venue is proper in this judicial district pursuant to 28 U.S.C. §1391 and §1400.

B. CYBER-IMAGING AND THE CYBER PATENT

6. Cyber is a high-tech software company in the "Virtual Try-On" (VTO") industry. Cyber, located in the Research Triangle, was started in 1996 by Hal Wilson, one of its current owners. Wilson received his Accounting Degree from the University of North Carolina in Chapel-Hill, and Masters of Business Administration with an emphasis on Computer Information Technology from East Carolina University. Prior to Cyber, Wilson worked at various companies implementing advanced financial software systems.

7. Jim Welch is a co-founder and a current co-owner of Cyber. Welch has a Masters Degree in Engineering from Duke University and has completed all of the course work for his Doctorate Degree with an emphasis in Artificial Intelligence.

8. Dr. Feng Lu is a co-founder and a current co-owner of Cyber. Lu has a Doctorate Degree in Computer Science with a focus on computer vision, computer graphics and image analysis. Dr. Lu is currently employed by Microsoft Corporation as a senior design engineer for the XP Media Center.

9. In 1997, Cyber introduced its revolutionary Virtual Try-On ("VTO") software, called "CyberImaging."

10. CyberImaging is a system that allows a customer, using the salon's computer, to virtually try-on a particular hairstyle and/or color to see what she would look like without actually having to cut and/or color her hair. A stylist takes a picture of the customer and uploads it to a computer. Using Cyber's unique measurement, digital imaging and masking techniques, the customer would click, drag and drop any one of a number of hairstyles from the models pictured in the computer program and the hairstyle would be accurately sized and fitted on the photograph of the customer's head. Cyber licensed its CyberImaging system throughout the U.S.

11. After years of development of its VTO technology, Cyber introduced "CyberEyes VTO." An optician takes a picture of the customer and uploads it to the store's website – which is located on Cyber's server. The optician also determines the distance between the pupils – the pupillary distance. The customer goes home and visits the store website (on Cyber's server) and can select more frames and lenses (from the database of frames and lenses on Cyber's server) and try them on virtually (on his/her photo that was uploaded from the optician's store) and order them through the store website. The VTO software allows each pair of frames and lenses to be placed on and removed off the photo of the customer's face without the customer ever actually trying on a single pair. Through Cyber's technology (measurement, masking and imaging), each frame is accurately sized and fitted on the customer's face. With the selected frames and lens, and the already known pupillary distance, the glasses can be fabricated.

12. As Wilson and Welch continued the development of CyberEyes VTO, they continued to develop a unique computerized technique to measure the pupillary distance. The customer places a strip on his or her actual forehead which is then shown on the screen via the computer camera, and upon being instructed by the computer, the customer drags and drops markers on two points on the strip and on each pupil. Through detection, measuring, and scaling, along with certain algorithms**,** the pupillary distance is determined.

13. The customer is able to select any pair of frames (from thousands), select any type of lens, and see how the glasses look on him without ever trying on a single pair. After the user makes his final decision on the frames and lenses, and the pupillary distance is determined, this information is transmitted to the lab for fabrication.

14. On June 11, 2013 the United States Patent Office awarded Cyber with U.S. Patent No. 8,459,792 ("the Cyber Patent") on this unique technique of determining the pupillary distance. The Cyber Patent is attached as Exhibit 1.

C. EYELATION AND BRAD KIRSCHNER

15. Brad Kirchner left college after one year of studying political science and went to work at his father and uncle's retail optical store.

16. In 2008 Kirchner was selling prescription safety glasses to companies that required its employees to wear safety glasses, for example, companies that have a manufacturing plant.

17. Kirchner would visit each plant with a suitcase packed with actual frames and an optician would accompany him to physically measure each employee's pupillary distance. Each employee would physically select the actual frames from the suitcase, the optician would measure his pupillary distance, and Kirschner would manually complete the paper work. Kirschner and the optician would leave the plant, and Kirschner would return to his father and uncle's store with the suitcase and paper work and have the safety glasses made and sent to the employee's company.

D. THE CYBER AND EYELATION LICENSE AGREEMENT

18. In July 2009, after meeting Wilson and learning about CyberEyes VTO, Kirschner formed Eyelation for the sole purpose of licensing CyberEyes VTO. Kirschner was the sole employee at Eyelation and had no sales.

19. On October 26, 2009, Cyber and Eyelation entered into a Software Development and Technology License Agreement ("Agreement") where Cyber would customize its CyberEyes VTO software for Kirschner. The Agreement is attached as Exhibit 2. The Specifications of the Software are Exhibit A and the Development Timeline is Exhibit B to the Agreement. (Ex. 2, pp. 11-13)

20. The Agreement states that Cyber owns all Technology and Intellectual Property "as may be incorporated in the Software." (Ex. 2, p. 4, § 4.1)

21. The Agreement also states that all software and any ideas and information related to the Software created during the Agreement by either party shall belong to Cyber.

> "The parties expressly recognize that additional intellectual or other property rights may be created in the performance of this Agreement. The parties expressly agree that all right, title and interest … in and to the Software … **and any ideas or information created, conceived or reduced to practice by Cyber or EYE relating to the Software in the course of performance of the Agreement shall belong to Cyber."** (Ex. 2, p. 4, §4.2)

22. The Agreement sets forth three Phases for the development, acceptance and payment of the Software. Eyelation would pay Cyber $10,000 (in three installments), with the first payment due upon execution of the Agreement, the second payment due "within 10 days **after completion and approval of Phase II"** and the third payment due "within 10 days **after completion and approval of Phase III."** (Ex. 2, p. 5, §6.1(d))

23. Exhibit B to the Agreement states that Phase II is completed only after Eyelation's "acceptance" of Phase II. (Ex. 2, p. 13) Importantly, Exhibit B also states that Phase III -- the final Phase -- is completed only after "Delivery of Software as defined by the agreement, and in conformity with all Specifications," and "Acceptance by EYE." (Ex. 2, p. 13)

24. Thus, Eyelation would make the payment for Phase III only after Eyelation approved the completed Software that was in conformity with all of the Specifications and accepted by Eyelation.

25. The Agreement further provides that Eyelation would also pay Cyber a $10 royalty for every pair of frames it sold using the Software, and at Eyelation's option, it would pay Cyber an hourly rate for additional work that was outside of the specifications that Eyelation requested of Cyber. (Ex. 2, p. 5, § 6.1(a); §8.2(a))

26. Eyelation, which did not have any other business at the time, monitored the development of the Software on a daily basis. Section 3.3 of the Agreement sets forth a very

specific procedure if Eyelation believed the Software did not conform to the Specifications. Specifically, after Cyber delivered the Software, Eyelation had 30 days to notify Eyelation of any problems. Cyber had 30 days to cure and correct the problems and re-deliver the Software. Eyelation had an additional 30 days to review the Software, and if it was still not satisfied, Eyelation had the option to either afford Cyber the opportunity to attempt to remedy the issue or submit it to an independent third-party to determine if the Software conformed to the Specifications. (Ex. 2, p. 3, §3.3) Eyelation never complained about Cyber's Software or invoked Section 3.3.

27. In accordance with the Agreement, Cyber completed all three Phases and Eyelation paid for all three Phases, with the last payment being made in June 2010. Thus, in accordance with the Agreement -- which was drafted by Eyelation's attorney -- the Software that Cyber delivered was completed and approved by Eyelation (Ex. 2, p. 5, §6.1(d)) and was "in conformity with all Specifications" and was "accepted by Eyelation" when it made the final payment in June 2010. (Ex. 2, p. 13)

28. Wilson, after investing years in developing CyberEyes VTO expected to conservatively receive a return of $4.5 million over the next eight years. (Ex. 3)

29. Screen shots of the CyberEyes VTO Software customized for Eyelation is set forth in Exhibit 4.

a. pages 1-3 show examples of initial screens for Eyelation customers, Hagemeyer, Solo Cup, and Safety Source prompting the customer's employee to start.

b. pages 4-5 shows the log-in screen where the customer's employee logs in.

c. page 6 prompts the customer to place the fitting pad on his forehead;

d. page 7 shows a photo of the customer with the fitting pad on the forehead;

e. page 8 shows the two markers aligned on the fitting pad and two markers aligned on the pupils to allow the computer to scale, dimension and fit the frames on the employee; after alignment the camera takes the photo;

f. pages 9-12 show various frames selected by the employee (from the top of the screen) that are placed on the photo using the Cyber's Virtual Try-On technology;

g. pages 13-15 show the prescription scanning process;

h. pages 16-19 show the lens selection process; and

i. pages 20-21 show the shopping cart and check-out steps.

30. Eyelation launched the CyberEyes VTO Software system under the name "Eyelation" at the October 2010 National Safety Conference in San Diego, California. Just prior to the 2010 Show, Eyelation's Kirschner wrote to Cyber's Wilson "I really appreciate all of the work that you have put into this project," that "it is amazing …given all of the challenges," and that "I will make d--- sure that this work is worth our effort at the end of the day." (Ex. 5)

31. The 2010 Show went better than expected. Kirchner reported that Eyelation made "20-30 VERY high quality contacts from decision makers at large companies," and had "serious interest from multiple international organizations." He further stated that it was "absolutely amazing," "I was thrilled," "have created quite a splash," and it was an "awesome first day at the show." (Ex. 6) He again emphasized "it really went great today," "the people we spoke to were truly excited and serious about the product and they were BIG, VERY BIG... all serious," and it was "absolutely awesome, and went better than I planned." (Ex. 7)

32. Thereafter, Eyelation's Kirschner described Cyber's Software as "unique," "exclusive" to Eyelation and was a result of "years of research and development." (Ex. 8) Eyelation licensed the Software to customers, paid Cyber its $10 royalty per frame and told Wilson that the Software was "fantastic" and "awesome." (Ex. 9)

33. Eyelation's business -- which consisted only of CyberEyes VTO -- became very large, as sales were larger than forecasted. Kirschner no longer needed to drag his suitcase of frames and bring an optician with him to each customer, nor did he ever have to go to a company in person except for the initial set-up. By utilizing CyberEyes VTO, the customer's employees were able to sit down and virtually try-on the frames and lenses at their leisure, and place their order through the Internet.

34. However, unknown to Cyber, on July 10, 2010, 30 days after Eyelation accepted and made the final payment of the CyberEyes VTO software -- and 90 days before Kirschner introduced Eyelation to the public --Eyelation secretly filed a U.S. Patent application on the CyberEyes VTO system with Kirschner as the inventor and owner. (Ex. 10)

35. Kirschner filed the Patent application despite the fact that the Agreement states that (1) Cyber owns all Technology and Intellectual Property "as may be incorporated in the Software" (Ex. 2, p. 4, § 4.1) and (2) all software and any ideas and information related to the Software created during the Agreement by either party shall belong to Cyber. (Ex. 2, p. 4, § 4.2)

36. Moreover, 17 of the 18 patent figures in the patent application are screen shots of Cyber's software that Cyber delivered to Eyelation on June 10, 2010. (Ex. 10, pp.3-20)

37. In February 2011, after receiving his first orders, Kirschner requested the source code to the Software, representing that he wanted to make some modifications thereto. Because the Agreement (§8.2) contemplated this, and under the assurances of Kirschner, Wilson sent Kirschner the source code. (Ex. 11)

38. However, immediately after receiving the source code, Kirschner attempted to acquire ownership of the Software and Intellectual Property belonging to Cyber where Cyber would relinquish ownership of the Software and its Intellectual Property rights in exchange for an extension of the term of the Agreement from 10 to 15 years and increasing the notice of

termination to 18 months. (Ex. 12) Attached to the e-mail was a "Contract Rider" – which had been prepared by Eyelation's attorney -- stating that Eyelation owned all of the Software. ("Contract Rider" attached as Ex. 13, pp.1-2) Wilson refused because the Software was the foundation of Cyber-Imaging and would be tantamount to giving up his company.

39. Kirschner, unknown to Cyber, was meeting with large potential distributors and was representing to them that Kirschner was the owner of the Software and intellectual property. (Sealed: Ex. 14, p.1; Ex. 15, p.2; Ex. 16)

40. Shortly after receiving CyberEyes VTO source code, and unknown to Wilson, Kirschner directed his newly hired programmer, who admitted to reviewing and revising Cyber's source code, to start replicating the functionality of the CyberEyes VTO Software.

41. In October 2011 Eyelation then hired a lawyer who threatened Wilson that that Eyelation would no longer pay any royalties unless Wilson signed a Separation and Termination Agreement attached to the letter which stated that Eyelation would own all of the Software and Intellectual Property, and even if a court held that Cyber owned it, Cyber would agree to assign it to Eyelation.. (Ex. 17, pp.1, 7) The lawyer emphasized "you have nothing to gain and everything to lose by refusing to execute the Separation Agreement." (Ex. 17, p.1) Eyelation's lawyer continued "therefore this letter shall serve as your notice that unless you execute the Separation Agreement dated December 23, 2011 your payments will be terminated." (*Id.*) The lawyer threatened that Eyelation would only continue the royalty payments if Cyber relinquished ownership. (*Id.*) Cyber was stunned and rejected this proposal. Eyelation, without telling Wilson, had decided to terminate the Agreement.[1]

[1] In the pending Arbitration discussed *infra*¸ Eyelation's pretrial hearing brief acknowledges that Eyelation terminated the Agreement in October 2011. (Ex. 18, p. 2)

42. The following month (January 2012) Cyber learned that Honeywell International had posted a job search for a Director of Eyelation Sales. (Ex. 19) The job posting further explained that this position would be responsible for implementing the Eyelation software for Honeywell safety customers. By early 2012, Eyelation had grown from one employee, Kirschner, to 8 full-time employees. In December 2011, Eyelation stated "we have seen a growth in orders of 566% over a ten month period." (Ex. 20) Eyelation's revenues went from zero to being a million dollar company by using CyberEyes VTO – exactly what Kirschner and Wilson forecasted in their business models. To date, Eyelation has paid Cyber a total of $5,280 in royalties.

E. EYELATION

43. The Eyelation design "team" consists of three individuals: Brad Kirschner, Brandon Hass and Kiet Pham.

44. Brad Kirschner is 36 years old, quit college after one year of studying political science, and began working for his dad and his uncle, wheeling in a suitcase full of actual safety glass frames, bringing in an optician and manually completing the paper work. Kirschner has never taken any computer engineering or software courses, and does not know how to write software. Kirschner dominates the control of Eyelation's day-to-day activities and is the primary decision maker.

45. Brandon Hass is 28 years old, also quit college, had less than one year of experience in any type of computer programing and had never developed any commercial application of any software. Hass, from Asia, was introduced to Kirschner through a friend, Vin Chu. Hass was Eyelation's second employee and started at Eyelation in February 2011, which was approximately the same time Kirschner received Cyber's source code.

46. Kiet Pham is 31 years old, also from Asia, quit art school for a year, worked in a coffee shop serving coffee after leaving college, and then as a cashier in Hobby Lobby before Vin Chu

introduced him to Kirschner. Pham has never taken any software course and has never written any source code before Kirschner hired Pham in February 2011.

47. Through his connection Vin Chu, Kirschner hired and instructed Hass and Pham to copy Cyber's software. A side-by-side comparison of the CyberEyes VTO software developed for Eyelation (by Feng Lu, Jim Welch and Hal Wilson) ("Eyelation V1") and the software copied by Eyelation (by Brandon Hass and Kiet Pham) ("Eyelation V2") is attached as Exhibit 21. The functionality and aesthetics are virtually identical.

a. page 1 is the initial screen for Eyelation customers prompting the employee to start.

b. page 2 shows the log-in screen where the customer's employee logs in.

c. page 3 prompts the customer to place the fitting pad on his forehead;

d. page 4 shows the two markers aligned on the fitting pad and two markers aligned on the pupils to allow the computer to scale, dimension and fit the frames on the employee;

e. page 5 shows a frame selected by the employee (from the top of the screen) that are placed on the photo using the Cyber's Virtual Try-On technology;

f. page 6 shows the lens selection process; and

g. page 7 shows the shopping cart and check-out steps.

COUNT I: PATENT INFRINGEMENT

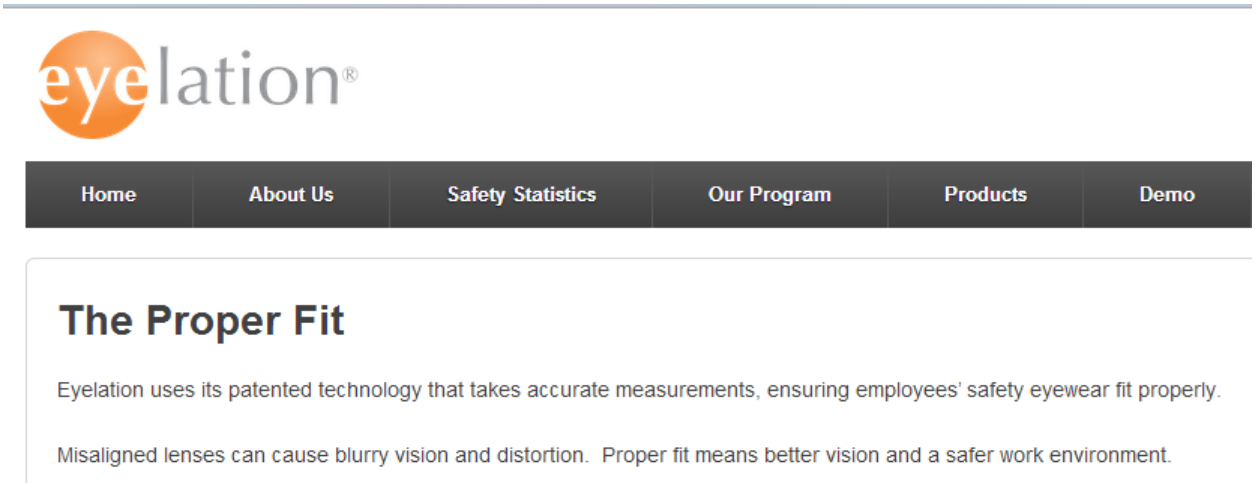
48. Cyber realleges and incorporates paragraphs 1-48 as though fully stated herein.

49. Eyelation's software measures the pupillary distance as recited in the claims of the Cyber Patent.

50. Each limitation of claim 17 of the Cyber Patent and where it is in the infringing Eyelation software, is shown below and in Exhibit 22.

	LIMITATION	EYELATION SYSTEM
A	A system for fitting a user with a pair of glasses, the system comprising	This is shown throughout Ex. 22, p. 1
B	a fitting pad configured to be placed on the forehead of the user	Ex. 22, p. 1
C	the fitting pad having a first detection point and a second detection point at a predetermined distance from the first detection point;	Ex. 22, p. 1
D	a camera for capturing an image of the user, including the user's pupils, as the user wears the fitting pad;	Ex. 22, p. 1
E	a display	Ex. 22, p. 1
F	a user interface; and	This is the mouse that the person uses to place the circles on the fitting pad's detection points and the pupils. (Ex. 22, p. 2)
G	a processor in communication with the display, the user interface, and the camera	This is the processor of a computer that communicates with the user and it has to be there for the system to work.
H	wherein the processor is configured to calculate the number of pixels on the image between the first and second detection points, so as to provide a pixels-per-distance calculation for the captured image.	This is the processor that performs the necessary calculation to size the face in order to virtually place the frames on the face and/or to determine the pupillary distance. It is the only reason why the fitting pad and four detection points are used. Eyelation's Brandon Hass has testified that Eyelation performs this calculation. (Ex. 23, p. 68:6 – p. 71:23 filed under seal)

51. Even the Eyelation website states that it uses the patented technology:



52. Kirschner was the moving party, active, and conscious force behind Eyelation's infringement, as he directed and authorized the use of Cyber's source code and participated in utilizing and selling the infringing software under the Eyelation name.

53. Kirschner failed as an owner and officer of Eyelation to avoid infringing activity by knowingly directing his employees to use Cyber's source code and personally selling it as Eyelation's patented technology.

54. During the development of the pupillary distance measuring technique for CyberEyes VTO, Wilson advised Kirschner that he had filed a patent application and also sent him a copy of the application. Kirschner's response was "That's cool about the patent. It definitely needed to be done…. hopefully it goes through soon." (Ex. 24)

55. Despite having knowledge of the Cyber Patent's claims, and describing the Cyber Software as "revolutionary," Kirschner and Eyelation have chosen to terminate the Agreement and infringe the Cyber Patent.

56. Kirschner wrongfully used the corporate form of Eyelation to carry-out his infringing activities described above.

57. In order to avoid injustice, Kirschner should be personally liable for his and Eyelation's infringing activity.

58. Kirschner and Eyelation's infringement has been willful.

COUNT II: BREACH OF CONTRACT

59. Eyelation realleges and incorporates paragraphs 1-59 as though fully stated herein.

Section 11.1 of the Agreement states, *inter alia,* that "each party … shall use such information only for the purposes herein." (Ex. 2, p. 8)

60. Eyelation and Kirschner used CyberEyes VTO Software, including its source code for improper purposes, namely to replicate it and call it its own when it belongs to Cyber.

COUNT III: FRAUD

61. Eyelation realleges and incorporates paragraphs 1-61 as though fully stated herein.

62. Eyelation engaged is an elaborate and systematic pattern of fraud and deceit.

63. On July 10, 2010, 30 days after Eyelation accepted and made the final payment of the CyberEyes VTO software – and 90 days before Kirschner introduced Eyelation to the public, Eyelation secretly filed a U.S. Patent application on the CyberEyes VTO system with Kirschner as the inventor and owner. (Ex. 10)

64. In February 2011, Kirschner told Wilson that he needed the source code for CyberEyes VTO in order to make functionality enhancements. Kirschner's statements were false, as he planned to use the source code to create software for Eyelation and claim it as its own.

65. Unaware that Kirschner was going to use Cyber's source code to replicate the Software, Wilson provided Kirschner with Cyber's source code as well as a login and password to Cyber's entire database. (Ex. 11) Wilson's reliance on Kirschner's representations was reasonable because the Agreement stated that Eyelation was responsible for all enhancements and improvements to the software.

66. Contemporaneously with receiving Cyber's source code and database access, Kirschner hired Brandon Hass and Kiet Pham and began secretly replicating Cyber's Software.

67. Eyelation hired a lawyer who wrote to Wilson stating that Eyelation would no longer pay any royalties unless Wilson signed the Separation and Termination Agreement which stated that Eyelation owned all of the Software. (Exs. 13, 17)

68. After terminating the Agreement, Kirschner continued representing to large potential distributors that he was the owner of the software and intellectual property, even though he had no rights to the Patent and had wrongfully copied Cyber's Software. (Exs. 14-16)

69. By wrongly obtaining Cyber's source code, Eyelation was able to create its own software, claim it as its own and terminate the Agreement and cease making royalty payments to Cyber. This injury to Cyber was solely caused by Eyelation and Kirschner's false statements.

70. Additionally, Kirschner's misrepresentations greatly minimized Cyber's market presence, as well as diminished the value of Cyber's Patent, its Software, and business.

71. Eyelation has teamed up with a large distributor, Honeywell, which has caused harm to Cyber's reputation and goodwill because Cyber is no longer seen as the owners of the Software and Patent in the public's eyes.

72. Eyelation and Kirschner's continuous and calculated pattern of conduct from secretly filing a patent application on the CyberEyes VTO system and obtaining the source code and database access under the guise of enhancing the software, to copying the Software and selling it as its own, clearly demonstrate that Kirschner, all along, was planning on claiming ownership to the Software and associated patents. This is shown by the following facts:

a. once Cyber completed and delivered Phase III in June 2010 Kirschner secretly filed a patent on the CyberEyes VTO system which the Agreement clearly states belongs to Cyber;

b. Kirschner requesting and receiving CyberEyes VTO source code and database access under the guise of wanting to work on the Software;

c. Kirschner represented to the industries' largest distributors that Eyelation owns the CyberEyes VTO Software and patents;

d. immediately after requesting Cyber's source code, Kirschner hired individuals to replicate the CyberEyes VTO Software;

e. when a-d was occurring, Kirschner prepared an Agreement which required Wilson to agree that Eyelation owns the Software for a modification of the Agreement that its term would be extended; and when that failed,

f. Kirschner had a lawyer who threatened Wilson that he better accept the Kirschner offer because he has "everything to lose by refusing to execute the Separation Agreement."

COUNT IV: UNFAIR & DECEPTIVE TRADE PRACTICES ACT [N.C. GEN. STAT. § 75-1.1]

73. Eyelation realleges and incorporates paragraphs 1-73 as though fully stated herein.

74. Eyelation engaged in deceptive acts during and after it licensed software from Cyber.

75. One month after Eyelation accepted and made the final payment of the CyberEyes VTO software, Eyelation secretly filed a U.S. Patent application on the CyberEyes VTO system with Kirschner as the inventor and owner. (Ex. 10)

76. Subsequently, Kirschner made deliberate false statements to deceive Cyber into disclosing its source code, entire database, and enhancements to functionality which were proprietary, so that it could copy it and create its own software. Furthermore, Kirschner hired Brandon Hass and Kiet Pham to copy and re-write the software so that Eyelation would no longer need to pay Cyber royalties and could terminate the Agreement.

77. Eyelation's deceptive acts not only breached the terms of the Agreement, they misled Wilson to disclose the source code, provide unlimited access to Cyber's database and exposure to proprietary enhancements to functionality. This allowed Eyelation to create its own software to gain an unfair business advantage. Eyelation's misrepresentations injured Cyber's goodwill, reputation and business, as well as diminished the value of Cyber's Patent.

THE PENDING ARBITRATION IN CHICAGO

78. The parties agree the Agreement was terminated no later than March 1, 2012. On March 29, 2012, in accordance with the Arbitration provision in the Agreement (Ex. 2, p. 9, ¶17), Cyber filed an Arbitration for breach of the Agreement which is currently pending in Chicago, Illinois.

79. At issue in the Arbitration is (1) whether the Software Eyelation is using belongs to Cyber as defined in the Agreement and (2) whether it owes Cyber past royalties.

80. The Agreement states that Cyber owns all Technology and Intellectual Property "as may be incorporated in the Software." (Ex. 2, p. 4, § 4.1)

81. The Agreement also states that all software and any ideas and information related to the Software created during the Agreement by either party shall belong to Cyber.

> "The parties expressly recognize that additional intellectual or other property rights may be created in the performance of this Agreement. The parties expressly agree that all right, title and interest … in and to the Software … **and any ideas or information created, conceived or reduced to practice by Cyber or EYE relating to the Software in the course of performance of the Agreement shall belong to Cyber."** (Ex. 2, p. 4, §4.2)

82. The patent count (Count I) is not subject to the Agreement and Arbitration for at least two reasons: (1) the parties agree that the Agreement has been terminated by March 1, 2012 at the latest and the Cyber Patent issued on June 11, 2013; and (2) Eyelation's primary defense in the Arbitration it that it "independently developed" its own software and it is not using Cyber's

Software, and thus its software is not subject to the Agreement and therefore it does not owe any royalties.

83. The breach of contract count (Count II) is not subject to the Agreement and Arbitration because the Arbitration clause states that breaches under Section 11 of the Agreement seeking such injunctive relief are not subject to Arbitration. (Ex. 2, ¶ 17.1)

84. The fraud and deceptive trade practices counts (Counts III & IV) are not subject to the Agreement and Arbitration clause because the fraud and deceptive acts are based upon, and include all of the facts of, the contract count and the Arbitration clause states that breaches under Section 11 of the Agreement seeking such injunctive relief are not subject to Arbitration. (Ex. 2, ¶ 17.1)

WHEREFORE, Cyber requests the following relief:

a. a finding that Eyelation and Kirschner infringe the Cyber Patent under 35 U.S.C. §271;

b. a finding that the infringement was willful;

c. an immediate temporary restraining order preventing any further infringement by Eyelation, Kirschner, or anyone acting with Eyelation or Kirschner;

d. a permanent injunction preventing any further infringement by Eyelation, Kirschner, or anyone acting with Eyelation or Kirschner;

e. damages in accordance with 35 U.S.C. §284;

f. increased damages in accordance with 35 U.S.C. §284;

g. attorney fees in accordance with 35 U.S.C. §285;

h. prejudgment interest;

i. holding Brad Kirschner personally liable for Eyelation's infringing activity;

j. damages for breaching the Agreement;

k. damages for the fraud;

l. punitive damages for the fraud;

m. attorney fees for the fraud;

n. attorneys fees pursuant to N.C. Gen. Stat §75-16.1;

o. treble damages pursuant to N.C. Gen. Stat §75.16; and

n. any other relief this Court deems is just and reasonable.

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