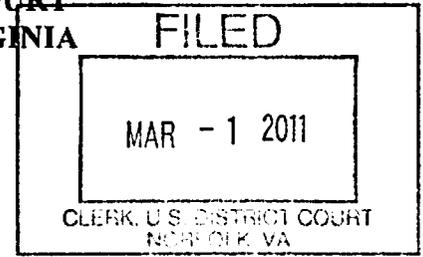


**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Norfolk Division**



**FRED HUTCHINSON CANCER  
RESEARCH CENTER; ARGUS  
GENETICS, LLC; AND MARS, INC.,**

**Plaintiffs,**

**v.**

**CIVIL ACTION NO. 2:10cv616**

**BIOPET VET LAB, INC.; AND RADIO  
SYSTEMS CORPORATION D/B/A  
PETSAFE,**

**Defendants.**

***MEMORANDUM OPINION AND ORDER***

This matter is before the Court on Plaintiffs' Motion for a Temporary Restraining Order against Defendant, Radio Systems Corporation d/b/a Petsafe ("PetSafe"), and a Preliminary Injunction against Defendants, BioPet Vet Lab, Inc. ("BioPet") and PetSafe (collectively "Defendants"), pursuant to Rule 65 of the Federal Rules of Civil Procedure. On February 22, 2011, this Court conducted a hearing and granted the Temporary Restraining Order. This Memorandum Opinion further explains the reasons for which the Temporary Restraining Order was **GRANTED**. The parties will reconvene on March 11, 2011 at 10:00 am for a hearing regarding the Motion for Preliminary Injunction.

**I. FACTUAL AND PROCEDURAL HISTORY**

In December 2003, Plaintiff Fred Hutchinson Cancer Research Center ("FHRC") filed a patent application for its dog breed identification technology. Mem in Supp of Pls.' Mot. for

TRO and Prelim. Inj. at 2. On June 1, 2010, it received United States Patent No. 7,729,863 (“the ‘863 patent”) for the technology. *Id.* FHCRC exclusively licenced this technology, along with the patent application, to Argus Genetics, LLC (“Argus”) on August 9, 2005. *Id.* Argus then sublicensed the technology and patent rights to Mars, Inc. (“Mars”) in exchange for payment of a royalty. *Id.* On December 17, 2010, Plaintiffs filed a Complaint in this Court against BioPet Vet Lab, Inc., alleging that Defendant had infringed and was currently infringing “one or more of the claims of the ‘863 patent by using, selling and offering to sell the dog breed identification services associated with its DNA Breed Identification Kit product.” Compl. ¶ 14. On January 31, 2011, upon learning that another company planned to market BioPet’s product at an upcoming veterinary conference, Plaintiff filed an Amended Complaint naming Radio Systems Corp. d/b/a/ PetSafe as a co-defendant in the case. Am. Compl. ¶¶ 5, 18. On February 9, 2011, BioPet filed an Answer and Counterclaim alleging that FHCRC submitted false oaths that were relied upon by the United States Patent Office in issuing the ‘863 patent and requesting declaratory judgments on the grounds of invalidity, non-infringement, and unenforceability, among other claims.

On February 14, 2011, Plaintiffs filed a Motion for Temporary Restraining Order (“TRO”) and a Motion for Preliminary Injunction. In these motions, Plaintiffs requested that Defendants refrain from infringing U.S. Patent No. 7,729,863 (“the ‘863 Patent”) by using, selling, offering to sell, directly or indirectly, distributing, displaying, using in commerce, demonstrating, or advertising, directly or indirectly, in communications with veterinarians or veterinary business, or at any and all trade shows, conventions, seminars, or conferences, including but not limited to the 83<sup>rd</sup> Western Veterinary Conference in Las Vegas, Nevada, set

for February 20-24, 2011 the following: (1) DNA breed identification products, and (2) dog breed identification services associated with a DNA breed identification product. On February 18, 2011, PetSafe filed a Response in Opposition alleging that Plaintiffs' Motions for TRO and Preliminary Injunction should be denied because the patent is invalid due to anticipation by prior art. Def.'s Resp. in Opp. at 6. Plaintiff's then filed a Rebuttal Brief on February 21, 2011. Having been briefed and argued by both parties, this matter is now ripe for consideration.

## II. LEGAL STANDARD

Rule 65 of the Federal Rules of Civil Procedure provides for the issuance of preliminary injunctions and temporary restraining orders ("TRO") as a means of preventing harm to one or more of the parties before the court can fully adjudicate the claims in dispute. From a procedural standpoint, a temporary restraining order differs from a preliminary injunction in two respects: a preliminary injunction requires the adverse party to have adequate notice (unlike a TRO which may be entered without notice); and a preliminary injunction is of indefinite duration while a TRO is limited to a duration of 14 days. *Compare* Fed.R.Civ.P. 65(a) *with* Fed.R.Civ.P. 65(b); *see, e.g., U.S. Dep't of Labor v. Wolf Run Mining Co.*, 452 F.3d 275, 281 n.1 (4th Cir. 2006). Consequently, the legal standard for issuing a TRO is the same as that for a preliminary injunction. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 129 S.Ct. 365, 374 (2008); *Real Truth About Obama v. Federal Election Commission*, 575 F.3d 342, 347 (4th Cir. 2009) (indicating that the *Winter* standard governs preliminary injunction proceedings in the Court of Appeals for the

Fourth Circuit as well as all other federal courts).

Given this standard, adjudication of preliminary injunctions or TROs in a patent infringement case necessarily involve consideration of substantive issues regarding the patent. To the extent that substantive issues arise that fall within the specific domain of patent law, precedent from the United States Court of Appeals for the Federal Circuit governs. *See Hybritech Inc v Abbott Labs.*, 849 F.2d 1446, 1451 n.12 (Fed. Cir. 1998); *Eyickett Corp. v. Unisys Corp.*, 155 F.Supp.2d 527, 535 (E.D. Va 2001).

### III. DISCUSSION

In support of the motions for TRO and preliminary injunction, Plaintiffs allege the following: 1) that they are likely to succeed on the merits by showing that Defendants Dog Identification Kit infringes on Claims 1, 20, 22 and 28 of the '863 patent; 2) that Plaintiffs will suffer irreparable harm based on permanent loss of customers, price erosion and losses to its reputation and goodwill; 3) that the balance of equities weighs in Plaintiffs' favor, and 4) that the public interest warrants protecting their rights under patent '863. *See* Mem. in Supp. of Pls.' Mot. for TRO and Prelim. Inj. at 12-26. This Court will address each element in turn to determine whether a TRO should be issued in this case.

#### A. Likelihood of Success on the Merits

A plaintiff must make a clear showing that it will likely succeed on the merits at trial before a court can issue a preliminary injunction in its favor. *Winter v. Natural Res. Def. Council, Inc.*, 129 S.Ct. 365, 376 (2008); *Real Truth About Obama v. Federal Election Commission*, 575 F.3d 342, 346-47 (4th Cir. 2009). At the preliminary injunction stage, a patent enjoys the same presumption of validity as at any other stage of litigation. *Titan Tire Corp. v.*

*Case New Holland, Inc.*, 566 F.3d 1372, 1377 (Fed. Cir. 2009); *Canon Computer Sys., Inc. v. Nu-Kote Int'l, Inc.*, 134 F.3d 1085, 1088 (Fed. Cir. 1998). As an affirmative defense to a Plaintiff's motion for preliminary injunction, a Defendant may attack the likelihood of success by raising questions about the validity of the patent. *Titan Tire Corp.*, 566 F.3d at 1377. However, to do so, the alleged infringer must present evidence that *raises a substantial question of* invalidity. *Id.* (emphasis in original). Once an alleged infringer has presented such evidence, the burden shifts back to the patentee to present contrary evidence that they are likely to succeed at trial on the validity issue. *Id.*

In this case, Plaintiffs assert that they are likely to succeed on the merits based upon Defendants' alleged infringement on claims 1, 20, 22 and 28 of the '863 Patent. Mem. in Supp. of Pls.' Mot. for TRO and Prelim. Inj. at 12. In order to prove patent infringement, Plaintiffs must compare the alleged infringing device to the properly construed claims to determine if all the claims limitations are met. *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1351 (Fed. Cir. 2001). In support of the allegation, Plaintiffs submitted a declaration from Dr. Neal Fretwell, Research and Development Director in the Mars Veterinary unit of Mars Symbioscience, a division of Mars, Inc., which contained a comparative analysis of the '863 patent claims and Defendants' dog identification product. *See generally* Decl. Fretwell. Plaintiffs also submitted a declaration from Mr. Michael J. Price, General Manager of Mars Veterinary, describing Mars' marketing and sale of the its dog breed identification kit as a sub-licensee of the Fred Hutchinson patent as well as the impact that Defendants' product has had on their business. *See generally* Decl. Price.

In response, Defendant, PetSafe, challenges the validity of the '863 patent on the grounds

that it was anticipated by prior art. Def.'s Resp. in Opp. at 6. In support of this argument, PetSafe presents nine articles to the Court. *See generally* Def.'s Resp. in Opp., Exs. 1-9. However, PetSafe focuses only on three of the articles in its reply and relies primarily on a proffer that one specific article, "Individual Assignment Using Microsatellite DNA Reveals Unambiguous Breed Identification in the Domestic Dog," by M.T. Koskinen ("Koskinen article"), anticipates claim 1 of the '863 patent. In presenting this argument, PetSafe offers as evidence the articles on their face and a declaration from Mr. Van Irion, attorney for the Defendants, stating his belief that "the '863 patent is invalid due to numerous prior art publications that contain all elements of each claim . . ." Decl. Van Irion ¶ 5. According to the United States Court of Appeals for the Federal Circuit, an alleged infringer has fulfilled the substantial question standard if the movant cannot prove that the invalidity claim lacks substantial merit. *Oakley, Inc v. Sunglass Hut Int'l.*, 316 F.3d 1331, 1340 (Fed. Cir. 2003) (quoting *Tate Access Floors, Inc. v. Interface Architectural Resources, Inc.*, 279 F.3d 1357, 1365 (Fed. Cir. 2002)). Here, the movant has provided a copy of the patent showing that the Koskinen article was already considered by the patent examiner during prosecution. *See* Decl. Delflache, Ex. 1 (presenting a copy of United States Patent No. 7,729,863 as issued on June 1, 2010 citing Koskinen article). This evidence makes it "especially difficult" for PetSafe to establish a substantial question of invalidity absent evidence that the article was not properly considered. *Glaxo Group Ltd. v. Apotex, Inc.*, 376 F.3d 1339, 1348 (Fed. Cir. 2004) (stating that the "burden [of showing invalidity] is especially difficult when, as in the present case, the infringer attempts to rely on prior art that was before the patent examiner during prosecution."). Therefore, absent evidence to the contrary, it is clear that the patent examiner considered the article and found that

it did not anticipate the '863 patent. Furthermore, PetSafe has failed to present any evidence outside of counsel's proffer to support its blanket assertions that any of the other articles mentioned anticipate the '863 patent.

In light of the fact that PetSafe did not present any evidence in the form of affidavits or testimony by a skilled professional to substantiate their invalidity claim, and given the fact that the primary article relied upon in both the written pleadings and oral arguments (the Koskinen article) was already considered by the patent examiner, this Court finds that PetSafe has failed to raise a "substantial question of invalidity" as required by *Titan Tire Corporation v. Case New Holland, Inc.*

Consequently, this Court concludes that the presumption of validity of the '863 patent has not been challenged by PetSafe. Furthermore, given the presumed validity of the '863 patent, Plaintiffs' allegations of infringement of claims 1, 20, 22 and 28 and Plaintiffs' sworn affidavits from skilled professionals in the art (including claim by claim analysis charts) to support the infringement allegations, this Court finds that Plaintiffs have established a likelihood of success on the merits, as required by *Winter*.

#### **B. Irreparable Harm**

The Supreme Court of the United States has indicated that plaintiffs seeking preliminary relief must demonstrate that irreparable harm is likely in the absence of the requested relief. *Winter*, 129 S.Ct. at 375 (indicating that a movant for preliminary injunction must demonstrate more than a possibility of irreparable harm). Plaintiffs assert that they will suffer a permanent loss of customers and market share, price erosion and a loss of goodwill and reputation in the absence of preliminary relief. While these matters were pending before the Court, Defendant,

PetSafe, was maintaining a booth at the 83<sup>rd</sup> Western Veterinary Conference in an effort to market and sell its version of the dog breed identification kit to veterinarians. Plaintiffs argue that allowance of this activity would result in permanent loss of customers and market share because once a customer has purchased a kit and tested a dog, there is no means of recapturing that customer (i.e., customers usually do not test dogs more than once). Decl. Price ¶ 22.

Plaintiffs further assert that they will suffer price erosion as a result of PetSafe's entry into the market because both BioPet and PetSafe have priced their products below that of Mars' products (e.g., \$40-45 for PetSafe's DNA Breed Identification Test versus \$85 for Mars' Wisdom Panel Insights test). Mem. in Supp. of Pls.' Mot. for TRO and Prelim. Inj. at 19; Decl. Price ¶ 15.

Finally, Plaintiffs allege that they will suffer permanent loss of reputation if PetSafe is allowed to continue its activities absent preliminary relief because both BioPet and PetSafe's products are of lesser quality and have already been ill-received by customers in the market. See Decl. Price ¶¶ 27-31 and Ex. 9; Decl. Fretwell ¶¶ 46-47. In support of these assertions, Plaintiffs have submitted copies of internet blogs/social media sites expressing customer dissatisfaction with the BioPet product, declarations from two skilled professionals and a copy of the PetSafe pamphlet displaying pricing for its DNA Breed Identification kit. See Decl. Price, Exs. 1, 7, 9-12.

“When the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor or the loss of goodwill, the irreparable injury prong is satisfied.”

*Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994); *Merrill Lynch, Pierce, Fenner and Smith v. Bradley*, 756 F.2d 1048, 1055 (4th Cir. 1985). In addition to loss of customers and goodwill, Plaintiffs have also presented compelling evidence of price erosion. Defendant does not refute any of the evidence Plaintiffs

presented to establish irreparable harm. Therefore, in light of the evidence presented, Plaintiffs have established a likelihood of irreparable harm in the absence of preliminary relief.

### **C. Balance of Equities**

Plaintiffs must also establish that the “balance of equities tips in [their] favor.” *Winter*, 129 S.Ct. at 376. Plaintiffs assert that the balance in equities tips in their favor because 1) PetSafe has not been in the market long; 2) Mars as a sublicensee is paying royalties for a product that PetSafe is infringing upon at no added cost, and 3) PetSafe has other products that could be marketed to veterinarians at the conference. Mem. in Supp. of Pls.’ Mot. for TRO and Prelim. Inj. at 23-25. PetSafe asserts that the balance of equities weighs in its favor because Plaintiffs’ patent is invalid therefore precluding any harm and because PetSafe would suffer irreparable harm to their First Amendment rights. Def.’s Resp. in Opp. at 14-15. After considering the arguments of both parties, the balance of equities weighs in Plaintiffs’ favor because Plaintiffs have an established reputation and history of offering the products to veterinarians that would be adversely impacted by PetSafe’s sale of a lesser product; and Plaintiffs payment of royalties for the use of the product puts them at a competitive disadvantage.

### **D. Public Interest**

Finally, Plaintiffs must establish that preliminary relief would be in the public interest. *Winter*, 129 S.Ct. at 376. Plaintiffs cite case law dating back 50 years, highlighting the strong public interest in preserving the rights of patent holders. Mem. in Supp. of Pls.’ Mot. for TRO and Prelim. Inj. at 25 (citing *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (discussing the underlying importance of patents to advancing the public welfare “through the talents of authors and inventors”). PetSafe asserts that the public interest weighs in its favor because of the invalidity of

the '863 patent. Def.'s Resp. in Opp. at 15. Given this Court's finding that PetSafe has not raised a substantial question of invalidity, Defendant's argument is unpersuasive to the Court. As such, this Court **FINDS** that the public interest weighs in favor of enforcing Plaintiff's patent.

#### **IV. CONCLUSION**

For the reasons stated above and on the record, Plaintiffs' Motion for a Temporary Restraining Order is **GRANTED**. Plaintiffs' Motion for Preliminary Injunction will be reserved for consideration pending a hearing in this Court on March 11, 2011.

**IT IS SO ORDERED.**

Norfolk, Virginia  
February 28, 2011

  
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Raymond A. Jackson  
United States District Judge