



More Sinister than Thanos himself? The Graverobbers of Theranos

Analysis of Labrador Diagnostics v Biofire Diagnostics, LLC

March 25, 2020

For the last few weeks, we’ve been following an interesting story of opportunism, greed, and corruption. On March 6, 2020, The Corporation Trust Company registered a new Delaware LLC named “Labrador Diagnostics.” On March 9, 2020, this same Labrador, owned by investment funds managed by Fortress Investment Group LLC, [filed a patent infringement lawsuit](#) in the District of Delaware to “protect its intellectual property.” Two days later, the defendant announced that they were developing test kits for Covid-19. Fortress Investment was terrified of the PR ramifications of being seen as exploiting the pandemic, and rightly so. Within a week, they were under fire.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LABRADOR DIAGNOSTICS LLC,

Plaintiff,

v.

BIOFIRE DIAGNOSTICS, LLC and
BIOMERIEUX S.A.,

Defendants.

C.A. No. _____

JURY TRIAL DEMANDED

[Techdirt](#) did a brilliant job in publicizing the lawsuit, on the 16th of March criticizing Fortress for filing “**one of the most utterly bullshit patent infringement lawsuits you’ll ever see.**” A day later, on the 17th, [Fortress issued a press release](#) stating that the lawsuit had nothing to do with Covid-19, and they were granting anyone who wanted it a royalty-free license to their patents to do anything related to Covid-19 testing. “The lawsuit focuses on activities over the past six years that are not in any way related to COVID-19 testing.”

While this seems like a generous, philanthropic act, and more gutless observers [may be tempted to drop the scrutiny](#), we see things differently. A patent troll (tragically the path Fortress took when IP financing for constructive business proved too hard) is still a patent troll, **regardless of whether they are spinning free licenses to their worthless patents off as virtuous acts** or not. Did we need their permission in the first place? **No.** Does having access to their alleged patent rights make a fundamental difference to any helpful innovation? **No.** At the end of the day, Labrador Diagnostics is a non-practicing entity with no website or other visible media presence that we could find, no other patents, nor any evidence of any business activity other than being a vessel for frivolous patent litigation. Making this a more flagrant abuse of the patent system, **they are a Delaware limited liability company filed on the 6TH of March, 2020. That is exactly 3 DAYS before filing the patent lawsuit.** That they think they can get away with suing for damages over the past 6 years is laughable.

The case reads LABRADOR DIAGNOSTICS LLC, vs BIOFIRE DIAGNOSTICS, a subsidiary of Biomerieux, who are currently producing testing units for Covid-19.

To properly understand the context of this lawsuit, we must travel back in time, and visit the unicorns of Christmas past. In 2003, Elizabeth Holmes, then 19, founded a health technology company named Theranos. It raised over \$700 million and was subsequently valued at a peak of \$10 billion in 2013-14 (hence – UNICORN!).

“Theranos was hyped to its investors and in the media as a breakthrough in the blood-testing market, where the U.S. diagnostic-lab industry posts annual sales of over \$70 billion. Theranos claimed its technology was revolutionary and that its tests required only about 1/100 to 1/1,000 of the amount of blood that would ordinarily be needed and cost far less than existing tests.”

The problem was, they didn't quite live up to their own hype. Two medical researchers and an investigative journalist began to question the validity of their claims. It wasn't long before the SEC, investors, and other medical authorities piled on, leading ultimately to the dissolution of Theranos. Elizabeth Holmes is going on trial in August for fraud charges related to this affair.

It's quite concerning when this skullduggery is merely the context for what is currently occurring, and not the main event. When Theranos was liquidated thanks to the aforementioned events in 2018, many of their patents were purchased by Fortress Investment Group. The two patents in question being used to sue Biofire are US8283155 and US10533994. Based on these two patents, they are trying to block Biofire Diagnostics from producing more infringing units (or at least were, until the media found out Biofire was producing Covid-19 test kits) and recover the grievous “damages” that they have suffered. I reiterate the fact that Labrador was formed 3 days before the lawsuit was filed, leaving us wondering how exactly Labrador can have suffered any damages...

Reading the lawsuit is enough to make your blood boil. It is also unclear how Labrador can on the one hand grant Biofire a royalty free license for their patents to produce Covid-19 tests while still maintaining the lawsuit.

Analysis

Labrador's lawsuit is riding on the validity of two patents that are already questionable thanks to the untimely demise of the original applicant, Theranos. Many articles have been written on this case, [speculating that the leftover IP from Theranos is likely garbage](#) (read: “I trust any IP acquired from Theranos about as much as I'd trust a man who told me he'd invented a living squid hat that crapped gold doubloons”), and we indeed agree with this speculation. Our analytical systems found no less than 416 patents that are significantly similar to the patents in question. There are 5 in particular which Theranos' patents are statistically likely to suffer fatal enforceability risk upon. Not to mention the countless other patents within the incestuous Theranos portfolio that overlap upon each other, decreasing the chance that any one individual patent will be found enforceable in court.

Document #	Title	Assignee Name	Priority	File	Issue
US8283155	Point-of-care fluidic systems and uses thereof	Theranos, Inc.	9-May-05	8-Oct-09	9-Oct-12
US10533994	Systems and methods of sample processing and fluid control in a fluidic system	Theranos IP Company, LLC	24-Mar-06	28-Sep-15	14-Jan-20

Both of these patents in question refer to devices that “allow real-time detection of analytes from a biological fluid.” Now an analyte is “a chemical substance that is the subject of chemical analysis.” This this sound like a circular argument to you? We could also phrase this as “the detection of something in a liquid.” Below is the first infringement claim of the lawsuit:

"1. A two-way communication system for detecting an analyte in a bodily fluid from a subject, comprising:"

20. Defendants' FilmArray 2.0 and Torch systems are each two-way communication systems for detecting an analyte in a bodily fluid from a subject.

21. Defendants' FilmArray 2.0 Instrument connected to a computer running FilmArray software, together with FilmArray pouches, is a system. This system is referred to herein as the "FilmArray 2.0 System."

No shit. My tongue is part of a system which detects various 'analytes' in food such as salt, sugar, and acids. Don't tell anyone, but I'm starting to worry that I might be the next target for an infringement lawsuit.

In all seriousness, the claims of the patent they state are being infringed are incredibly mundane and obvious (patents must be non-obvious to be granted). They include gems such as "a) a reader assembly comprising a programmable processor that is operably linked to a communication assembly;" where they point out that Biofire's machine uses, of all things, an ETHERNET CABLE to export data from its processor. Heathens!

Below is a list of relevant prior art that could potentially pose issues for the validity of the patents in question here. It is only a small selection out of the 416 we found...

Selected Art of Interest

Document #	Title	Assignee Name	Priority	File	Issue
US8551714	Microfluidic devices	IntegenX Inc.	15-Sep-04	6-Feb-12	8-Oct-13
US8370070	Integrated biosensor and simulation system for diagnosis and therapy	FERNANDEZ DENNIS S	22-Aug-03	24-Oct-08	5-Feb-13
US6964862	Sample processing device and method	Chen & Chen, LLC	29-Dec-00	16-Aug-04	15-Nov-05
US6663833	Integrated assay device and methods of production and use	Bayer AG	10-Mar-98	5-Mar-99	16-Dec-03
US6403367	Integrated portable biological detection system	Nanogen, Inc.	7-Jul-94	22-Dec-99	11-Jun-02

Conclusion

This is textbook patent trolling, attempting to masquerade as generous corporate giving. The most insidious thing is, anybody who accepts their patent licenses is (likely unintentionally) adding to the presumed validity of their patents and the lawsuit, and potentially painting themselves as targets for future lawsuits.

For the sake of retaining any hope in the judicial system, we sincerely hope that this case gets laughed out of court, as it should. If we can be of further assistance in ensuring that this happens, please reach out to us.

For more details on this report, please contact patentlyobvious@m-cam.com.

A Brief Primer on the Patent System

In recent years, the importance of patents and intellectual property rights as an important variable in the marketplace has come to the forefront of the public consciousness as world leaders declare their country's lead in the innovation race. Damaging intellectual property litigation is becoming increasingly common across all industries. This is exacerbated when patent rights are granted for non-novel ideas. A vast amount of precedent innovation is unconsidered by patent-granting authorities in the creation of new IP rights. Patent granting authorities including the United States Patent and Trademark Office (USPTO), European Patent Office (EPO), Japanese Patent Office (JPO), Chinese State Intellectual Property Office (SIPO), Korean Intellectual Property Office (KIPO) and many others are constrained by the use of patent classification systems which are routinely circumvented by patent applicants.

There is a two-way social contract underlying the patent system. In the United States, patent terms are generally limited to 20 years from the date of application. By statutory intention, once a patent has expired, the patent holder loses the right to exclude others from fully utilizing any innovation described in the patent. A large number of patents enter the public domain when they are "abandoned" – when owners discontinue paying patent maintenance fees. Patents also only provide an exclusionary right in the country for which the patent is filed. As demonstrated by the Global Innovation Commons¹ (G.I.C.), using intellectual property available in the public domain eliminates the need to pay licensing fees on those innovations in countries where the patent was never registered, or worldwide, if abandoned.

Patently Obvious[®] is a report focusing on select groups of patents in order to increase transparency in markets, addressing information asymmetries, and providing a more level playing field for all parties.

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¹ <http://www.globalinnovationcommons.org/>