

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-000743

01/19/2017

HON. ROGER E. BRODMAN

CLERK OF THE COURT
M. Corriveau
Deputy

WILLIAM J LIIMATAINEN

DANIEL G DOWD

v.

KEVIN M THILL, et al.

SCOTT H ZWILLINGER

WILLIAM SCOTT JENKINS JR.

RULING ON OWNERSHIP OF NEW ANTENNA DESIGN

I. INTRODUCTION

On November 29 – 30, 2016, the parties held a trial to the Court. The Court heard testimony from William Liimatainen, James Aberle, Kevin Thill, William Stennard, Sid Leach and Constantine Balanis. The Court reviewed the deposition testimony of Kelli Rice, William Stannard and James Weeden. The Court reviewed the post-trial briefings and held oral argument on January 3, 2017.

At issue is ownership of the so-called Four-Way MIMO antenna. Liimatainen argues that the Four-Way MIMO is owned by the Company; Thill argues that he individually owns the invention.

II. FINDINGS OF FACT

Antenna Plus, LLC (the “Company”) is a limited liability company originally organized in Wisconsin in 1997. The Company designs, manufactures and sells specialty antennas for cellular, PCS, GPS, Wi-Fi and certain private radio frequencies.

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Liimatainen and Thill are co-founders and 50% members of the Company. Liimatainen is a mechanical engineer and Thill is an electrical engineer. Liimatainen and Thill worked together for several years on the design and manufacture of antennas before formally organizing the Company in 1997.

The Company does not have a written operating agreement. Neither Liimatainen nor Thill have written employment agreements or a written “inventions agreements” that assign inventions to the Company.

On their business cards, Liimatainen was listed as Vice President of Operations. Thill was listed as Vice President of Engineering. Thill was the only electrical engineer at the Company.

In 2009, the Company reorganized in Arizona. The Articles of Organization signed by Thill and filed with the Arizona Corporation Commission identify Thill as the manager of the Company.

Liimatainen and Thill jointly invented certain products and designs that are manufactured and sold by the Company. With respect to some of those inventions, Liimatainen and Thill applied for the issuance of patents to the United States Patent and Trademark Office.

Liimatainen and Thill jointly invented a “Cellular Telephone Antenna.” The USPTO issued Patent No. 5,041,838 for the invention on August 20, 1991. The invention was subsequently manufactured and sold by the Company.

Liimatainen and Thill jointly invented a “Radio Frequency Antenna.” The USPTO issued Patent No. D418,142 for the invention on December 28, 1999. Liimatainen and Thill assigned the patent to the Company, which manufactures and sells products using the invention.

Liimatainen and Thill jointly invented a “Dual Function Communication Antenna.” The USPTO issued Patent No. 6,087,994 for the invention on July 11, 2000. Liimatainen and Thill assigned the patent to the Company, which manufactures and sells products utilizing the invention.

Liimatainen and Thill jointly invented a “Dual Frequency and Communication Antenna.” USPTO issued Patent No. 6,850,191 on February 1, 2005. Liimatainen and Thill assigned the patent to the Company, which manufactures and sells products utilizing the invention.

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Liimatainen and Thill jointly invented a “Dual Frequency Band Communication Antenna Assembly Having an Inverted F Radiating Element.” The USPTO issued Patent No. 8,669,903 on March 11, 2014. Liimatainen and Thill assigned the patent to the Company, which manufactures and sells products utilizing the invention.

Liimatainen and Thill jointly invented a multiple input and multiple output (“MIMO”) antenna design (the so-called “Two-Way MIMO”). Although they did not apply for a patent for this invention, the invention incorporates technology previously patented and assigned to the Company. Liimatainen and Thill agree that the Company owns the invention. The Company manufactures and sells products utilizing the invention.

With regard to the glass-mount antenna, by the time Antenna Plus was formed in 1997, it was no longer in use and there was no need to assign it to the Company. 11/29/16 at 3:01:24. Thill acknowledged that every invention was assigned to the Company:

Q: So since Antenna Plus gained a formal existence as a limited liability company in 1997 you had assigned every invention and design to the company as of February 2016 except for the four-way MIMO?

A: Yes.

11/29/16 Transcript at 224:15 – 19.

The Court finds that the parties had an established practice of assigning new antenna designs to the Company.

On January 22, 2016, Thill applied to the USPTO for the issuance of a patent for a “Multi-Element Antenna for Multiple Bands of Operation and Method Therefore” (the “Patent Application”). The Patent Application identifies Thill as the sole inventor of the invention (the so-called “Four-Way MIMO” or the “new antenna”). Thill has not executed an assignment of the Patent Application to the Company.

Thill paid for all the costs of the Patent Application using his personal funds. However, there was no evidence that Thill gave the Company an opportunity to pay for the Patent Application, and the Court finds that Thill’s decision to use personal funds was his decision alone.

During the time from August 2016 through the present, the Company has used, marketed, manufactured and sold products using the Four-Way MIMO.

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The Company has not paid, and Thill has not demanded that the Company pay, royalties for use of the Four-Way MIMO.

As a manager of the Company, Thill was responsible for the design, development and improvement of the electrical aspects of the Company's antennas. Thill admitted that he was responsible for helping to improve the Company's product lines, and that it was his job at the Company to design antennas. Thill's job duties included coming up with new ideas for antennas and developing those ideas into products. In short, Thill was employed, among other things, to invent antennas for the Company.

Thill testified that he came up with a new antenna design because it was best for the Company.

The Court finds that part of Thill's compensation was for the design and advancement of the Company's product line. In fact, Thill testified:

Q: And one of your duties is to advance the product line and meet customer expectations?

A: Yes.

Q: I mean, that's part of what you're paid to do, right?

A: It's part of what I get paid to do, yeah.

11/29/16 Transcript at 217:5 – 10.

Thill created the new antenna design as a replacement for the Two-Way MIMO design. The Four-Way MIMO design resulted from Thill's efforts to address specific problems he perceived as impacting the business and profitability of the Company, including the costs and turnaround time required to produce the Company's antennas using the Two-Way MIMO design.

Thill regularly performed Company business before or after traditional work hours and at locations outside of the Company's physical offices. On occasion, Thill worked on Company business from his home.

Thill testified that he came up with the idea for the design of the Four-Way MIMO on personal time on a plane flight to Chicago. There was no evidence contradicting this claim. Thill testified that he had his "eureka" (my words, not his) moment while reading an article on antennas during the plane flight. But the Court finds that keeping current on antenna design is a part of Thill's job with the Company, just like reading advance sheets from home or on plane flights is part of an attorney's job.

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Other than applying for the patent as the sole inventor and using personal funds for the patent attorney, Thill did not assert ownership of the new antenna design until approximately April or May 2016. Prior to that time, Thill acted as though the new antenna was owned by the Company. The Court certainly believed that the Company owned the new antenna design based on evidence and argument presented at the preliminary injunction hearing.

Thill kept Liimatainen out of the loop during the initial stages of the Four-Way MIMO design and development. Thill unilaterally cut off Liimatainen's access to corporate records and did not consult Liimatainen concerning the new antenna. This was inconsistent with their past managerial practices.

Thill developed, tested and marketed the Four-Way MIMO design on Company time and using Company funds. Initially, Thill concealed his design and development efforts, as well as the accompanying expenditures of Company funds, from Liimatainen.

Thill spent approximately \$92,000 in Company funds to pay for the development of a Four-Way MIMO prototype for manufacture. Thill charged much of this money by credit card instead of by purchase order. The Court finds that the use of a credit card was a deliberate effort by Thill to keep Liimatainen in the dark about development of the new antenna.

Without Liimatainen's knowledge, Thill entered into a lease in Scottsdale for facilities to manufacture the Four-Way MIMO and incurred other pre-manufacturing costs. Thill's failure to keep Liimatainen informed was addressed in detail in this Court's March 2, 2016 order. The Court said:

[T]he Court was persuaded that Mr. Thill's recent conduct has not complied with the parties' implied operating agreement or the obligation of any party to a contract to act in good faith. Mr. Thill has unilaterally acted in a fashion that the Court finds inappropriate. The evidence demonstrates that Mr. Thill took significant corporate action without notifying Mr. Liimatainen. He cut off Mr. Liimatainen's access to corporate records. Even if the parties disagree on the corporation's course of action, Mr. Liimatainen had a right to be informed and consulted.

The Court finds that the evidence presented in November 2016 confirms the Court's conclusion reached on March 2, 2016.

On January 4, 2016, Thill informed Company employees and - for the first time - Liimatainen of the Four-Way MIMO design and the Company's preparations for sale of the

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Four-Way MIMO design. Thill characterized the Four-Way MIMO design has a “redesign” of the Company’s Two-Way MIMO design. *See* Exhibit 7.

The Court considers Exhibit 7 to contain important information. It is a letter sent by self-identified “Managing Member” Kevin Thill to the “Antenna Plus Team,” *i.e.*, Antenna Plus employees. Among other items, the letter states that Thill “redesigned our MIMO antennas” in order “to reduce material costs and assembly times.” *Id.* The letter clearly reflects the managerial control asserted by Thill over the Company.

In 2016, at Thill’s direction, the Company embarked on a marketing campaign, advertising the Four-Way MIMO design to its existing customer base, and encouraging its customers to purchase the Four-Way MIMO design in place of the Two-Way MIMO design. For almost all purposes, the Four-Way MIMO design has replaced the Two-Way MIMO design. The Two-Way MIMO design is manufactured only by special order.

Initially, Liimatainen was not supportive of the new antenna design. He badmouthed the antenna design to key Company employees, calling it a “cheap Chinese knockoff.” At the preliminary injunction proceeding, he asked the Court to stop production of the new antenna design.

Liimatainen’s objection to the new antenna centered on the durability of the new antenna. For example, he was unhappy that glue was used to hold the covering together. But he did not challenge the electrical design for the antenna.

Although Liimatainen requested at the preliminary injunction hearing that the Court stop design and production of the Four-Way MIMO Antenna, the Court declined:

[T]he Court was not persuaded that stopping the development of the MIMO antenna redesign is in the parties’ (or the Company’s) best interests. Mr. Thill is identified as the “manager” in the records filed with the Arizona Corporation Commission. Materials have been purchased, contracts have been issued and space has been rented. On the limited record presented, the Court was not persuaded that pursuing the new MIMO design was an unreasonable business decision (in contrast to the manner in which the decision was carried out, which was unreasonable).

Minute Entry dated 03/02/16, page 2 (emphasis in original). The Court affirms this previous finding.

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The new antenna has been a success.

The Four-Way MIMO design has effectively replaced the Company's two-way MIMO design. For MIMO antennas offering up to two Wi-Fi capabilities, the Four-Way MIMO design offers the same functionality, utilizes the same product name, utilizes the same product number and is sold at the same prices as the Company's Two-Way MIMO design. Once the Company began selling the Four-Way MIMO design, all orders for MIMO antennas were automatically filled with the Four-Way MIMO design unless specially excepted.

The Four-Way MIMO design now represents a substantial amount of the Company's revenue and is the sole focus of the Company's Scottsdale facility. There is no question that the new antenna is a critical component to the Company's success. The new antenna services the same market and has the same application as the old Two-Way MIMO antenna.

The Four-Way MIMO design relates to an essential aspect of the Company's existing business.

The parties had a dispute over whether the Four-Way MIMO antenna design is a brand-new design or a redesign of an existing product. The Court was persuaded that the new antenna is a brand-new, cutting edge design from an electrical standpoint. On this point, the Court found Dr. Balanis's testimony persuasive. But the Court does not consider this testimony particularly relevant to its decision.

At all relevant times, Thill served as a manager of the Company and owed fiduciary duties to the Company, including the duties of loyalty, honesty and full disclosure.

In an email dated February 11, 2016, Thill acknowledged that he had fiduciary obligations to the Company. Thill wrote:

Not only do I have the right to make these changes, I have the fiduciary responsibilities to the Company and it's [sic] employees to implement changes which will help the growth and the prosperity of the [C]ompany.

Exhibit 12, page 4. This letter establishes two facts: First, Thill recognized that he owed a fiduciary obligation to the Company. Second, development of the Four-Way MIMO antenna was a specific and concrete opportunity for the Company's established line of business.

The Company never rejected or abandoned the Four-Way MIMO design. The Court finds Liimatainen credible when he testified that his objections to the new antenna design were based

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on mechanical issues, not electrical issues. In addition, Liimatainen did not have the authority to reject or abandon the Four-Way MIMO design. Thill was the Company manager.

Thill's job duties included innovation in design, development and improvement of the Company's products. As part of those duties, he created an antenna design that is a specific and concrete business opportunity for the Company. Thill's current actions are an attempt to usurp corporate opportunities. Thill's attempt to assert ownership over the new antenna is a breach of his fiduciary duty to the Company.

Although there is no written operating agreement, the Court finds that there was an implied operating agreement. Based on past practices, in which each of the prior antenna designs was assigned to the Company, the parties assigned the patent to the Company.

Thill delayed in asserting that he alone owned the invention. Thill's delay in asserting his individual ownership is persuasive evidence that initially Thill recognized that the new antenna design belonged to the Company.

Leach testified that it was standard practice for Arizona companies to have agreements assigning employee inventions to the Company. As manager, Thill would have been responsible for executing such agreements.

II. CONCLUSIONS OF LAW

It is well established that patent ownership is governed by state law, not federal law. *See Akazawa v. Link New Tech. Int'l, Inc.*, 520 F.3d 1354, 1357 (Fed. Cir. 2008) ("Our case law is clear that state law, not federal law, typically governs patent ownership."); *Int'l Nutrition Co. v. Horphag Research Ltd.*, 257 F.3d 1324, 1329 (Fed. Cir. 2001) ("[T]he question of who owns patent rights, and on what terms, typically is a question exclusively for state courts and not one arising under United States patent laws."); *Jim Arnold Corp. v. Hydrotech Sys., Inc.*, 109 F.3d 1567, 1572 (Fed. Cir. 1997) ("It may seem strange at first blush that the question of whether a patent is valid and infringed ordinarily is one for federal courts, while the question of who owns the patent rights and on what terms typically is a question exclusively for state courts. Yet that long has been the law.").

Generally, inventors own the patent rights to their inventions even if they were created during working hours or with employer resources. In an employer-employee relationship, however, there are three recognized exceptions to this general rule: (1) the employer will have ownership if there is an express contract stating the ownership rights will vest with the employer; (2) the employer will have ownership if the employee was specifically hired to exercise inventive faculties to create the invention; and (3) the employer may retain a "shop right" even if it does

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not retain ownership of the invention. *In re Stonecraft, LLC*, 322 B.R. 623, 630 (Bankr. S.D. Miss. 2005); *see also* Restatement of Employment Law §§ 8.09-8.10.¹ In *Stonecraft*, the court also held that an officer holding fiduciary duties could usurp a corporate opportunity by asserting personal ownership of intellectual property. 322 B.R. at 631. There, the Court said: “It is generally accepted that a person who functions, at the time of the invention, in a fiduciary capacity in a business organization may be under an obligation, in the absence of an agreement to the contrary, to assign any patents resulting from the invention to the organization.” *Id.*

In the instant case, there is no written contract providing that ownership rights to inventions vest with the employer. As a result, the issue becomes whether Thill was employed to invent, whether there is a breach of the corporate opportunity doctrine or whether there was an enforceable implied contract to assign invention rights. The Court will address each of these issues.

A. Employed to Invent

If an employee is hired to make an invention, the employer retains ownership of the patent. *See U.S. v. Dubilier Condenser Corp.*, 289 U.S. 178 (1933) (“One employed to make an invention, who succeeds, during his term of service, in accomplishing that task, is bound to assign to his employer any patent obtained. The reason is that he has only produced that which he was employed to invent. His invention is the precise subject of the contract of employment.

¹ The Restatement of Employment Law § 8.09(a) provides that “[u]nless otherwise agreed between the employer and the employee (§ 8.11), when an employee has not been hired or assigned to do inventive work, the employee has the right to patent an invention the employee creates, even if the invention is created during working hours or with the use of the employer’s resources.” The Restatement of Employment Law § 8.09(b) provides that “[u]nless otherwise agreed between the employer and the employee (§ 8.11), an employee hired or assigned to do inventive work has presumptively assigned to the employer any patents on inventions relating to the work for which the employee was hired (compare § 8.11).” In the event the employee retains the patent under § 8.09, “the employer has a nonexclusive, nonassignable right to use, without payment of royalty, any invention that an employee creates during working hours or with the use of the employer’s resources.” Restatement of Employment Law § 8.10; *see* 9 Ariz. Prac., Business Law Deskbook § 18:17 (2016-2017 ed.) (“The shop rights doctrine addresses the situation where the employee develops an invention. Originating from patent law, the shop rights doctrine holds that when an employee, during hours of employment, uses the employer’s materials and equipment to conceive and perfect an invention for which the employee obtains a patent, the employee must accord the employer a non-exclusive right to practice the invention. The doctrine is based upon the employer’s presumed contribution to the invention through time, materials, and equipment.” (footnotes omitted)).

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A term of the agreement necessarily is that what he is paid to produce belongs to his paymaster.”); *see also* Restatement of Employment Law § 8.09(b).

The defense expert, Sid Leach, cited to *Teets v. Chromalloy Gas Turbine Corp.*, 83 F.3d 403 (Fed. Cir. 1996), to support his opinion that the employed-to-invent doctrine is very narrow, and that an employer can only claim ownership if it is expressly provided for in the employment contract. Leach cites to the following language:

Under these rules, a Florida employer can not claim ownership of an employee’s invention “unless the contract of employment by express terms or unequivocal inference shows that the employee was hired for the express purpose of producing the thing patented.” Thus, when an employer hires a person for general service and the employee invents on the side, the invention belongs to the employee. However, the employer may claim ownership of the invention if the employer hires a person for the “specific purpose of making the invention.”

Teets, 83 F.3d at 407-08 (citations omitted). The court in *Teets*, however, also stated that “[w]ithout such an express agreement, employers may still claim an employee’s inventive work where the employer specifically hires or directs the employee to exercise inventive faculties.” *Id.* at 407. The reasoning behind such an implied-in-fact contract is that when the employment focuses specifically on invention the employee is already fully compensated for the inventive work. *Id.* “To apply this contract principle, a court must examine the employment relationship at the time of the inventive work to determine if the parties entered an implied-in-fact contract to assign patent rights.” *Id.* Whether such an agreement exists is a question of fact, founded upon a meeting of the minds, and inferred from the parties conduct in light of the surrounding circumstances. *Id.* at 407, 408.

In determining whether an employee is employed to invent, courts have found evidence of a past practice of assigning patents to an employer to be persuasive evidence of a duty to assign. In *Mainland Industries, Inc. v. Timberland Machines and Engineering Corp.*, the Oregon Court of Appeals found there was an oral agreement between an employer and employee obligating the employee to assign anything invented with company time and materials to the employer. 649 P.2d 613, 616 (Or. Ct. App. 1982). The agreement also allowed the employee to retain ownership of any inventions made outside company time and at the employee’s own expense. *Id.* In evaluating whether such an agreement existed, the court found the employee’s practice of assigning patents to the company to be persuasive evidence of a duty to assign. *Id.* at 616-17; *see also White’s Electrs., Inc. v. Teknetics, Inc.*, 677 P.2d 68, 70-71 (Or. Ct. App. 1984) (“Absent an agreement to the contrary, an employee who is hired to invent, and who succeeds

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during his term of service in accomplishing that task, is bound to assign to the employer all rights in the invention. Furthermore, the practice by an [employee] of assigning patents to an employer constitutes persuasive evidence of a duty to assign.” (citations omitted)). After finding such an agreement existed based on past practice, the court next looked at the circumstances surrounding the invention to determine whether the employer or the employee owned the patent. *Mainland Indus., Inc.*, 649 P.2d at 616-17; *see also Scott Sys., Inc. v. Scott*, 996 P.2d 775, 778 (Colo. App. 2000) (stating employer may own patent even though employment agreement did not assign inventions to employer when employee’s “job duties include the responsibility for inventing or for solving a particular problem that requires invention”).

B. Corporate Opportunity Doctrine

The corporate opportunity doctrine prohibits a manager of a company from wrongfully depriving the company of a business opportunity. “The ‘business opportunity’ doctrine holds that a director or officer may not seize for himself, to the detriment of his company, business opportunities in the company’s line of activities in which it has an interest or prior claim.” *Tovrea Land & Cattle Co. v. Linsenmeyer*, 100 Ariz. 107, 122 (1966). Of course, “[t]he more precise test is whether the director has a specific duty to act in regard to the particular matter as a representative of the company. If there is no such duty, the director may acquire outside interests although the corporation may be more or less interested.” *Id.*

In *Taser International, Inc. v. Ward*, 224 Ariz. 389, 398-99 (App. 2010), the court of appeals found that the corporate opportunity doctrine was not violated by a former employee who developed a product that competed with his former employer’s product. But *Taser International* is distinguishable from the instant situation. The Court noted that there was no evidence indicating that the employee “usurped any concrete opportunity.” *Id.* at 399. By contrast, in the instant case the Four-Way MIMO is a distinct and concrete opportunity that supplants and replaces the Company’s Two-Way MIMO.

If, at the time of invention, the inventor functions in a fiduciary capacity in a business organization, or occupies a special position of trust within the organization, the inventor *may* be obligated to assign the patent to the company. *In re Stonecraft, LLC*, 322 B.R. at 631; *see also Univ. Patents, Inc. v. Kligman*, 762 F. Supp. 1212, 1221 (E.D. Penn. 1991) (“The law regarding implied contracts to assign patent rights in the employer-employee context has developed primarily in two areas: (1) where the employee is hired for some particular reason, and (2) where the employee holds a position of trust as to the employer.” (internal citation omitted)). Whether the inventor owes a fiduciary duty is based on relevant state law. Once a duty is found, courts may apply several factors in determining whether the fiduciary should be required to assign the patent to the employer. *In re Stonecraft, LLC*, 322 B.R. at 631 (listing factors including that the fiduciary was the company’s “alter-ego”; the patent is in the company’s name; the product based

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on the patented invention was marketed as a company product; no license agreement exists between the fiduciary and the company; the company was led to believe the product was a company asset; and the fiduciary usurped a corporate opportunity).

C. Implied Covenant

“The terms of the oral partnership agreement are determined by the parties’ intent as indicated by their conduct and statements.” *Rhue v. Dawson*, 173 Ariz. 220, 227 (App. 1992).

III. ANALYSIS AND CONCLUSIONS

The Court does not believe that 35 U.S.C. §261 preempts the ownership issue. Section 261’s requirement for written assignment does not apply when, as determined by the Court, the Company owned the patent all along. The requirement of a written assignment can be satisfied by this Court’s order.

The Court agrees with plaintiff that § 261 does not address or preempt fiduciary duties, equitable ownership or implied agreements to assign inventions by co-owners of an LLC. Nor does the Court believe that any state law claims in this case conflict with § 261. Patent ownership may be transferred by operation of law, and § 261 does not address equitable ownership or fiduciary duties. Federal patent law is not advanced by preempting state law claims concerning the employed to invent doctrine or breach of the corporate opportunity doctrine.

For the reasons noted below, the Court finds that the new Four-Way MIMO design is owned by the Company and Thill has a legal and equitable obligation to assign the Four-Way MIMO design and the Patent Application to the Company. The Court bases its conclusion on three separate and independent reasons.

1. Thill was employed to invent

If an employee invents on the side, the invention typically belongs to the employee. But Thill did not invent the new antenna on the side. He did it as part of his job for the Company.

If an employee is hired to make an invention, the employer retains ownership of the patent. Thill’s job responsibilities included inventing new products for the Company. As a result, Thill was employed to invent and the Company retained the ownership of antenna inventions created by Thill, even if he created the inventions at home or away from the Company’s premises.

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The Company's ownership of the antenna design is an unequivocal inference from the parties' past conduct and operation of the Company.

The fact that the new antenna design is a new design is of no moment. The new design is an antenna which replaced a current Company product. It was created to solve problems caused by the existing antenna. Moreover, Thill's job was to invent new antennas. He did so. It is part of what he was paid to do.

THE COURT FINDS that the Company owns the Four-Way MIMO antenna design through the employed to invent doctrine.

2. Thill violated the corporate opportunity doctrine

A second, independent basis demonstrates the Company's ownership of the new antenna. Thill was a manager of the Company. He owed it fiduciary duties.

In *In re Access Cardiosystems, Inc.*, 340 B.R. 127 (D. Mass. 2006), the court rejected an argument nearly identical to the argument advanced by Thill in the instant case. There, an officer of a corporation owed fiduciary duties of care and loyalty to the company. He claimed that he was the rightful owner of intellectual property. The court rejected his claim, finding that "his actions constituted clear violations of his fiduciary duties to the corporation. The intellectual property, the [patent application] and any ensuing patent are essential corporate opportunities that [the officer] has attempted to divert for his own gain." *Id.* at 149.

As the manager, Thill owed fiduciary obligations to the Company. Thill's job duties included innovation and the design, development and improvement of the Company's products. The new antenna design was such an improvement. The Company devoted substantial resources to the new antenna design. Thill's current actions are an attempt to usurp corporate opportunities. Thill's attempt to assert ownership over the patent is a breach of fiduciary duty.

Thill argues that the corporate opportunity doctrine should be narrowly construed in Arizona. Even under a narrow definition of corporate opportunity, Thill usurped the Company's corporate opportunity. The new antenna is an essential aspect of the Company's operations. It services the same market and has the same application as the Two-Way MIMO antenna.

The Company is more valuable if it is the sole owner of the new antenna design. (Indeed, Thill argues that shop rights are not assignable and therefore any shop right to manufacture the new antenna would end upon the Company's dissolution.) Refusing the Company ownership of the new antenna would be divesting the Company of a concrete opportunity and reduce the Company's value. It would make the Company less valuable because 1) Thill and the new

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antenna would be a competitor to any entity purchasing the Company and 2) the new purchaser would lose the shop right to make the new antenna. Thill himself recognized the critical nature of the new antenna when he wrote that he needed to make changes to allow production of the new antenna because it was necessary “to implement changes which will help the growth and the prosperity of the [C]ompany.” Exhibit 12, page 4. Thill had a specific duty to improve Company products, and the new antenna arises out of that specific duty.

Thill’s expert, Sid Leach, testified that the customary practice of companies with respect to the ownership and use of patents invented by employees is to have employees sign written instruments, typically in the form of invention assignment agreements, that obligate the employee to assign any patents to the company. Here, Thill was the owner and manager of the Company. If there was a failure of the Company to follow “customary practice,” the failure was in large part Thill’s. The Court would find it inequitable for Thill to take advantage of his own failure to require key inventors in the Company to sign an agreement that is, according to his own expert, “customary.”

Defendant argues that, pursuant to *TM2008 Investments, Inc. v. Procon Capital Corp.*, 234 Ariz. 421 (App.2014), he has no fiduciary duty to the Company. The Court disagrees.

The issue in *TM2008* was whether the Limited Liability Company Act created fiduciary duties between members. Here, Thill’s fiduciary duty is based - not on his membership in the LLC - but on the undisputed fact that Thill was the manager of the LLC who was tasked with the function of designing new products for the Company. It is based on his acknowledged fiduciary duties to the Company as its manager.

THE COURT FINDS that Thill’s attempts to assert ownership of the Four-Way MIMO antenna is a breach of fiduciary duty and is an attempt to usurp corporate opportunities. Accordingly, the Company owns the new antenna design pursuant to the corporate opportunity doctrine.

3. Thill has an implied in fact agreement to assign

Here, the parties had no written operating agreement. But an operating agreement need not be in writing. The parties had historically operated under the practice that antenna patents were owned by the Company. The Court finds the past assignment practices to be persuasive.

The Court was not persuaded by defendants’ claim that the glass-mount antenna was not assigned to the Company. With regard to the glass-mount antenna, by the time Antenna Plus was formed in 1997, it was no longer in use and there was no need to assign it to the Company.

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11/29/16 at 3:01:24. Moreover, Thill acknowledged that every invention was assigned to the Company:

Q: So since Antenna Plus gained a formal existence as a limited liability company in 1997 you had assigned every invention and design to the company as of February 2016 except for the four-way MIMO?

A: Yes.

11/29/16 Transcript at 224:15 – 19.

“The terms of the oral partnership agreement are determined by the parties’ intent as indicated by their conduct and statements.” *Rhue*, 173 Ariz. at 227. The parties’ prior conduct best represents the understanding that patents were owned by the Company. *See Associated Students of Univ. of Arizona v. Ariz. Bd. of Regents*, 120 Ariz. 100, 105 (App. 1978) (in interpreting a contract, “acts of parties under a contract, before disputes arise, are the best evidence of the meaning of” the contract terms). Here, the evidence demonstrates that both parties treated new antenna designs as property of the Company. Initially, in this case both parties treated the Four-Way MIMO antenna design as property of the Company. Not until April or May in 2016 did Thill first argue that he was the sole owner of the new antenna design.

THE COURT FINDS by clear and convincing evidence that the implied operating agreement assigned any antenna patents developed by Thill or Liimatainen to the Company. As a result, the Company owns the Four-Way MIMO antenna design.

IV. ORDERS

IT IS ORDERED that the Company is the owner of the Four-Way MIMO design and Patent Application, and that Thill has a legal and equitable obligation to assign the Four-Way MIMO design and associated intellectual property to the Company.

IT IS FURTHER ORDERED that the Company is further entitled to a constructive trust over all interests of Thill in, to, or derived from the Four-Way MIMO design and associated intellectual property.

The Court believes the instant situation is an appropriate application of Rule 54(b). The issue of LLC dissolution is dependent in large part on the ownership issue just decided. The parties agreed to expedite litigation on the ownership issue in order to reach a resolution as soon as possible. Although this order does not terminate the receivership or the liquidation

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proceedings, the Court believes that it is in the interests of justice, and that there is no just reason for delay, for entry of judgment at this time.

IT IS FURTHER ORDERED that, within 10 days of the filed date of this order, plaintiff shall submit a proposed form of judgment containing Rule 54(b) language.