LEXSEE 1994 U.S. DIST. LEXIS 21457

CACI INTERNATIONAL INC. et al., Plaintiffs, v. PENTAGEN TECHNOLOGIES INTERNATIONAL, LTD., et al., Defendants.

Civil Action No. 93-1631-A

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

1994 U.S. Dist. LEXIS 21457

June 16, 1994, Decided
June 16, 1994, Filed

DISPOSITION: [*1] Plaintiffs' Motion for Summary Judgment GRANTED as to Counts I, II, IV and V, and DENIED as to Count III. Defendants' Motion for Summary Judgment GRANTED as to Count III and DENIED as to all other counts.

COUNSEL: For CACI, INTERNATIONAL, INC., CACI, INC - FEDERAL, plaintiffs: Christian Reginald Bartholomew, Joseph William Koegel, Jr., Steptoe & Johnson, Washington, DC.

For PENTAGEN TECHNOLOGIES INTERNATIONAL, LTD., JOHN C BAIRD, MITCHELL R LEISER, defendants: Gregory E. Stambaugh, Brown & Stambaugh, Manassas, VA.

For PENTAGEN TECHNOLOGIES INTERNATIONAL, LTD., JOHN C BAIRD, MITCHELL R LEISER, defendants: Joel Z. Robinson, New York, NY.

For MITCHELL R LEISER, defendant: John Kenneth Zwerling, Zwerling & Kemler, P.C., Alexandria, VA.

For USA, interested party: Robert A Spencer, U.S. Attorney's Office, Alexandria, VA.

JUDGES: Leonie M. Brinkema, United States District Judge.

OPINIONBY: Leonie M. Brinkema

OPINION:

MEMORANDUM OPINION

I

This matter is before the Court on motions for summary judgment. The central issue in this matter is whether plaintiffs have infringed a copyright by marketing software to a third party pursuant to a teaming agreement with the alleged copyright holder's [*2] subsidiary/licensee and the copyright holder's "successor in interest." Additionally, plaintiffs seek declaratory judgment regarding any infringement of defendants' trademark and damages for related state law claims of breach of contract, tortious interference with business relations, and defamation.

Plaintiffs moved for summary judgment on all issues pursuant to *Fed. R. Civ. P. 56*. Defendants filed an opposition to that motion in which they also moved for summary judgment on all issues. The Court's disposition of these matters is reflected in this opinion.

II

The ownership history of the software that is at the heart of this controversy is long and tortuous. Because this history bears on some of the issues in this matter, it will be necessary to recount it here, although every effort will be made to be succinct. The parties do not differ to any significant degree about these facts.

Defendant Pentagen Technologies International, Ltd. ("Pentagen") is an English corporation with an office in New York. Defendant Baird Technologies, Inc. ("BTI") is a Delaware corporation, also located in New York. BTI is the United States subsidiary of Pentagen. Defendant John Baird ("Baird") was an [*3] officer of both Pentagen and BTI during the time periods relevant to this lawsuit. He was also a developer of the MENTIX software, which is at the heart of the parties' dispute. Defendant Mitchell Leiser is a vice-president and director of Pentagen and was, at relevant times, an officer and director of BTI.

In 1989, Robert O'Brien invested in Pentagen through his company, Runaway Development Group, S.A. ("RDG"). Overall, O'Brien/RDG invested $ 400,000, part of which was common stock convertible into secured promissory notes of Pentagen. O'Brien exercised that option in Spring, 1990. Pentagen issued

the notes which were secured by the intellectual property of Pentagen, namely MENTIX. On June 21, 1990, Pentagen assigned its patent applications to RDG. O'Brien also began acting as a director of Pentagen and BTI. Pentagen defaulted on the loan and O'Brien asserted ownership of the software through his own corporations RDG and Expert Objective Systems Development Corporation (EOSD). O'Brien also filed suit against Pentagen and BTI in New York alleging securities fraud. Pentagen counterclaimed, asserting that O'Brien/RDG converted the MENTIX software because the underlying security interest [*4] was void under English law which does not allow for equity interests to be converted into secured loans.

At about the same time O'Brien/RDG converted equity interest in the fledgling software enterprise into a secured loan, BTI was marketing the MENTIX software to the Army Materiel Command (AMC), which is part of the United States Government Department of Defense. From all reports, the AMC was favorably impressed with the software, which purportedly translates programming applications from one language to another. Although the AMC expressed some interest in procuring the software, it had two notable reservations about the vendor, BTI. The first concern was that BTI had no "track record" of providing goods and services to the government, and therefore could not qualify as a "responsible party." The second concern was that BTI was a wholly owned subsidiary of an English company, and therefore its products would be difficult to procure in light of the Buy America Act. At this point BTI approached plaintiffs. CACI International ("CACI"), an international high-tech business for systems engineering and information sciences, is a Delaware corporation with its principal place of business [*5] in Virginia. CACI-Federal ("CACI-Fed") is a CACI subsidiary which focuses on systems integration, custom software development, and software engineering. BTI recognized that plaintiffs had significant experience marketing to the government and that CACI was recognized as a "responsible party." CACI and BTI, through its officer Baird and later through O'Brien, negotiated a teaming agreement under which CACI would market MENTIX to the AMC. BTI assured CACI that it had a Master Licensing Agreement with Pentagen which allowed it to license MENTIX to third parties, such as CACI and the AMC.

During these negotiations two events occurred, unknown to CACI at the time, which bear on this present imbroglio. The first was Pentagen's defalcation on the O'Brien loan with the subsequent assertion of ownership rights over MENTIX by RDG. The second was Pentagen's failure to make the appropriate corporate filings in England, which resulted in the corporation being struck from the list of companies from March 1990 to September 14, 1990, during which time its assets, including the intellectual property MENTIX, was bona vacantia, and forfeit to the Crown.

O'Brien and BTI's counsel advised CACI that [*6] RDG was a successor in interest to Pentagen's MENTIX copyright. Having been provided with a copy of the assignment of Pentagen's rights by O'Brien, and having been informed that RDG was licensing its subsidiary EOSD to provide MENTIX for the teaming agreement, CACI amended the draft teaming agreement to reflect that change. CACI sent the revised draft to O'Brien and Baird. Baird did not respond, but O'Brien continued the negotiations. On August 15, 1990, CACI signed the teaming agreement with BTI (O'Brien signing as "acting CEO"), EOSD and O'Brien. In that agreement, BTI, EOSD and O'Brien warranted to CACI, Inc.-Federal that they had good title to or adequate rights to license MENTIX. However, later that same day, Baird told CACI that RDG did not have title to MENTIX and suggested that CACI not enter into the teaming agreement with them. CACI advised Baird that the teaming agreement had already been signed.

Concerned by this communication, CACI turned to O'Brien for assurances regarding the ownership of MENTIX and licensing capabilities of EOSD, BTI and O'Brien. O'Brien again sent a copy of the assignments. Thereafter, pursuant to the teaming agreement, CACI made a copy of the software [*7] in September 1990 and returned the original MENTIX disks to O'Brien. n1

n1 This copying was a two-step process. The first version of the software which O'Brien sent reflected the copyright holder as Baird. CACI sought clarification and O'Brien sent new disks which reflected that EOSD was the copyright holder.

Based on these representations, CACI proceeded to perform under the teaming agreement by sending a "white paper" to the AMC recommending a research project to develop MENTIX into a product that would serve the AMC's needs. Next, CACI prepared and presented a business proposal outlining the method of reengineering AMC information systems to integrate databases and modernize systems. Several meetings were held with AMC to make presentations and answer questions. At the end of September, 1991, after this work had been done, Baird again contacted CACI and disputed O'Brien's rights to MENTIX. Baird faxed to CACI a copy of the counterclaim to a suit brought by RDG against Pentagen and Baird in New York. Although [*8] CACI was referenced in the counterclaim, it was not a party in that lawsuit.

Three days later, Baird also asserted his belief that CACI was on the verge of entering into a contract with the AMC involving MENTIX, and offered to sign the

teaming agreement and to provide the licensing rights for MENTIX to CACI. On October 3, CACI informed Pentagen that there was no contract with the AMC. Pentagen again offered CACI what it believed were the necessary licensing rights and indemnification should CACI wish to proceed with an AMC procurement. At that point O'Brien again assured CACI that RDG had title to MENTIX. O'Brien sent another copy of the assignments. Additionally, NSL, the owner of the software from which MENTIX was derived, informed CACI by letter that "as far as we are concerned, Mr. Baird has no continuing arrangement or agreement with respect to Q'Nial."

CACI discontinued all activity related to marketing MENTIX to the AMC and began its own internal review of the situation. Eight weeks later, in January 1992, CACI terminated the teaming agreement and returned its copy of MENTIX to O'Brien. Defendants have presented no evidence of CACI making any additional copies of MENTIX or [*9] of getting any contract from AMC for this project.

The next month, the U.S. Army Information Systems Selection and Acquisition Agency issued a request for proposals for the Army's Sustaining Base Information Services ("SBIS") Program. CACI teamed with IBM to submit a proposal. In July 1993, IBM was awarded the SBIS contract, and CACI currently serves as a subcontractor to IBM on that contract.

At this point CACI was drawn into the litigation quagmire surrounding the ownership of MENTIX. In July 1993 Pentagen filed suit against CACI in the Supreme Court of New York claiming conversion of MENTIX based on CACI's marketing of the software to the AMC, as well as violations of the New York Penal Code and nonexistent sections of the Virginia Code of Criminal Justice based on the same marketing activity. CACI moved to dismiss in September, and that motion was still pending when, in January 1994, the action became removable to the federal court. That lawsuit is now on the docket of the United States District Court for the Southern District of New York and the motion to dismiss remains pending.

In December 1993, Pentagen filed a complaint against CACI in federal court alleging (1) copyright [*10] infringement under *17 U.S.C. § 501;* (2) trademark infringement and unfair competition under § § 32 and 43 (a) of the Lanham Act, *15 U.S.C. § § 1114* and 1125; and (3) a violation of the Major Fraud Against the United States Act, *18 U.S.C. § 1031*. That complaint is based again on CACI's marketing MENTIX to the AMC and adds that CACI's use of its RENovate methodology and CACI's development of software on the SBIS contract will infringe Pentagen's copyright of MENTIX. CACI filed a motion to dismiss all counts of Pentagen's complaint on February 22, 1994.

Believing that the federal court in New York lacked jurisdiction over it and that Pentagen's claims would ultimately be litigated in the Eastern District of Virginia, CACI filed its complaint on December 22, 1993, seeking declaratory judgment regarding Pentagen's copyright infringement and trademark infringement and adding supplemental state law claims for damages arising from breach of contract, tortious interference with contract and defamation. Following this Court's ruling denying defendants' motion to dismiss, defendant BTI failed to file an answer. An Order entering [*11] Default Judgment against BTI issued on March 17, 1994.

With this background in mind, the Court now addresses the legal issues raised in the summary judgment motions.

III

Copyright infringement

The defendant owners of the MENTIX copyright are precluded as a matter of law from establishing copyright infringement with respect to some of CACI's activity while CACI possessed the software. Registration of a copyright is a prerequisite for bringing an infringement claim *17 U.S.C. § 411*(a); See *Eastern Pub. and Advertising, Inc. v. Chesapeake Publ. & Advertising, Inc., 831 F.2d 488, 490 (4th Cir. 1987).* Pentagen did not register its MENTIX copyright until December 7, 1993. Additionally, the statute of limitations for copyright infringement claims is three years from the date the cause of action accrued. Because the registration did not occur until December 1993, activities that predate December 1990 are not actionable under a copyright infringement theory. Defendants argue that the Court should consider the teaming agreement and marketing to the AMC as a continuous and on-going scheme and have the later alleged acts of infringement relate [*12] back to earlier activities. This Court has rejected any application of a "rolling statute of limitations" theory under the copyright law. *Hoey v. Dexel Systems Corp., et al, 716 F. Supp. 222, 223 (E.D. Va. 1989).* Therefore, activities predating December 7, 1990, are as a matter of law outside the scope of this lawsuit. Specifically, CACI's making one backup copy of MENTIX in September 1990 cannot constitute copyright infringement.

This Court limits its examination of the copyright infringement question to the marketing activities to AMC that occurred after December 7, 1993 and in connection with the SBIS contract. A claim of copyright infringement requires a showing of ownership of a valid copyright and unauthorized copying of the copyrighted work. *Avtec Systems, Inc. v. Peiffer, 1994 U.S. App. LEXIS 6522,* *7 (4th Cir. 1994). Although plaintiffs raise some challenges to defendants' ownership of a valid copyright, the central issue to be decided is whether

marketing without actual distribution of a software package constitutes copyright infringement. n2 For the reasons set forth below, we hold that it does not.

n2 Plaintiff argues that during the time Pentagen was not a registered company, March to September 1990, it cannot assert ownership of the copyright because its assets were bona vacantia and property of the Crown. Though the intricacies of British property law as they relate to the application of copyright ownership under the U.S. Code are of keen academic interest, the Court finds that the issues in this case can be squarely addressed without resort to such Rumpolean antics.

[*13]

The owner of a copyright under Title 17 has certain exclusive rights, including the right to authorize (1) the reproduction of a copyrighted work, (2) the preparation of derivative works based upon the copyrighted work, and (3) the distribution of copies of the copyrighted work to the public by sale or other transfer of ownership, or by rental, leasing, or lending. *17 U.S.C. § 106.* In marketing the work to the AMC, plaintiffs offered to prepare a derivative work, MENTIX-MVS. There is no evidence in the record that the derivative work was actually prepared or that MENTIX was copied (within the statutory time frame) or distributed in any respect pursuant to the AMC during CACI's marketing efforts under the teaming agreement. In rebuttal to plaintiffs' evidence that it did none of those things, defendants offer only a statement by an AMC employee that he overheard a comment related to MENTIX from which he inferred that a copy of the software had been made by CACI and provided to the AMC. Such evidence does not rise to a genuine dispute of material fact, let alone act as proof of infringement. In claiming that a mere offer to provide a derivative work of copyrighted [*14] material constitutes infringement, defendants overlook an essential element of an infringement claim: that the work was copied. A copyright holder may prove copying by showing access to the copyrighted work and substantial similarity between the copyrighted work and the infringing work. *M. Kramer Mfg. Co., Inc. v. Andrews, 783 F.2d 421 (4th Cir. 1986).* Apart from the backup copy, there is no direct evidence of copying. There is no evidence in the record of a work that is "substantially similar" to MENTIX resulting from the AMC marketing efforts.

As to the SBIS contract, defendants contend that CACI's offer to provide re-engineering services through its RENovate methodology would necessarily require use of a product either derived from or substantially similar to MENTIX. CACI disputes that it had access to the MENTIX software at the time it teamed with IBM to prepare a proposal on the SBIS contract. The evidence supports CACI's assertion that MENTIX was returned the month before the government solicited SBIS proposals. Even if the Court draws the inference that CACI contemplated using a MENTIX-infringing copy or derivative in a government contract before the Army's [*15] request for proposals came out, particularly during the time before the backup copy of the software was returned, there is still no evidence in the record that CACI created a product that is substantially similar to MENTIX. Moreover, the unrebutted evidence, specifically the report of Dr. Rotenstreich, plaintiffs' expert, reflects that MENTIX (or its derivative) could not perform the reengineering offered by CACI in the SBIS project. That report also concluded that MENTIX is almost "identical" to Q'Nial and that "as a software engineering tool Q'Nial can be replaced by many other tools that are much better and less expensive." Such a finding substantively undercuts defendants' arguments that a software product developed by CACI under the SBIS contract to provide software reengineering depended on access to MENTIX or would be substantially similar to MENTIX. Therefore, the Court finds that with respect to both the AMC marketing effort and the SBIS contract proposal, plaintiffs are entitled to declaratory judgment on Count I.

Trademark infringement

Plaintiffs seek declaratory judgment that their use of the word MENTIX in marketing efforts with the AMC does not constitute trademark [*16] infringement or unfair competition under *15 U.S.C. § § 1114* and 1125. In addressing the issue of trademark infringement, the Court is without jurisdiction to look at claims arising before December 1991. Trademark infringement claims are subject to a two-year statute of limitations. See *Unlimited Screw Products, Inc. v. Malm, 781 F. Supp. 1121, 1125 (E.D.Va. 1991).* Defendants allege that plaintiffs deceived the United States government by stating to the AMC that it could legally provide MENTIX software when it allegedly could not. Those proposals, however, were made before December 1991. There is no evidence in the record of activity by plaintiffs within the scope of the limitations period that could have infringed MENTIX's trademark. Therefore, this Court finds that plaintiffs are entitled to summary judgment as to count II.

Breach of Contract

Plaintiffs allege that defendants breached the teaming agreement which plaintiffs terminated on January 20, 1992. Under the terms of the August 15, 1990, teaming agreement between CACI and BTI/EOSD/O'Brien, BTI and EOSD warranted that they

had good title or adequate right to license MENTIX and [*17] that they would indemnify and hold plaintiff CACI-Federal harmless with respect to infringement claims, and shall "(i) defend at its own expense, (ii) obtain through negotiation or (iii) modify the product to make it noninfringing while preserving the original functionality, so as to enable the parties to continue using such products as originally intended under this Agreement." Pltf. Ex. 4B. Plaintiffs seek to enforce the indemnification clause against both BTI, a signatory to the agreement, and Pentagen, as the alter ego of BTI which exercised pervasive control over BTI. Plaintiffs also ask the Court to find defendants Baird and Leiser personally liable because they held themselves out as officers of Pentagen during the time Pentagen was not a corporation, which included the time the teaming agreement was signed.

The Court has already entered default judgment against BTI, requiring BTI to indemnify and hold CACI harmless with respect to the claims asserted by Pentagen. Under the terms of the May 2, 1994 Order of this Court, CACI needs to establish that: (1) Pentagen was BTI's alter ego; and (2) Baird and Leiser were Pentagen's or BTI's alter egos in order to obtain summary judgment [*18] against all three defendants.

The teaming agreement is governed by the law of Virginia. With respect to piercing the corporate veil, plaintiffs must show that BTI is "the alter ego, alias, stooge, or dummy of the individuals sought to be charged personally and that the corporation was a device or sham used to disguise wrongs, obscure fraud, or conceal crime." *RF&P Corp. v. Little, 247 Va. 309, 440 S.E.2d 908, 913 (Va. 1994)* (quoting *Cheatle v. Rudd's Swimming Pool Supply Co., 234 Va. 207, 360 S.E.2d 828, 831 (Va. 1987).*

Plaintiffs direct the Court to a number of factors in arguing that Pentagen was BTI's alter ego: the directors of Pentagen and BTI were "essentially identical", the boards of directors met simultaneously, BTI borrowed substantial sums from Pentagen which have not been repaid (because BTI is insolvent), and Pentagen owned a majority of BTI's stock. Given these facts, plaintiffs argue, the Court should find that Pentagen was the alter ego of BTI. Virginia courts are reluctant to pierce the corporate veil in contract situations. *Beale v. Kappa Alpha Order, 192 Va. 382, 64 S.E.2d 789 (1951); Garrett v. Ancarrow Marine, Inc., 211 Va. 755, 180 S.E.2d 668 (1971).* [*19] This is especially true where, as here, the two companies have held themselves out as separate entities, separate records are kept, and the formalities associated with corporate entities are observed. Moreover, under the facts developed in this record, it was BTI as controlled by O'Brien, not Pentagen, which entered into the teaming agreement. The Court, therefore, denies plaintiffs' request for summary judgment on Count III. Under the default judgment already entered plaintiffs are entitled to an ex parte hearing in which to offer proof of damages as to BTI.

Tortious interference with business relations

Plaintiffs claim that defendants Pentagen, Baird and Leiser have tortiously interfered with CACI's contract with IBM to perform work on the SBIS program. To prove tortious interference with contract under Virginia law, plaintiffs must show "(1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferer; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy [*20] has been disrupted." *Duggin v. Adams, 360 S.E.2d 832, 835, 234 Va. 221 (Va. 1987)* (quoting *Chaves v. Johnson, 230 Va. 112, 335 S.E.2d 97, 102 (Va. 1985).*

Defendants do not dispute any of the facts alleged by plaintiffs. CACI teamed with IBM to perform work under the SBIS contract and is a subcontractor for the SBIS contract. Pentagen was aware of the contractual relationship between IBM and CACI, as evidenced by Pentagen's press releases of October 28, 1993 and December 10, 1993 which reference the IBM/CACI contract. There is also undisputed evidence that Pentagen communicated with other parties to the SBIS contract, such as the Army and other contractors in an attempt to interfere with CACI's contractual relationship with IBM. Indeed, Pentagen threatened IBM, other subcontractors and the Army with litigation for associating with CACI and urged a losing bidder to pursue a bid protest of the SBIS award based on the allegation that CACI was infringing on the MENTIX software copyright.

CACI argues that Pentagen's interference was premeditated and harassing. As a result of Pentagen's action IBM advised CACI that CACI could not use its RENovate methodology on the [*21] SBIS contract without IBM's prior written authorization. Because of discovery abuses and failure to follow court orders, defendants were precluded on May 2, 1994, from submitting evidence on the issue of tortious interference.

CACI has not submitted evidence that Baird and Leiser acted as other than officers of Pentagen when these interfering actions were made. All these actions were taken after Pentagen had been reinstated as a corporation. Therefore, the Court does not find individual liability on this count as to Baird and Leiser for whom summary judgment is granted. However, as to the corporate defendants, the Court finds that plaintiffs are entitled to summary judgment on Count IV in an amount to be determined at trial.

Defamation

Plaintiffs seek recovery for defamation, contending that Pentagen alleged in a press release dated September 13, 1993, and elsewhere, that CACI used and marketed the MENTIX computer software or a derivative of MENTIX as a significant component of CACI's RENovate process. This Court must follow the legal standard for defamation articulated in *Swengler v. ITT Corp., 993 F.2d 1063 (4th Cir. 1993),* which holds that under Virginia [*22] law it is defamation per se to prejudice a person in his trade, and that prejudice arises from statements "which cast aspersion on its honesty, credit, efficiency or its prestige or standing in its field of business." Id., quoting *General Products Co., Inc. v. Meredith Corp., 526 F. Supp. 546, 549-50 (E.D. Va. 1981).* In an October 28, 1993, press release Pentagen alleged that CACI's SBIS software bears a striking similarity to MENTIX and infringes Pentagen's copyright and trademark in MENTIX. CACI offered to allow Pentagen to review records that would demonstrate that CACI was not using MENTIX software in connection with RENovate, but Pentagen did not accept the offer. The record further reflects that Pentagen made those public statements with knowledge that they were false. Specifically, after defendant Leiser conducted his own "investigation" in September, 1993 of plaintiffs' RENovate methodology he concluded that "Renovate is a process and it is !!!!!TOOL INDEPENDENT!!!!" To put it clearly, defendants knew that plaintiffs' RENovate process did not infringe the MENTIX copyright at all before they issued press releases to the contrary. After the public allegations [*23] were made, the defendants purposefully ignored opportunities to learn the facts relevant to their allegations. Plaintiffs have established by clear and convincing evidence that defendants acted with malicious intent and are therefore entitled to punitive damages. *Swengler, supra.*

Therefore, the Court finds that plaintiffs are entitled to judgment on count V and the trial will go forward to determine the amount of compensatory and punitive damages.

Entered this 16th day of June, 1994.

Leonie M. Brinkema

United States District Judge

ORDER

For the reasons stated in the accompanying Memorandum Opinion, plaintiffs' Motion for Summary Judgment is GRANTED as to Counts I, II, IV and V, and DENIED as to Count III. Defendants' Motion for Summary Judgment is GRANTED as to Count III and DENIED as to all other counts. It is hereby

ORDERED that judgment is entered against Pentagen Technologies International, Ltd. on Counts I and II, declaring that: plaintiffs' marketing efforts directed at the AMC did not infringe Pentagen's MENTIX copyright; CACI's RENovate process does not infringe Pentagen's MENTIX copyright; the work to be performed by CACI on the SBIS contract does [*24] not infringe Pentagen's MENTIX copyright; and plaintiffs' marketing efforts directed at the AMC did not infringe any trademark held by Pentagen.

Further, it is hereby

ORDERED that judgment is entered against Pentagen Technologies International, Ltd. on Count IV, as to Pentagen's liability for tortiously interfering with the contractual relationship between CACI-Federal and IBM.

Further, it is hereby

ORDERED that judgment is entered against Pentagen Technologies International, Ltd., Baird and Leiser as to Count V, as to the defendants' liability for defamation per se.

Further, it is hereby

ORDERED that judgment is entered against plaintiffs with respect to defendants Pentagen Technologies International, Ltd., Baird and Leiser as to Count III.

In sum, the issues that remain for trial on June 20, 1994 are damages on Count IV, compensatory and punitive damages on Count V, and plaintiffs' ex parte proof of damages against BTI on Count III.

The Clerk is directed to forward copies of this Order and the Memorandum Opinion to counsel of record.

Entered this 16th day of June, 1994.

Leonie M. Brinkema

United States District Judge

Alexandria, Virginia