



Investor Update
February 28, 2011

Wi-SKY Inflight Shareholders:

We are often asked “what is the status of the litigation?” Most of the time it is impossible to publicly disclose details because there are elements of strategy which we cannot reveal to our defendants. However, below is an extract from a recent court brief filed in one of the lawsuits. One of the defendants has filed a lawsuit against us (the plaintiff mentioned below) and this is a partial extract of a 30-page brief in response to our opponent’s allegations.

While factually complex, the crux of this case can be resolved by an interpretation of a single contract: the Contractor Confidentiality, Invention Rights Agreement (“Invention Rights Agreement”) entered into between Wi-SKY and Defendants Michael Leabman (“Leabman”) and Vivano Networks, Inc. (“Vivano”). The Invention Rights Agreement clearly and unambiguously makes Wi-SKY the exclusive owner of ground-to-air communication technology created by Leabman before and during his tenure as CTO of Wi-SKY. In its Memorandum in Support of its Motion for Summary Judgment, plaintiff conveniently ignores critical and unambiguous language in the Invention Rights Agreement that vests exclusive ownership in ground-to-air communication technology in Wi-SKY. Plaintiff attempts to defeat the plain language of the contract by inserting extrinsic evidence where none is needed and attempting to focus this Court’s attention on provisions of the contract taken entirely out of context and to divert this Court’s attention from the clear and unambiguous language in the Invention Rights Agreement.

A plain reading of the Invention Rights Agreement makes clear that Wi-SKY is the owner of the ground-to-air communication technology set forth in that contract. In short, this Court need go no further than the four corners of the contract to reach a determination that Wi-SKY exclusively owns the ground-to-air communication technology at issue in this case.

Specifically, the Invention Rights Agreement provides “[i]nventions, as defined herein, and subject to the obligation timetable set forth in Appendix A, **shall be the sole and exclusive property of Wi-SKY...**” This language is clear and unambiguous: all inventions defined in the Invention Rights Agreement became the “sole and exclusive” property of Wi-SKY upon the execution of the contract. Therefore, all inventions as defined in the Invention Rights Agreement are Wi-SKY’s exclusive property.

Inventions—those that became the sole and exclusive property of Wi-SKY—are defined as: “all inventions, proprietary ideas, copyrightable material, designs, improvements and discoveries of any kind whether hardware or software **which Contractor now has made, conceived or developed**, or which Contractor may later make, conceive or develop, during the period of Contractor’s engagement with Wi-SKY, which pertain to, apply to, relate to or benefit Wi-SKY’s business, inflight communication mission, patents, patents pending or business model or any of the work or businesses carried on by Wi-SKY.” Inventions do not have to be “fixed in a tangible medium of expression.” The preamble to Section 5 specifies that these Inventions are limited to those “pertaining to the unique application for ground-to-air communication.”

Therefore, under a plain reading of the contract, “all inventions...[that Leabman had then made, conceived or developed, or which Leabman may later make, conceive or develop], which pertain to,

apply to, relate to or benefit Wi-SKY's business, inflight communication mission, patents, patents pending or business model or any of the work or businesses carried on by Wi-SKY" that "pertain[ed] to the unique application for ground-to-air communication" became Wi-SKY's exclusive property upon the signing of the Invention Rights Agreement. In short, Wi-SKY owns all inventions—including patents—pertaining to the ground-to-air communication concept.

The contract further provides that "[Leabman and Vivano] hereby **assigns all Contractor's rights** in all Inventions and in all related patents, copyrights, trademarks, trade secrets and other proprietary rights therein to Wi-SKY." It is, therefore, clear and unambiguous, that part of what Wi-SKY paid for was an assignment of Leabman's prior patent rights related to ground-to-air communication technology.

Wi-SKY did not, however, contract for communications with other mobile clients. Rather, Wi-SKY contracted and paid for the exclusive ownership rights in all ground-to-air technology. To the extent Leabman has ownership interests in other areas, Wi-SKY is not seeking that property. Wi-SKY only wishes for the Court to declare that Wi-SKY owns the property for which Wi-SKY paid and contracted: all inventions, including patents, pertaining to ground-to-air communication technology were assigned to Wi-SKY.

It is an undisputed principle of law that Leabman may assign to Wi-SKY his patent, "*in whole or in part.*" Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 135 (1969); 35 U.S.C. § 261 ("Applications for patent, patents, *or any interest therein*, shall be assignable by law in an instrument in writing.") (emphasis added). In this case, Leabman contracted to assign the part of *any* patents he filed pertaining to ground-to-air communication to Wi-SKY; therefore, any patent Leabman filed—whether prior to or during his tenure as CTO—that contains ground-to-air communication technology belongs exclusively to Wi-SKY.

The plain language of the contract shows that Wi-SKY paid for Leabman's patent rights pertaining to ground-to-air communication. Importantly, no one disputes that Leabman and Vivano were paid in the form of both stock and cash. Plaintiff argues in an overly simplistic fashion that because Wi-SKY did not pay for the filing of the actual patent application, Wi-SKY did not pay for the patents. This argument is completely absurd and once again—ignores the plain language of the contract.

The contract specifies that "[c]onsideration as compensation and *payment for the efforts and covenants of both parties to this Agreement*, shall be in the form of cash, stock and other binding obligations and commitments as set forth herein...." (emphasis added). The phrase "payment for the efforts and covenants of both parties to this Agreement" refutes Plaintiff's argument that the consideration provided by Wi-SKY was solely for Leabman's serving as CTO of Wi-SKY and for his efforts in building a custom radio. As if this language is not clear enough, the contract provides that Leabman "shall not be entitled to any additional compensation for any and all Inventions made during the period of [Leabman's] engagement with Wi-SKY." (Invention Rights Agreement, § 5(d)). The consideration provided by Wi-SKY—the consideration negotiated, bargained for and accepted by Leabman—necessarily included payment for Leabman's efforts of filing any patent applications.

In short, the Invention Rights Agreement could not be more clear: Wi-SKY is the exclusive owner of all ground-to-air technology, whether created by Leabman prior to or during his engagement with Wi-SKY. Even if Leabman has patents encompassing a broader concept, such as ground-to-ground or ground-to-sea, this does not alter the fact that Leabman contracted away his ownership rights to the ground-to-air technology provided for in those patents. Therefore, as a matter of simple contract law, all technology contained within any patent applications pertaining to ground-to-air communication is the exclusive property of Wi-SKY.

While Wi-SKY believes that the Invention Rights Agreement contains no ambiguities, if the Court were to find any ambiguity, Georgia rules of contract construction further support Wi-SKY's position that

Wi-SKY is the exclusive owner of the ground-to-air technology defined in the Invention Rights Agreement. Sheridan v. Crown Capital Corp., 251 Ga. App. 314, 315 (2002) (If an apparent ambiguity exists, the trial court must seek to resolve the ambiguity through the application of the rules of construction.).

Under the rules of construction, the goal is to “ascertain the intent of the parties.” Id. at 315. A contract “must be construed as a whole rather than in separate and distinct parts, giving effect to all terms.” Id. at 317. A contract should not be determined by examining isolated clauses and provisions. Id. (The construction of the contract should “give a reasonable, lawful and effective meaning to all manifestations of intention by the parties *rather than an interpretation which leaves a part of such manifestations unreasonable or of no effect.*”) (emphasis added). Georgia encourages courts to construe a contract as binding on both parties because “the law will not construe a contract so as to give one party the right to destroy it by a simple refusal to comply with it.” Id. (quoting Finlay v. Ludden & Bates So. Music House, 105 Ga. 264 (1898)). Further, interpreting the language in a contract that would create an absurdity is improper. See e.g., Lemieux v. Blue Cross & Blue Shield of Georgia, 216 Ga. App. 230, 231 (1994).

The Invention Rights Agreement does not fall within the general category of contracts whereby Georgia law provides that any ambiguities should be resolved against the drafter of the contract. See Kennedy v. Brand Banking, 245 Ga. 496, 500 (1980) (pre-printed form contract prepared by bank); Brown v. Welch, 253 Ga. 118, 119 (1984) (attorney contingency fee agreement prepared by attorney). Under that line of cases, the individual signing the contract has no ability to alter or modify the form contract, and therefore it makes sense that, as a matter of public policy, any ambiguities should be resolved against the drafter. In this case, however, the Invention Rights Agreement was not a form, standard agreement drafted exclusively by Grant Sharp and placed in front of Leabman to sign.

Rather, the drafting process was a collaborative one between Leabman and Grant Sharp. In an email dated January 26, 2009, Leabman expressed concern to Sharp that Sharp would “give [Leabman] a release to use the chip for other applications that aren’t ground to air.” (Ex. C, Email from Leabman to Sharp). As a result, the red-lined changes to the Invention Rights Agreement were made and submitted to Leabman for approval. (Ex. C).

Clearly, the contract anticipated for the assignment of property rights. Plaintiff tries to argue that because the Invention Rights Agreement does not name specifically those certain prior patent filings that Wi-SKY’s ownership interests are somehow diluted, despite the fact that the contract requires an assignment of “all Contractor’s rights in *all* inventions and in *all* related patents...” (emphasis added). By using the word “all,” the parties clearly intended the assignment of every patent related to ground-to-air communication.

Instead of addressing the Invention Rights Agreement as a whole, Plaintiff points to distinct provisions of the contract and takes them entirely out of context. In doing so, Plaintiff fails to specify those portions of the contract that explain or elaborate upon the provisions cited by Plaintiff. Contrary to Plaintiff’s efforts to piecemeal the contract in such a way to inure to “its” benefit, the contract must be construed as a whole, rather than in separate and distinct parties. See Sheridan, 251 Ga. App. at 317; Sage Tech. v. NationsBank N.A. South, 235 Ga. App. 405, 407 (1998). Therefore, contract provisions should be construed together to ascertain the intent of the parties. Viewing the Invention Rights Agreement as a whole, the only reasonable and meaningful interpretation of the contract is that Wi-SKY is the exclusive owner of the inventions specifically set forth in Section 5 of the Invention Rights Agreement.

The language in the consideration provision does not vary this result. Plaintiff argues that because the consideration provisions did not provide for any additional consideration for the assignment of Leabman’s prior inventions or patent applications that the “most sensible” interpretation is that the Contractor Agreement did not contemplate any assignment. (Pl.’s M. p. 17). On the contrary,

the most sensible interpretation of the contract is to read the plain, black-and-white language contained in the contract. Specifically, the consideration provisions provide that the consideration enumerated in Section 1 was both “compensation and payment for the *efforts and covenants* of both parties to this Agreement.” (Invention Rights Agreement, § 1). Leabman’s “efforts and covenants” under the Invention Rights Agreement include Leabman’s obligation to assign inventions to Wi-SKY, and those inventions explicitly included patents Leabman made after the signing of the contract. As if this language is not clear enough, the contract further provides that Leabman “shall not be entitled to any additional compensation for any and all Inventions made during the period of Contractor’s engagement with Wi-SKY.” (Invention Rights Agreement, § 5(d)).

Next, the language in the confidentiality provision does not vary the result that Wi-SKY is the exclusive owner of the ground-to-air communication technology. Plaintiff argues that the definition of “confidential information” shows that the parties did not intend for an assignment of previous patents. Above and beyond the plain language of the contract which provides for an assignment, the confidentiality provision of the contract does not contradict the assignment requirement. Once again, Plaintiff conveniently ignores the provision of the contract defining the ownership rights at issue in this case. Specifically, the contract provides, “Inventions...shall be deemed part of the Confidential Information of Wi-SKY for purposes of this Agreement, whether or not fixed in a tangible medium of expression.” (Invention Rights Agreement, § 5(b)).

In short, Wi-SKY agrees with Plaintiff that this Court can decide the issue relating to the ownership of the ground-to-air technology as a matter of law. As a matter of law, Wi-SKY is the exclusive owner of this property. The Invention Rights Agreement is clear on its face that the consideration paid to Leabman by Wi-SKY was for the ground-to-air technology. Wi-SKY is not seeking to obtain rights to any other purported property rights applicable to other mobile clients. Wi-SKY is seeking a declaration as to the ownership of the technology it contracted and paid for, that which Plaintiff is so desperately trying to obtain: ground-to-air communication technology. A plain reading of the contract shows that this technology is exclusively owned by Wi-SKY.

Disagreement as to the intent of the parties to a contract is an evidentiary, factual matter for resolution by the jury and not a matter of law for the court to determine. See Rolan v. Glass, 305 Ga. App. 217, 221 (2010). All available evidence supports a finding that Leabman intended to convey *all* patents pertaining to ground-to-air communication technology to Wi-SKY. For example, in the email from Leabman to Sharp on January 26, 2009, Leabman expressed, “I trust that you’ll give us a release to use the chip for *other applications that aren’t ground-to-air?*” (Ex. D). This evidence shows that Leabman knew, prior to entering into the Invention Rights Agreement, that Wi-SKY would have the exclusive rights to ground-to-air communications. Otherwise, Leabman would not have requested specification from Wi-SKY.

In addition, Leabman, as Wi-SKY’s CTO, signed an Authorization to Proceed with AP Labs, Inc. (“AP Labs”) for the purposes of technical discussions pertaining to “air to ground communications for commercial aircraft.” (Ex. E, AP Labs Non-Disclosure Agreement and Authorization to Proceed). Pursuant to this agreement, Leabman acknowledged, on Wi-SKY’s behalf, that AP Labs and Wi-SKY were negotiating a product development agreement for Wi-SKY’s air-to-ground communication technology. (Ex. E).

Further, Leabman—just days before disclosing his intent to breach the Invention Rights Agreement—discussed in emails with other Wi-SKY directors and officers the labeling of the “Wi-SKY Radio.” (See Exhibit N to Wi-SKY’s Motion for Summary Judgment). Leabman attached a picture of a Wi-SKY radio he proposed be presented to clients that contained in broad letters across the radio: “Wi-SKY Inflight.” (See Exhibit N to Wi-SKY’s Motion for Summary Judgment).

Therefore, to the extent any ambiguity exists and cannot be resolved through the rules of contract construction, extrinsic evidence showing the express intent of the parties should be submitted to a jury for its determination of the parties' intent when entering the Invention Rights Agreement.

Management remains optimistic about the outcome of the litigation. The other side claims to be optimistic about their chances as well. We offer these extracts from our legal brief so that investors can get a feel for the type of argument that is taking place, and determine for themselves what might happen. There are many variables involved, and we do not want to oversimplify this case.

However, we remain confident that we are putting forth a very strong argument in favor of our position, and we trust justice will be served.

We also hereby notify investors that the company has filed for protection from creditors under Chapter 11 bankruptcy until we can get the ownership of the patent rights adjudicated by the court. The identification of assets and distribution to creditors is the purpose of Chapter 11 protection of debtors. Wi-SKY management continues to operate the company as a Debtor in Possession (DIP). We expect a resolution of the ownership of the IP while we are under protection of Chapter 11.

M. Grant Sharp
President & CEO