

# **EXHIBIT A**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

NACRE AS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Case No.8:07-cv-02676-AW
	)	
SILYNX COMMUNICATIONS, INC., <i>et al.</i> ,	)	
	)	
Defendants.	)	
	)	

**DEFENDANTS’ AMENDED COUNTERCLAIM**

Defendants Silynx Communications, Inc. (“Silynx”) and Gil Limonchik (together, “Defendants”) for their counterclaims allege, on knowledge as to themselves and otherwise upon information and belief, as follows:

1. Silynx is a Delaware corporation having its principal place of business at 9901 Belward Campus Drive, Suite 150, Rockville, MD 20850.
2. Mr. Limonchik is an individual residing in Gaithersburg, Maryland, and is the Chief Executive Officer of Silynx.
3. Counterclaim defendant Nacre AS (“Nacre”) purports to be a Norwegian corporation with its principal place of business in Trondheim, Norway.
4. Defendants’ first, second, third, fourth and fifth counterclaims seek declarations, pursuant to 28 U.S.C. §§ 2201 and 2202, of non-infringement, invalidity and/or unenforceability in connection with a certain trademark and certain patents described more fully below that have been asserted by Nacre against Defendants.

5. Silynx's sixth and seventh counterclaims assert monopolization and attempted monopolization by Nacre in violation of federal antitrust laws, including Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2. Silynx's eighth counterclaim asserts a claim for tortious interference with economic relations.

6. This Court has jurisdiction over these counterclaims pursuant to 15 U.S.C. §§ 1051, *et seq.*, 35 U.S.C. §§ 1, *et seq.*, as well as pursuant to 28 U.S.C. §§ 1331, 1338(a).

7. Venue is proper in this Judicial District pursuant to 28 U.S.C. §§ 1391(b) and 1400(b), including because Nacre transacts business in this forum and has voluntarily subjected itself to the jurisdiction of this Court.

### **FACTS**

8. Nacre purports to be the owner of the trademark QUIETPRO<sup>®</sup>, registered with the United States Patent and Trademark Office, Reg. No. 3,152,982, Oct. 10, 2006. Nacre has commenced suit against Silynx and Mr. Limonchik, alleging that their use of the designation "QuietOps" in connection with hearing protection headsets infringes Nacre's rights in the QUIETPRO<sup>®</sup> trademark. Defendants have denied such allegations and have asserted that the QUIETPRO<sup>®</sup> trademark is invalid.

9. Nacre purports to be the owner by assignment of all right, title, and interest in United States Patent No. 7,039,195 ("the '195 patent") and in United States Patent No. 6,567,524 ("the '524 patent"), and alleges that Defendants have infringed each of such patents. Defendants have denied such allegations and have asserted that the '195 and '524 patents are neither valid nor enforceable.

10. There presently exists a substantial, actual, and continuing controversy between Nacre and Defendants as to the infringement, validity, and enforceability of the QUIETPRO<sup>®</sup> trademark and of the '195 and '524 patents.

### **INTERSTATE COMMERCE**

11. Nacre has substantially affected interstate commerce by monopolization and attempted monopolization in the relevant market, as alleged below.

12. Throughout the period from at least April 2005 through the present (the “relevant time period”), Nacre has marketed and sold tactical in-ear hearing protection/communication headsets in a continuous and uninterrupted flow of commerce across state lines and throughout the United States.

13. Nacre has employed the Internet, interstate telephone lines, and the United States mails in furtherance of its monopolization and attempted monopolization.

### **RELEVANT MARKET**

14. The relevant market with respect to Silynx’s sixth and seventh counterclaims is the market for tactical in-ear hearing protection/communication headsets sold to the military and law enforcement purchasers in the United States. This relevant market is characterized by distinct attributes, including without limitation the requirement that products sold for use in a military or law enforcement environment must withstand particularized rigors and requirements that non-tactical or over the ear communications systems are unable to meet.

15. Throughout the relevant time period up to and including the present, Nacre has had market power in the relevant product and geographical market.

16. Nacre’s share of the relevant product and geographical market exceeds 80%.

### **COUNT I**

#### **Declaratory Judgment of Trademark Non-Infringement**

17. Defendants repeat and re-allege the allegations of paragraphs 1 through 16 of their Counterclaims, as if fully set forth herein.

18. Contrary to Nacre's allegations, Defendants have not, and do not, willfully or otherwise, infringe in any way the rights of Nacre in the mark QUIETPRO®.

19. Contrary to Nacre's allegations, the QUIETPRO® mark is invalid.

20. Defendants are entitled to a declaration that Silynx's use of the mark QuietOps™ does not infringe Nacre's alleged rights in the QUIETPRO® mark, and that the QUIETPRO® mark is invalid.

**COUNT II**  
**Declaratory Judgment of Trademark Invalidity**

21. Defendants repeat and re-allege the allegations of paragraphs 1 through 20 as if fully set forth herein.

22. Nacre's alleged mark QUIETPRO®, both at common law and pursuant to federal registration number 3,152,987, is invalid because of a failure to comply with one or more requirements of 15 U.S.C. §§ 1051 *et seq.* and a failure to use the mark in the United States prior to use by others in connection with similar goods and services.

23. To resolve the legal and factual questions raised by Nacre, and to afford relief from the uncertainty and controversy that Nacre's accusations have caused, Defendants are entitled to a declaratory judgment that Nacre's rights in the mark QUIETPRO® are invalid and to an order directing that the federal registration of the QUIETPRO® mark be cancelled by the U.S. Patent and Trademark Office.

**COUNT III**  
**Declaratory Judgment of Patent Non-Infringement**

24. Defendants repeat and re-allege the allegations of paragraphs 1 through 23 as if fully set forth herein.

25. Contrary to Nacre's allegations, Defendants have not, and do not, willfully or otherwise, infringe, contribute to the infringement of, or actively induce others to infringe any claim of the '195 or the '524 patent.

26. To resolve the legal and factual questions raised by Nacre, and to afford relief from the uncertainty and controversy that Nacre's accusations have caused, Defendants are entitled to a declaratory judgment that they do not infringe, willfully or otherwise, any claim of the '195 or '524 patents either literally or under the doctrine of equivalents.

**COUNT IV**  
**Declaratory Judgment of Patent Invalidity**

27. Defendants repeat and re-allege the allegations of paragraphs 1 through 26 as if fully set forth herein.

28. There exists an actual controversy as to the validity of the '195 and '524 patents.

29. The claims of the '195 and '524 patents are invalid for failure to comply with one or more sections of Title 35 of the United States Code, including, without limitation, 35 U.S.C. §§ 101, 102, 103 and/or 112.

30. To resolve the legal and factual questions raised by Nacre, and to afford relief from the uncertainty and controversy that Nacre's accusations have caused, Defendants are entitled to a declaratory judgment that the claims of the '195 and '524 patents are invalid.

**COUNT V**  
**Declaratory Judgment of Patent Unenforceability**

31. Defendants repeat and re-allege the allegations of paragraphs 1 through 30 as if fully set forth herein.

32. There exists an actual controversy as to the validity of the '195 and '524 patents.

33. The claims of the '195 and '524 patents are unenforceable for intentionally failing to disclose material prior art to the U.S. Patent and Trademark Office that the inventors were aware of. In particular, those involved in patent prosecution failed to disclose to the U.S. Patent and Trademark Office at least one publication by one of the inventors entitled "Active Noise Reduction In An Ear Terminal" given on March 18, 1999 at the Technical University of Berlin as part of the 137th Regular Meeting of the Acoustical Society of America 2nd Convention of the European Acoustics Association: Forum Acusticum 99 integrating the 25th German Acoustics DAGA Conference.

34. To resolve the legal and factual questions raised by Nacre, and to afford relief from the uncertainty and controversy that Nacre's accusations have caused, Defendants are entitled to a declaratory judgment that the claims of the '195 and '524 patents are unenforceable.

**COUNT VI**  
**Monopolization in Violation of Section 2 of the Sherman Antitrust Act**

35. Silynx repeats and re-alleges the allegations of paragraphs 1 through 34 as if fully set forth herein.

36. Nacre has engaged in monopolization in the relevant market during the relevant time period, in violation of Section 2 of the Sherman Antitrust Act. Nacre's acts of unlawful monopolization have included the unlawful acquisition of monopoly power by Nacre procuring either or both of the '195 and '524 patents by knowing and willful fraud, and the unlawful maintenance of monopoly power by baselessly asserting those patents in bad faith against Silynx.

37. The knowing and willful fraud by Nacre and its applicants and representatives in procuring the '195 and '524 patents has included the following conduct:

- a. On March 18, 1999, Georg Otteson, one of the named inventors of both the '195 and '524 patents, and currently the Chief Scientist at Nacre, presented a paper entitled "Active Noise Reduction In An Ear Terminal," at the Joint Meeting of the Acoustical

Society of America, the European Acoustics Association, and the Deutsche Gesellschaft fur Akustik (German Acoustics Conference). The paper was published in the February 1999 Journal of the Acoustical Society of America (the "Otteson Paper").

- b. The Otteson Paper -- which was presented and published more than one year before the applications for the '195 and '524 patents were filed -- disclosed all the structural details of the invention, including a detailed depiction of the ear piece, outer microphone, inner microphone, vent, loudspeaker, and seal. The Otteson Paper also disclosed the electrical and logical operation of the Active Noise Reduction ("ANR") system embodied in the invention.
- c. Despite the fact that one of the named inventors wrote the Otteson Paper, and was therefore indisputably aware of it, and of its materiality to the '195 and '524 patents, Nacre and its applicants and representatives intentionally failed to disclose the article to the Patent Office in connection with the applications for the '195 and '524 patents.
- d. The named inventors -- including Georg Otteson -- represented to the Patent Office in applying for the '195 and '524 patents that they were aware of their duty to disclose known material prior art, implicitly also representing that they had complied with or would comply with this duty.
- e. Despite their acknowledged duty of candor and good faith, Nacre, its applicants and representatives had no intention of disclosing, and did not disclose, all known material prior art, including the Otteson Article, to the Patent Office.
- f. Nacre and its applicants and representatives, in applying for the '195 and '524 patents and at all times thereafter through the issuance of the those patents, intentionally, fraudulently and materially deceived the Patent Office in knowing violation of their legal and ethical duties of candor and good faith to the Patent Office as alleged above.

38. In making and submitting the declarations and representations referred to above, and in concealing and failing to disclose the material prior art referred to above, Nacre's applicants and representatives willfully intended to deceive the Patent Office and intended, by such fraud and deception, to obtain patents to which they were not otherwise entitled.

39. In issuing the '195 and '524 patents, the Patent Office justifiably relied on the foregoing misrepresentations, concealment, and omissions of material prior art and other material facts by Nacre's applicants and representatives, and that the Patent Office would not otherwise have issued those patents.



40. At all relevant times, Nacre has known of the fraudulent origin, invalidity, and unenforceability of the '195 and '524 patents and, in asserting the patents against Silynx – as well as in any other past, present or future attempts to enforce the patents – Nacre has been, is, and will be acting with full knowledge of the patents' fraudulent origin, invalidity, and unenforceability.

41. Nacre's infringement lawsuit against Silynx was brought in bad faith, and is both objectively and subjectively baseless for reasons including the suit's lack of any reasonable merit, and Nacre's lack of any probable cause for bringing it, in view of, without limitation, the clear invalidity and unenforceability of the patents as alleged above, all of which was known to Nacre at all relevant times.

42. In filing this lawsuit, in prosecuting this lawsuit up to the present date, and in any and all prosecution of this lawsuit hereafter, Nacre has acted, is acting, and will be acting in bad faith, and without belief in the merits of its claims. Nacre, has been, is, and, in any and all prosecution of this lawsuit hereafter, will be using this lawsuit to conceal an attempt to directly interfere with Silynx's business relationships and business, to unlawfully maintain a monopoly of the relevant market, and to conceal by deceit Nacre's maintenance of that monopoly.

43. As examples of Nacre's bad faith, at the time of filing this lawsuit, Nacre knew, and now knows that the '195 and '524 patents are invalid and unenforceable for the reasons set forth in Counts IV and V above, and because Nacre's Applicants and Representatives intentionally withheld material prior art from the Patent Office in prosecuting the applications that resulted in the '195 and '524 patents.

44. In addition, Nacre had actual knowledge at the time it brought its current claims against Silynx that Silynx does not infringe either the '195 or the '524 patent. Specifically, during the prosecution of '195 and '524 patents Nacre expressly disclaimed features that it now seeks to enforce in bad faith against Silynx.

45. For example, during the prosecution of the '195 patent, Nacre originally claimed “an inner microphone having a sound inlet for being directed into the meatus . . . .” In order to distinguish that claim from U.S. Patent No. 5,577,511, Nacre amended the original claim and claimed instead “a meatus directed microphone having a sound inlet that opens to a closed space of the meatus,” further clarifying that the “[i]nner microphone refers to a microphone that is directed to the meatus and has a sound inlet that opens to the closed space of the meatus such as shown in figure 1.”

46. Thus, based on Nacre’s own, express representations to the Patent Office, the '195 patent requires a microphone that is actually directed to the meatus (as opposed to a microphone having a sound inlet for being directed to the meatus). Despite Nacre's actual knowledge that the inner microphone in Silyn's product is directed toward the front of the user's face, and not toward the meatus, and therefore does not infringe the '195 patent, Nacre has nonetheless pursued its patent infringement claims against Silyn in bad faith and with specific intent to restrain competition.

47. Similarly, during the prosecution of the '524 patent, Nacre originally claimed an inner microphone for “analyzing sound characteristics of the resulting sound field in the meatus (3), and producing analyzed sound characteristics.” The Patent Office initially rejected the application based on prior art, including but not limited to U.S. Patent No. 4,985,925. In response, Nacre argued to the Patent Office to distinguish its invention from U.S. Patent No. 4,985,925 that analyzing “sound characteristics” is different from comparing one sound level to another: “In contrast, the claim recites . . . a comparing unit comparing the inner microphone analyzed sound characteristics with the stored measured predetermined sound characteristics (as contrasted with one sound level being compared to another sound level).” (November 12, 2002 Response to Office Action).

48. Thus, based on Nacre's own, express representations to the Patent Office, the "sound characteristics" claimed in the '524 patent are limited to exclude the comparison of one sound level to another. Despite Nacre's actual knowledge that Silynx's product compares one sound level to another rather than analyzing sound characteristics, and therefore does not infringe the '524 patent, Nacre has nonetheless pursued its patent infringement claims against Silynx in bad faith and with specific intent to restrain competition.

49. Nacre has market power in the relevant market as alleged above.

50. Nacre has used and is using its '195 and '524 patents and its bad faith infringement litigation against Silynx to restrain competition by, without limitation, attempting to induce Silynx to leave the relevant market, attempting to damage Silynx's ability to compete in the relevant market, and attempting to deter other potential competitors from entering the market.

51. Nacre has succeeded in restraining competition in the relevant market during the relevant time period by fraudulently obtaining and asserting the '195 and '524 patents and by filing and prosecuting its bad faith infringement litigation against Silynx.

52. Nacre's monopolistic conduct as alleged herein is already harming competition by deterring other competitors and would-be competitors from entering the relevant market, and by depriving military and law enforcement consumers in the United States of the increased output, broader choice, and lower prices that would result from competition on the merits.

53. As a direct and proximate result of Nacre's acts of monopolization, Silynx has suffered injury to its business and property and damages, including attorneys' fees and litigation expenses required to defend against Nacre's bad faith infringement lawsuit, as well as lost profits and lost

goodwill sustained or to be sustained by Silynx. As a result of Nacre's conduct alleged above, Silynx has suffered damages in an amount to be determined at trial.

#### **COUNT VII**

#### **Attempted Monopolization in Violation of Section 2 of the Sherman Antitrust Act**

54. Silynx repeats and re-alleges the allegations of paragraphs 1 through 53 as if fully set forth herein.

55. Nacre has attempted to monopolize the relevant market during the relevant time period, in violation of Section 2 of the Sherman Antitrust Act. Nacre's acts of attempted monopolization have included procuring either or both of the '195 and '524 patents by knowing and willful fraud and baselessly asserting them in bad faith in litigation against Silynx.

56. In fraudulently obtaining and asserting the '195 and '524 patents as alleged herein, Nacre has acted with the specific intent to monopolize the relevant market.

57. In filing and prosecuting its bad faith infringement litigation against Silynx as alleged herein, Nacre has acted with the specific intent to monopolize the relevant market.

58. Nacre's attempts to monopolize the relevant market, as alleged herein, have had and now have a dangerous probability of success.

59. Nacre has had market power in the relevant product and geographical markets, throughout the relevant time period or, in the alternative, that Nacre has a dangerous probability of success of obtaining such market power.

60. Nacre's attempted monopolization of the relevant market as alleged herein would harm competition in the relevant market by deterring other competitors and would-be competitors from entering the relevant market, and by depriving military and law enforcement consumers in the United

States of the increased output, broader choice, and lower prices that would result from competition on the merits.

61. If Nacre succeeded in its attempt to cause Silynx to exit from the relevant market because of fraudulently-obtained patents and bad faith litigation, Nacre would obtain a virtually complete monopoly in the relevant market.

62. As a direct and proximate result of Nacre's attempted monopolization of the market, Silynx has suffered injury to its business and property and damages, including attorneys' fees and litigation expenses required to defend against Nacre's bad faith infringement lawsuit, as well as lost profits and lost goodwill sustained or to be sustained by Silynx. As a result of Nacre's conduct alleged above, Silynx has suffered damages in an amount to be determined at trial.

**COUNT VIII**  
**Tortious Interference With Economic Relations**

63. Silynx repeats and re-alleges the allegations of paragraphs 1 through 62 as if fully set forth herein.

64. Silynx has established existing economic relations and the expectation of prospective economic relations with law enforcement and military customers for its tactical, in-ear hearing protection/communication headsets, including but not limited to the armed forces in the United States and elsewhere throughout the world.

65. In 2008, military and law enforcement customers in the United States and elsewhere throughout the world communicated to Silynx their intention of purchasing thousands of Silynx's tactical, in-ear hearing protection/communication headsets.

66. Nacre and its representatives in the United States and elsewhere throughout the world have interfered with Silynx's existing and prospective economic relations with military and law

enforcement customers, including by misrepresenting to Silynx's established and prospective customers that Silynx would be unable to continue marketing and supplying its products as a result of Nacre's patent infringement claims, and that Silynx would be unable to deliver on prospective contracts with its customers. The foregoing conduct was specifically calculated by Nacre to cause damage to Silynx in its lawful business

67. As a direct result of the interference of Nacre and its representatives, several military customers have decided not to proceed with significant orders for Silynx's products at this time.

68. Nacre has engaged in the foregoing conduct intentionally and willfully, with the sole objective of causing injury to Silynx in its lawful business.

69. Silynx has suffered actual damage and loss as a result of the interference of Nacre in an amount to be determined at trial.

70. Silynx is entitled to an award of punitive damages as the result of the intentional and malicious nature of the interference engaged in by Nacre, in an amount to be determined at trial.

#### **PRAYER FOR RELIEF**

WHEREFORE, Defendants pray for judgment and relief as follows:

- A. That Nacre take nothing as the result of its Complaint;
- B. That Nacre's claims be dismissed in their entirety;
- C. That judgment be rendered that Nacre is not entitled to the relief prayed for in its Complaint, or any relief whatsoever;
- D. A declaration that Defendants do not infringe the rights of Nacre in QUIETPRO®;
- E. A declaration that Nacre's rights in the mark QUIETPRO® are invalid and an Order canceling the QUIETPRO® registration;

- F. A declaration that Defendants do not infringe any claim of the '195 or '524 patent;
- G. A declaration that the '195 and '524 patents are invalid and/or unenforceable;
- H. An award to Defendants of their attorneys' fees pursuant to 35 U.S.C § 285 and 15 U.S.C. § 1117(a) because this is an exceptional case, and for costs of suit;
- I. A judgment that Nacre has violated 15 U.S.C. § 2;
- J. An award to Silynx of trebled monetary damages and attorneys' fees under 15 U.S.C. § 15;
- K. Appropriate injunctive relief awarded to Silynx under 15 U.S.C. § 26;
- L. An award to Silynx of compensatory and punitive damages for Nacre's intentional, tortious interference with Silynx's existing and prospective economic relations; and
- M. Such additional relief that the Court deems proper and just.

**JURY DEMAND**

Defendants demand a jury trial for all matters so triable.

Respectfully submitted,

*/s/ William Cravens*

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