

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

NAPCO, INC., )  
)  
Plaintiff, )  
)  
v. ) 1:21-CV-00025  
)  
LANDMARK TECHNOLOGY A, LLC, )  
)  
Defendant. )

**MEMORANDUM OPINION AND ORDER**

THOMAS D. SCHROEDER, Chief District Judge.

This is a patent case in which Plaintiff NAPCO, Inc. ("NAPCO") seeks a declaration that a patent of Defendant Landmark Technology A, LLC ("Landmark") is invalid as well as recovery for alleged abusive patent practices. Before the court is the motion of Landmark to dismiss Count III of NAPCO's first amended complaint, which alleges a violation of the North Carolina Abusive Patent Assertions Act ("the Act" or "the APAA"), N.C. Gen. Stat. § 75-140 et seq., a statute that has not been construed by any court. (Doc. 17.) Landmark argues that NAPCO has failed to plead the essential elements of the offense, that the Act is preempted by federal law, and that the Act violates the First and Fourteenth Amendments to the U.S. Constitution as well as the Commerce Clause. (Doc. 18.) NAPCO has responded in opposition (Doc. 39), and the Attorney General of North Carolina submitted an amicus brief to defend the validity of the Act (Doc. 49). A separate amicus brief

was submitted by various companies and retail and technology groups also in defense of the Act. (Doc. 50.) NAPCO further moves for expedited, limited discovery. (Doc. 37.) For the reasons set forth below, both motions will be denied.

## **I. BACKGROUND**

### **A. Factual Background**

NAPCO's first amended complaint makes the following factual allegations, which the court accepts as true for the purposes of the motion to dismiss:

NAPCO is a North Carolina corporation and owner of [www.binders.com](http://www.binders.com) ("the website"). (Doc. 15 ¶ 3.) Vulcan, NAPCO's wholly-owned subsidiary, operates the website. (Id.)

Landmark is a limited liability company organized under the laws of North Carolina and with its principal place of business in Durham. (Id. ¶ 5.) Its annual reports with the North Carolina Secretary of State indicate that its business is "Patent Licensing." (Id. ¶ 6.) Landmark owns the rights to U.S. Patent No. 7,010,508 C1 ("the '508 patent") (Doc. 15-1 at 2), which it has sought to enforce against potential infringers through the issuance of demand letters (Doc. 15 ¶¶ 18-19).<sup>1</sup> These demand letters are allegedly identical and include the same offer to

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<sup>1</sup> The content of the '508 patent, entitled "Automated Business and Financial Transaction Processing System," (Doc. 15 ¶ 45), is not relevant to the motions before the court. Accordingly, the court does not detail the patent here.

license the patent for a fee of \$65,000. (Id. ¶¶ 31-32.)

In October 2020, NAPCO received a demand letter from Landmark that accused NAPCO and the website of infringing on the '508 patent and that offered a non-exclusive license to the '508 patent for \$65,000. (Id. ¶¶ 12, 36; Doc. 15-1.) The demand letter indicated that the \$65,000 license fee represents "a substantial discount to the historic licensing price of Landmark's portfolio, and w[ould] not be available in the event of litigation." (Doc. 15 ¶ 43; Doc. 15-1 at 3.) The demand letter did not include the name or address of the patentholder, nor did it include an element-by-element claim analysis or description of services that allegedly infringed the '508 patent. (Doc. 15 ¶¶ 36, 38.) Landmark requested that NAPCO respond to the demand letter within 15 days. (Id. ¶ 43.)

NAPCO contends that the website does not infringe on the '508 patent and that Landmark knew or should have known that fact, and that Landmark willfully disregarded the falsity of its assertion in sending NAPCO the demand letter. (Id. ¶¶ 105-08.) Based on these allegations, NAPCO's amended complaint seeks a declaration of noninfringement on the '508 patent (Count I) and a declaration of invalidity of the '508 patent (Count II). (Id. ¶¶ 110-21.) NAPCO also brings a claim against Landmark for asserting patent infringement in bad faith in violation of the APAA (Count III). (Id. ¶¶ 122-32.) Landmark now moves to dismiss Count III of the amended complaint, arguing (1) NAPCO has failed to plead the

essential elements of a claim under the APAA; (2) the APAA is preempted by federal law, both facially and as applied to this case; and (3) the APAA is unconstitutional because it violates the First and Fourteenth Amendments to the U.S. Constitution as well as the dormant Commerce Clause. (Doc. 18.) The motion is now fully briefed and ready for resolution. (See Docs. 39, 49, 50, 53, 54.)

NAPCO has also moved for expedited, limited discovery as to “matters relating to the corporate structure, status, liquidity, and historical assertions of patent infringement by . . . Landmark . . . to support a possible motion for bond under N.C. Gen. Stat. § 75-144.” (Doc. 38 at 1; see Doc. 37.) This motion is also fully briefed and ready resolution. (See Docs. 38, 51.)

### **B. Background of the Abusive Patent Assertions Act**

At issue in this case is the North Carolina Abusive Patent Assertions Act, enacted by the North Carolina General Assembly in 2014. See N.C. Gen. Stat. 75-140 et seq. In promulgating the Act, North Carolina joined a growing number of states that have passed similar laws in an attempt to address the problems presented by non-practicing entities, known colloquially as “patent trolls,”<sup>2</sup> that make bad faith assertions of patent infringement. See Jason

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<sup>2</sup> “A patent troll is somebody who tries to make a lot of money off a patent that they are not practicing and have no intention of practicing and . . . [have] never practiced.” Overstock.com, Inc. v. Furnace Brook, LLC, 420 F. Supp. 2d 1217, 1218 (D. Utah 2005), aff’d, 191 F. App’x 959 (Fed. Cir. 2006) (internal quotation marks omitted).

D. Gardner & Stephen J.E. Dew, North Carolina Abusive Patent Assertions Act: A Powerful Gun, but Will It Hold Up in a Gunfight?, 17 N.C. J. L. & Tech. 391, 410-15 (2016).

The Act prohibits a person from making “a bad faith assertion of patent infringement.” N.C. Gen. Stat. § 75-143. The statute does not define “bad faith assertion” but lists factors a court may consider to determine whether a defendant has made a bad faith assertion, including certain deficiencies in the demand letter; a demand for payment of a fee within an unreasonably short period of time; actual or constructive knowledge by the patentholder that the assertion of patent infringement was meritless; the deceptive nature of the assertion; and whether the person has sent the same demand to multiple recipients and against a wide variety of products without demand letters reflecting differences between recipients. Id. § 75-143(a). The statute also lists factors a court may consider as evidence that the assertion was not made in bad faith, including that the demand letter was not deficient; the defendant made a good faith effort to establish that the plaintiff infringed the patent; the defendant made a substantial investment in the use of the patent or in the production or sale of a product or item covered by the patent; and the defendant demonstrated good faith business practices in previous efforts to enforce the patent or a substantially similar patent. Id. § 75-143(b).

With this understanding of the Act, the court now turns to

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