



collectively perpetrated against Dr. Schwimmer and the other Plaintiffs, acts that have caused and continue to cause significant loss, damage, and irreparable harm to Plaintiffs in the conduct of their medical practice.

2. Plaintiffs own and operate a revolutionary medical practice called The Snoring Center<sup>SM</sup> which has offices in Dallas, Fort Worth, and Houston, Texas. The Snoring Center<sup>SM</sup> is dedicated exclusively to minimally invasive, office-based treatment of snoring and sleep apnea. It is the first and largest such medical practice to exist in the United States. Plaintiffs' business model and the success they have enjoyed in operating The Snoring Center<sup>SM</sup> have been created by Plaintiffs and Dr. Schwimmer in particular through extensive time, labor, skill, and money.

3. Defendants inveigled their way into Dr. Schwimmer's confidence with false statements as to their motives and intent, posing as potential investors or as a potential joint venturer. As a result of their deception, Defendants obtained access to Plaintiffs' trade secrets, financial records, business strategies, and other proprietary and confidential information, which they then wrongfully used to establish a competing medical practice, which they have called The Center for Snoring Solutions. In doing so, Defendants have unfairly competed with Plaintiffs under Texas and federal law by committing common law fraud, misappropriating Plaintiffs' trade secrets, misappropriating their business model, publishing advertisements in interstate commerce containing false statements about the qualities and characteristics of The Center for Snoring Solutions and of The Snoring Center<sup>SM</sup> in violation of 15 U.S.C. § 1125(a) and disparaging The Snoring Center<sup>SM</sup> in the operation of its business.

**II.**  
**JURISDICTION AND VENUE**

4. This Court possesses subject matter jurisdiction over this action pursuant to the Lanham Act, 15 U.S.C. § 1051 *et seq.*, and 28 U.S.C. §§ 1331, 1332, and 1338. The Court also possesses supplemental jurisdiction over Plaintiffs' state law claims under 28 U.S.C. §§ 1338 and 1367.

5. The Court possesses personal jurisdiction over the parties, and venue is proper in this District pursuant to 28 U.S.C. § 1391(b) and (c) because a substantial part of the events or omissions giving rise to the claims occurred and continue to occur in this District.

**III.**  
**PARTIES**

6. Plaintiff Craig Schwimmer, M.D., M.P.H., F.A.C.S. is an individual who resides and operates a medical practice in Dallas County, Texas. Dr. Schwimmer's principal place of business is located at 6901 Snider Plaza, Dallas, Texas.

7. Plaintiff Snoring Center USA, LLC ("Snoring Center USA") is a limited liability corporation incorporated under the laws of the State of Texas. Snoring Center USA's principal place of business is located at 6901 Snider Plaza, Dallas, Texas.

8. Plaintiff Snoring Centers of Texas, P.A. ("Snoring Centers of Texas") is a professional association incorporated under the laws of the State of Texas. Snoring Centers of Texas's principal place of business is located at 6901 Snider Plaza, Dallas, Texas.

9. Plaintiff Snoring Center of Houston, P.A. ("Snoring Center of Houston") is a professional association incorporated under the laws of the State of Texas. Snoring Center of Houston's principal place of business is located at 3900 Essex Lane, Suite 315, Houston, Texas.

10. Defendant Presidio Industries LLC (“Presidio”) is a limited liability corporation incorporated under the laws of the State of California, whose registered office is located at 7164 Buckingham Boulevard, Berkeley, California 94705-1715. Presidio may be served with process by serving its registered agent, Corporation Service Company, at 2730 Gateway Oaks Drive, Suite 100, Sacramento, California 95833.

11. Defendant Wade A. Zander (“Zander”) is an individual who resides in the State of California and may be served with process at his residence at 220 Caldecott Lane, #318, Oakland, California.

12. Defendant Jason Godfrey (“Godfrey”) is an individual who resides in the State of California and may be served with process at his residence at 7164 Buckingham Boulevard, Berkeley, California.

13. Defendant Matthew D. Mingrone, M.D. (“Dr. Mingrone”) is an individual who resides in the State of California and may be served with process at his residence at 53 Whitney Avenue, Los Gatos, California 95030-6231.

14. Defendant Sereno, Inc. (“Sereno”) is a corporation incorporated under the laws of the State of California. Defendant Sereno may be served with process by serving its registered agent, Douglas S. Free, at 44 Montgomery Street, Suite 3380, San Francisco, California 94104-4830.

15. Defendant Sereno Management LLC (“Sereno Management”) is a limited liability corporation incorporated under the laws of the State of California. Sereno Management may be served with process by serving its registered agent, Douglas S. Free, at 44 Montgomery Street, Suite 3380, San Francisco, California 94104-4830.

16. Defendant Snoring Solutions Holdings, LLC (“Snoring Solutions”) is a limited liability corporation incorporated under the laws of the State of California. Snoring Solutions may be served with process by serving its registered agent, Douglas S. Free, at 44 Montgomery Street, Suite 3380, San Francisco, California 94104-4830.

**IV.**  
**MATERIAL FACTS APPLICABLE TO ALL COUNTS**

**A. Sleep-Disordered Breathing is a Significant Medical Problem**

17. Snoring and sleep apnea are collectively referred to as sleep-disordered breathing. These conditions affect some 75 million Americans, and are a major health issue. Even mild snoring can disrupt sleep, depriving snorers and their bed partners of the rest they need. This lack of sleep can cause everything from fatigue and short tempers to decreased job performance and auto accidents. Snoring has even recently been cited as one of the most common causes of divorce.

18. Even more troubling from a medical perspective is the fact that loud, habitual snoring may be an indicator of obstructive sleep apnea – a disease estimated to affect up to 10% of American adults. Sleep apnea has been linked to increased blood pressure, heart disease, stroke, and other serious health issues.

**B. Dr. Schwimmer Establishes The Snoring Center<sup>SM</sup>**

19. Traditional treatment options for sleep-disordered breathing consisted primarily of painful, invasive surgery or the use of poorly tolerated, cumbersome devices. Over the past several years, newer treatment options have become available. These minimally invasive treatments allow many patients to be treated more conveniently. Dr. Schwimmer, a board-certified otolaryngologist, recognized the potential market for these treatments and in 2004

founded the Snoring Center of Dallas to market and provide these services to the public. He soon became the leading authority on the use of, and on the successful marketing of, these services.

20. It is the unique combination of clinical expertise, entrepreneurial spirit, and marketing savvy that allowed Dr. Schwimmer to create the idea of a fee-for-service, direct-to-consumer marketed practice serving patients with sleep-disordered breathing. This market segment simply did not exist until Dr. Schwimmer created it.

21. The Snoring Center<sup>SM</sup> specializes in snoring and sleep apnea treatments that are not only effective, they allow patients to get right back to their daily lives. Using the latest technologies, The Snoring Center<sup>SM</sup> provides its patients with minimally invasive procedures using only local anesthetics. It is the first practice of its kind in the United States of America.

**C. The Snoring Center<sup>SM</sup> Quickly Becomes the Largest Provider of the Pillar Procedure in the United States**

22. By December 2005, The Snoring Center<sup>SM</sup> had become recognized as Texas's leading provider (i.e., the highest volume user) of the Pillar Procedure. The Pillar Procedure is an FDA-approved treatment for snoring and mild-to-moderate sleep apnea, and is The Snoring Center<sup>SM</sup>'s most commonly performed procedure.

23. Owing to the enormous success and potential of the medical practice, Dr. Schwimmer later dropped the geographic limitation "of Dallas" from the name of Plaintiffs' medical practice because the potential to scale the business became evident early on, and because its marketing efforts (and ability to draw patients) were geographically widespread. Since then, the business has been known simply as "The Snoring Center<sup>SM</sup>," which is a nationally registered trademark.

24. From the very beginning, the status of The Snoring Center<sup>SM</sup> as "The Nation's Leading Provider of the Pillar Procedure" has been an effective, valuable, and key element of its

ability to market to potential clients inside and outside its home market in Texas. Simply put, clients were and continue to be willing to travel long distances from outside of Texas to be treated by The Snoring Center<sup>SM</sup> because it has the most experience of any clinic of its kind. Indeed, Medtronic, the current owner of the Pillar Procedure, prominently featured The Snoring Center<sup>SM</sup> in its 2009 Annual Report, citing its status as its largest Pillar customer. In addition, the Summer 2010 issue of "Wake-Up Call," published by the American Sleep Apnea Association, featured a story about the President of Medtronic ENT and how he chose to undergo his Pillar Procedure at The Snoring Center<sup>SM</sup>, "the site that performs more Pillar implants than any place else in the world."

25. Plaintiffs, in particular Dr. Schwimmer, created the practice model and business model for The Snoring Center<sup>SM</sup> through extensive time, labor, skill, and money. The Snoring Center<sup>SM</sup> is the first clinic of its kind and remains to date the largest clinic of its kind. Plaintiffs' business differs greatly from a traditional medical practice. The concept of a fee-for-service, no-insurance, customer service oriented business model for minimally invasive snoring and sleep apnea treatment did not exist until Dr. Schwimmer created it. The entire construct is his design – and his methods, model and practices have been considered valuable and confidential from the beginning.

**D. Defendants Inveigle Their Way into Dr. Schwimmer's Confidence by Posing as Potential Investors**

26. In order to expand The Snoring Center<sup>SM</sup>, Dr. Schwimmer made efforts in 2008 to secure growth capital from outside sources. He retained Adam Lambert of Nextband Partners to identify potential investors. In early October 2008, Mr. Lambert introduced Dr. Schwimmer to Defendants Zander and Godfrey who were affiliated with Defendant Presidio. On or about October 16, 2008, during a visit to Dallas, Texas, Zander and Godfrey falsely represented to

Dr. Schwimmer that they were interested in providing investment to him to enable him to grow his medical practice. In reliance on that representation, Dr. Schwimmer engaged in open discussions with Zander and Godfrey, allowed them to study his business in great detail, and furnished Zander, Godfrey and Presidio with confidential financial and marketing data. Dr. Schwimmer would not have engaged in these discussions and provided this information to Zander, Godfrey, and Presidio but for this representation. Zander, Godfrey, and Presidio were well aware that the information being provided to them by Dr. Schwimmer was confidential because of the nature of the relationship between them and because it was clearly marked to that effect.

27. Dr. Schwimmer provided much closely-guarded confidential and proprietary information to Zander, Godfrey, and Presidio (“Confidential Information”), including the following information requested by them:

- (a) Historical Financial Statements (2005, 2006, 2007), which included detailed balance sheets, profit and loss statements, and detailed analysis of marketing methods and budgets;
- (b) Detailed information on daily patient flow and revenue;
- (c) Detailed pro forma analyses of projected new store financial performance;
- (d) Sensitive marketing insights and analyses; and
- (e) Insight into confidential pricing and co-op marketing agreements with suppliers.

28. Zander and Godfrey visited Dr. Schwimmer in Dallas, Texas on more than one occasion to elicit Confidential Information from him. Specifically, on October 16, 2008, and again on November 18, 2008, Zander and Godfrey travelled to Dallas to gather information about Plaintiffs’ business and discuss investment ideas with Dr. Schwimmer.



29. After obtaining volumes of confidential and proprietary information about Plaintiffs' business from Dr. Schwimmer, Zander, Godfrey, and Presidio made a patently ridiculous investment proposal to Dr. Schwimmer. Their proposal grossly understated the value of Plaintiffs' business, so much so that Dr. Schwimmer believes the proposal was made in bad faith and demonstrates that Defendants had no genuine intent to make an investment in Plaintiffs' business, but rather were seeking a way to usurp the value of the business for themselves. Dr. Schwimmer rejected the proposal. At this point, Defendants claimed to have "lost interest in the space" and commented, falsely as it turned out, that they did not see the growth potential in Dr. Schwimmer's business. The falsity of these claims is demonstrated by the fact the Defendants opened their own competing medical practice, as described below.

**E. Dr. Mingrone Obtains Additional Confidential Information from Dr. Schwimmer by Posing as a Potential Local Partner**

30. Medtronic, the medical supply company that now owns the Pillar Procedure and provides Dr. Schwimmer with the medical supplies required to perform that procedure, has been aware for some time that Dr. Schwimmer planned to grow The Snoring Center<sup>SM</sup> by opening offices across the United States. In order to assist Dr. Schwimmer in this plan, Medtronic has introduced Dr. Schwimmer to ENT doctors who are interested in growing their fee-for-service snoring business. One such introduction was made in June 2009, when Medtronic introduced Dr. Schwimmer to Defendant Dr. Mingrone.

31. Dr. Mingrone represented to Dr. Schwimmer that he wanted to explore the possibility of a joint venture with Dr. Schwimmer in the San Francisco Bay area in California. He also told Dr. Schwimmer that he had interviewed for a job with Defendants, but had not been hired.

32. In reliance on Dr. Mingrone's representation that he wanted to enter into a joint venture with him, Dr. Schwimmer disclosed confidential and proprietary information to Dr. Mingrone relating to the business of The Snoring Center<sup>SM</sup>. Dr. Mingrone expressly agreed with Dr. Schwimmer that all of the information Dr. Schwimmer would disclose to him in the course of their discussions regarding the potential joint venture was confidential and that Dr. Mingrone would keep it confidential. Dr. Schwimmer would not have disclosed this information to Dr. Mingrone if he had not made this agreement. They spoke extensively about Dr. Schwimmer's medical practice, which Dr. Mingrone visited in Texas. Their discussions continued for several months until Dr. Mingrone suddenly became very scarce, only to resurface shortly afterwards as Medical Director for Defendants' competing medical practice which they opened in the San Francisco Bay area, as described below. In addition to the Confidential Information described above, Dr. Schwimmer disclosed to Dr. Mingrone confidential marketing information, including the following:

- (a) Information regarding Dr. Schwimmer's confidential advertising strategy, which including placing advertisements in Southwest Airlines *Spirit* in-flight magazine; and
- (b) The strategy behind the look, feel, and style of Dr. Schwimmer's office locations.

For the purposes of this Complaint, the information described in this paragraph is included in the definition of "Confidential Information."

**F. Defendants Open a Competing Medical Practice**

33. In January 2010, despite having told Dr. Schwimmer that they had lost interest in the space, Defendants opened their own competing medical practice in the San Francisco Bay area in California. Defendants hired Dr. Mingrone as Medical Director of the practice.

Defendants' practice was modeled precisely on the business model of The Snoring Center<sup>SM</sup> that Defendants had learned about through their confidential discussions with Dr. Schwimmer. Defendants' competing medical practice is dedicated to minimally invasive, office-based treatment of snoring and sleep apnea, just like The Snoring Center<sup>SM</sup>. Defendants are providing the same minimally invasive medical procedures as The Snoring Center<sup>SM</sup>, including the Pillar Procedure. Defendants have deliberately styled the décor, look, and feel of their office location to emulate the mid-century modern décor, look, and feel of the Plaintiffs' locations. Recently, Defendants have started advertising in the same advertising media as Plaintiffs. Defendants even called their medical practice The Center for Snoring Solutions, a clear attempt to mimic Plaintiffs' business model to the last degree, Plaintiffs' business being named The Snoring Center<sup>SM</sup>. Defendants have also incorporated a crescent moon symbol into the name of their medical practice, as displayed on their website and in magazine advertisements, just as Plaintiffs' nationally registered trademark includes a crescent moon symbol. As described in more detail below, Defendants have started publishing statements in magazine advertisements and on their website falsely attributing to their medical practice characteristics and qualities that actually describe Plaintiffs' medical practice, The Snoring Center<sup>SM</sup>. In short, Defendants are attempting by all means at their disposal to mimic Plaintiffs' medical practice in an effort to unlawfully usurp the value and success of Plaintiffs' enterprise.

**G. Defendants Are Promoting Their Competing Medical Practice by Using False Advertising and Unlawful Business Disparagement**

34. In recent weeks, Defendants have become increasingly aggressive, brazen, and outrageous in their efforts to compete unfairly with Plaintiffs. For example, Defendants approached Plaintiffs' Dallas-based advertising agency, Pink Jacket Creative LLC, and tried to lure it away from them to help promote Defendants' medical practice in competition with

Plaintiffs. In addition, Defendants have started advertising The Center for Snoring Solutions very aggressively and emulating Plaintiffs' business model more closely than ever before. Plaintiffs have advertised The Snoring Center<sup>SM</sup> regularly in the Southwest Airlines *Spirit* magazine. In September and October 2010, Defendants have advertised The Center for Snoring Solutions in the very same magazine in a clear attempt to influence Dr. Schwimmer's potential customers. Dr. Schwimmer disclosed Plaintiffs' strategy of advertising in this magazine to Dr. Mingrone in confidence. Upon information and belief, Dr. Mingrone wrongfully disclosed the confidential strategy to the other Defendants in violation of the duty of confidentiality that he owed Plaintiffs.

35. Defendants' advertisements in Southwest Airline's *Spirit* magazine contained several false statements about the characteristics and qualities of The Center for Snoring Solutions, which were designed to influence consumers, including potential clients of Plaintiffs. For example, Defendants made the following false statements:

(a) "Sereno, The Center for Snoring Solutions, is a revolutionary medical practice uniquely designed to evaluate and then treat the complex problems that cause your snoring using minimally invasive treatments."

(b) "There has never been a practice like Sereno before."

(c) "We are the first practice of its kind exclusively dedicated to providing comprehensive solutions to this very complex and multi-factorial condition."

36. These statements are literally false because The Center for Snoring Solutions is not a "revolutionary medical practice uniquely designed" to treat snoring and sleep apnea. As Defendants well know, The Snoring Center<sup>SM</sup> had already been in existence providing the same medical services in the same way for at least six years before The Center for Snoring Solutions was opened. In fact, there has been a practice like Sereno before: it is The Snoring Center<sup>SM</sup>

owned and operated by Plaintiffs. Defendants' medical practice is not the first practice of its kind exclusively dedicated to treating snoring and sleep apnea. As Defendants well know, The Snoring Center<sup>SM</sup> is the first such practice.

37. By making these false statements in their advertisements, Defendants are also making false and disparaging statements about the characteristics and qualities of The Snoring Center<sup>SM</sup>. Defendants are falsely stating to the consuming public by clear and unmistakable implication that The Snoring Center<sup>SM</sup> is not a revolutionary medical practice uniquely designed to evaluate and treat snoring and sleep apnea, that The Snoring Center<sup>SM</sup> either does not exist at all or does not provide the same type of medical services as Defendants or was not the first practice of this kind. Defendants are well aware that these statements are false because of their prior knowledge of Plaintiffs' medical practice.

38. Defendants have also made false statements about the characteristics and qualities of their medical practice on The Center for Snoring Solutions' website, which is accessible in Texas, including the following false statements:

(a) "We are the largest practice in the world specializing in simple minimally invasive effective techniques to alleviate these complex conditions" referring to snoring and sleep apnea.

(b) "Sereno is the largest provider of the Pillar Procedure in the world."

39. The foregoing statements are literally false because Defendants' practice is not the largest practice in the world specializing in simple minimally invasive techniques to alleviate snoring and sleep apnea, nor are Defendants the largest provider of the Pillar Procedure in the world. These distinctions belong to The Snoring Center<sup>SM</sup> and to Plaintiffs.

40. By making these false statements on their website, Defendants are also making false and disparaging statements about the characteristics and qualities of The Snoring Center<sup>SM</sup>. They are falsely stating to the consuming public by clear and unmistakable implication that The Snoring Center<sup>SM</sup> is not the largest practice in the world specializing in simple minimally invasive effective techniques to alleviate snoring and sleep apnea and that The Snoring Center<sup>SM</sup> is not the largest provider of the Pillar Procedure in the world. Defendants are well aware that these statements are false because of their prior knowledge of Plaintiffs' medical practice.

41. Upon information and belief, Defendants have published these false statements in the advertisements described above and on their website in order to influence consumers in their choice of medical service provider, more specifically in order to induce them to choose The Center for Snoring Solutions instead of The Snoring Center<sup>SM</sup> for treatment of snoring and sleep apnea.

**H. Defendants' Wrongful Acts Have Caused and Will Continue to Cause Loss, Damage, and Irreparable Harm to Plaintiffs**

42. By perpetrating the improper acts described above, Defendants are guilty of false advertising under the Lanham Act, business disparagement, fraud, misappropriation of trade secrets, common law misappropriation, and unfair competition under Texas law. Plaintiffs have suffered loss, damage, and irreparable harm as result of these wrongful actions, including loss and damage to the business reputation and goodwill of The Snoring Center<sup>SM</sup>. Plaintiffs will continue to suffer loss, damage, and irreparable harm unless Defendants are enjoined from continuing to use Plaintiffs' trade secrets in pursuing their competing business, and from continuing to publish advertisements containing false statements about their own medical practice, and false and disparaging statements about Plaintiffs' medical practice.

V.

**COUNT I – FALSE ADVERTISING**

43. Plaintiffs incorporate the allegations set forth in Sections I through IV above.

44. Defendants have used and continue to use in interstate commerce in connection with the medical services provided by Defendants through The Center for Snoring Solutions false words, namely, the false statements described in paragraphs 35-38 above. These false statements are literally untrue and falsely attribute to The Center for Snoring Solutions characteristics and qualities that it does not possess and which are actually possessed by The Snoring Center<sup>SM</sup>. Defendants' use of these false statements has either deceived or has the capacity to deceive a substantial segment of potential consumers. Defendants' deception is material because it is likely to influence the consumers' purchasing decisions. Consequently, Defendants' use of these false statements is likely to cause confusion, mistake, or deception as to affiliation, connection, or association of The Center for Snoring Solutions with The Snoring Center<sup>SM</sup> or as to the origin, sponsorship, or approval of Defendants' medical services or commercial activities by Dr. Schwimmer and the other Plaintiffs.

45. Defendants' conduct constitutes false advertising in violation of 15 U.S.C. § 1125(a). Defendants' wrongful activities have caused and are likely to cause additional injury to Plaintiffs if not enjoined. Plaintiffs have no adequate remedy at law. Defendants' false advertising has caused, and if not enjoined by this Court as provided by 15 U.S.C. § 1116, will continue to cause, irreparable harm to Plaintiffs and to the business reputation and goodwill of The Snoring Center<sup>SM</sup> for which monetary relief will not fully compensate.

46. Defendants' infringing conduct has been willful, making this an exceptional case under 15 U.S.C. § 1117(a). Consequently, the Court may and Plaintiffs, therefore, request the Court to award Plaintiffs reasonable attorney's fees and to assess damages at three times the

amount of actual damages suffered by Plaintiffs and/or at three times the amount of Defendants' profits earned by their wrongful conduct.

**VI.**  
**COUNT II – COMMON LAW FRAUD**

47. Plaintiffs incorporate the allegations set forth in Sections I through V above.

48. Defendants Zander, Godfrey and Presidio knowingly and falsely represented to Plaintiffs that they were interested in providing investment capital to Dr. Schwimmer in order to enable him to expand the operations of The Snoring Center<sup>SM</sup>. This representation was false because Defendants' true intention was to obtain confidential information regarding Plaintiffs' medical practice and business model in order to enable them to open up a competing business of their own.

49. Defendants' false representations were material because they were calculated to induce Dr. Schwimmer to disclose Plaintiffs' confidential and proprietary information to Defendants, which Plaintiffs otherwise would not have been willing to disclose to them. Defendants made the false representations to Dr. Schwimmer with the intent that he should rely on them.

50. In reliance upon Defendants' false representations, Dr. Schwimmer disclosed confidential and proprietary information to the Defendants regarding The Snoring Center<sup>SM</sup> and Plaintiffs' unique business model, including the Confidential Information. Dr. Schwimmer would not have disclosed the Confidential Information or any confidential and proprietary information regarding The Snoring Center<sup>SM</sup> if Defendants had not made the foregoing false representations. As a result of such reliance, Plaintiffs have suffered injury, in that Defendants have misused the Confidential Information and other confidential and proprietary information



that Dr. Schwimmer disclosed to them in order to open a competing medical practice and divert potential customers away from Plaintiffs' medical practice, The Snoring Center<sup>SM</sup>.

**VII.**

**COUNT III – MISAPPROPRIATION OF TRADE SECRETS**

51. Plaintiffs incorporate the allegations set forth in Sections I through VI above.

52. At all times mentioned in this Complaint, Plaintiffs have been engaged in the business of providing medical services for the evaluation and treatment of snoring disorders and sleep apnea through their medical practice known as The Snoring Center<sup>SM</sup>. In the course of devising, establishing, and operating this medical practice, Plaintiffs developed through extensive time, skill, labor, and money a unique business model and related confidential and proprietary information, including the information described in paragraphs 27 and 32 above ("Confidential Information"). At all times, Plaintiff kept the Confidential Information confidential, labeled it as "Confidential," and did not disclose it to persons who were not connected with Plaintiffs' medical practice.

53. As described above, by posing as potential investors and as a result of making fraudulent misrepresentations to Dr. Schwimmer, Defendants Zander, Godfrey, and Presidio obtained access to and copies of Plaintiffs' Confidential Information. Defendants knew that the Confidential Information was confidential because of the confidential circumstances in which it was disclosed to them and because it was marked as confidential.

54. As described above, Defendant Dr. Mingrone represented to Dr. Schwimmer that he was interested in entering into a joint venture with Dr. Schwimmer and expressly agreed with Dr. Schwimmer that the information that Dr. Schwimmer would disclose to him in the context of discussing the potential joint venture was confidential and would be treated as confidential by Dr. Mingrone.

55. Instead of using the Confidential Information confidentially for the sole purpose for which it was disclosed to them, however, Defendants have wrongfully used that information to open up their own unfairly competing medical practice, usurping Plaintiffs' business model and trade secrets. As a direct and proximate result of Defendants' conduct, Plaintiffs have lost customers to Defendants and will continue to lose customers to them as a result of Defendants' unfair competition. Plaintiffs are also suffering loss of potential profits that would accrue to them but for Defendants' wrongful conduct. The total loss to Plaintiffs cannot be accurately measured at this time. However, unless Defendants are enjoined from using Plaintiffs' Confidential Information, Plaintiffs will suffer irreparable harm.

**VIII.**  
**COUNT IV – COMMON LAW MISAPPROPRIATION**

56. Plaintiffs incorporate the allegations set forth in Sections I through VII above.

57. At all times mentioned in this Complaint, Plaintiffs have been engaged in the business of providing medical services for the evaluation and treatment of snoring disorders and sleep apnea through their medical practice known as The Snoring Center<sup>SM</sup>. In the course of devising, establishing, and operating this medical practice, Plaintiffs developed a unique business model through extensive time, skill, labor, and money.

58. Defendants have wrongfully used Plaintiffs' business model in competition with Plaintiffs, thereby giving Defendants an unfair, special, competitive advantage over Plaintiffs because having acquired intimate and detailed confidential and proprietary knowledge of Plaintiffs' business model and Plaintiffs' Confidential Information in the course of the confidential discussions described in this Complaint, Defendants were burdened with little or none of the expense incurred by Plaintiffs in creating this unique business model.

59. As a result of Defendants' wrongful misappropriation of Plaintiffs' business model, Plaintiffs have suffered commercial damage, including damage to the business reputation and goodwill of The Snoring Center<sup>SM</sup> and loss of profits from clients that were diverted away from The Snoring Center<sup>SM</sup> as a result of Defendants' actions.

60. Plaintiffs will be irreparably injured unless such action is enjoined by this Court as provided by Texas law.

**IX.**  
**COUNT V – BUSINESS DISPARAGEMENT**

61. Plaintiffs incorporate the allegations set forth in Sections I through VIII above.

62. Defendants knowingly and willfully published false and disparaging words regarding Plaintiffs' economic interests in the advertisements placed in Southwest Airlines *Spirit* magazine and in the Sereno website, as alleged in paragraphs 34-41 above.

63. The disparaging words were false, as stated in paragraphs 34-41 above.

64. Defendants acted with malice because they knew, based on their prior knowledge of Plaintiffs' medical practice, that the words were false, or acted with reckless disregard for the truth of those words and because Defendants acted with ill will and for the purpose of interfering with Plaintiffs' economic interests. As a result, Plaintiffs have suffered loss and damage, including loss of clients, revenues, and profits, loss of business opportunities, and damage to the business reputation and goodwill of their medical practice, The Snoring Center<sup>SM</sup>.

65. Defendants acted with grossly malicious intent in disparaging Plaintiffs' business, unfairly competing with Plaintiffs so as to induce potential customers to obtain medical services from Defendants, rather than from The Snoring Center<sup>SM</sup>, acting out of ill will towards Plaintiffs and for the sole purpose of damaging the business reputation and goodwill of The Snoring

Center<sup>SM</sup> and depriving Plaintiffs of prospective customers. For these reasons, Plaintiffs are entitled to an award of exemplary damages.

66. Furthermore, Plaintiffs will be irreparably injured unless Defendants are enjoined by this Court from continuing to disparage The Snoring Center<sup>SM</sup> in its advertisements, website, and other promotional publications.

**X.**  
**COUNT VI – EXEMPLARY DAMAGES**

67. Plaintiffs incorporate the allegations set forth in Sections I through IX above.

68. The numerous wrongs done to Plaintiffs by Defendants, as described above, were aggravated by the kind of malice for which the law allows the imposition of exemplary damages, in that Defendants' actions were specifically intended to cause substantial injury to Plaintiffs. In addition, the wrongs done by Defendants were aggravated by the kind of fraud for which the law allows the imposition of exemplary damages, in that Defendants made material misrepresentations that were false, knowing that they were false, or with reckless disregard as to their truth and as a positive assertion, with the intent that the representations be acted on by Plaintiffs. Plaintiffs relied on the representations and suffered injury as a result of their reliance on them. Plaintiffs, therefore, seek an award of exemplary damages in an amount within the jurisdictional limits of the court.

**XI.**  
**APPLICATION FOR PRELIMINARY INJUNCTION**

69. Plaintiffs incorporate the allegations set forth in Sections I through X above.

70. There is a substantial likelihood that Plaintiffs will prevail on their claims against Defendants, based on the facts asserted above.

71. Defendants' actions have caused, and will continue to cause, irreparable injury to Plaintiffs, and the threatened injury outweighs any hypothetical damage that the proposed injunction may cause Defendants. Finally, the public interest favors the issuance of an injunction in this case.

72. Plaintiffs seek a preliminary injunction against Defendants, prohibiting them and their respective officers, directors, agents, servants, employees, attorneys, related companies, licensees, and all persons acting for, with, by, through, and under any of them until trial of this action or further order of the Court in the meantime from: (1) making any false statements, including the statements described above, regarding the characteristics and qualities of The Center for Snoring Solutions or regarding the characteristics and qualities of The Snoring Center<sup>SM</sup> in any advertisement published in any advertising medium, including any website operated by or for Defendants; (2) making any false and disparaging statements about the characteristics and qualities of The Snoring Center<sup>SM</sup> to any person by any means; and (3) using any confidential information provided by Dr. Schwimmer to Defendants or any of them, including the Confidential Information, for any purpose whatsoever.

73. Plaintiffs are willing to post bond in an amount to be determined by the Court.

**XII.**  
**TRIAL BY JURY**

74. Plaintiffs hereby request a trial by jury.

**XIII.**  
**PRAYER**

For the reasons stated above, Plaintiffs pray that this Court enter judgment in their favor and award the following relief:

(a) a preliminary and permanent injunction prohibiting Defendants and their respective officers, directors, agents, servants, employees, attorneys, related companies, licensees, and all persons acting for, with, by, through, and under any of them, from (1) making any false statements, including the statements described above, regarding the characteristics and qualities of The Center for Snoring Solutions or regarding the characteristics and qualities of The Snoring Center<sup>SM</sup> in any advertisement published in any advertising medium, including any website operated by or for Defendants, (2) making any false and disparaging statements about the characteristics and qualities of The Snoring Center<sup>SM</sup> to any person by any means, and (3) using any confidential information provided by Dr. Schwimmer to Defendants or any of them, including the Confidential Information (as defined above), for any purpose whatsoever, and a permanent injunction compelling Defendants to return all copies of such confidential information to Plaintiffs and to permanently purge all electronic copies of such confidential information from any digital storage medium owned or controlled by or on behalf of Defendants or any of them;

(b) judgment in favor of Plaintiffs for actual and statutory damages in an amount to be determined by the Court, and that such damages be trebled pursuant to 15 U.S.C. § 1117(a);

(c) judgment in favor of Plaintiffs for infringers' profits, enhanced as appropriate pursuant to 15 U.S.C. § 1117(a);

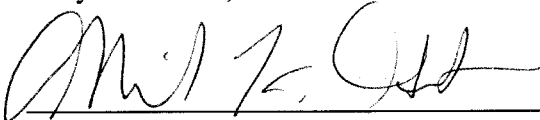
(d) judgment awarding Plaintiffs exemplary damages;

(e) judgment awarding prejudgment and postjudgment interest;

(f) judgment awarding Plaintiffs all costs of the action and reasonable attorney's fees pursuant to the provisions of 15 U.S.C. § 1117(a); and

(g) such other relief as the Court deems appropriate.

Respectfully submitted,

By: 

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Michael K. Hurst  
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Texas State Bar No. 10316310  
Anthony J. Magee  
amagee@ghjhlaw.com  
Texas State Bar No. 00786081

**Gruber Hurst Johansen & Hail LLP**  
1445 Ross Avenue, Suite 2500  
Dallas, Texas 75202  
214/855-6800 (main)  
214/855-6808 (facsimile)

**ATTORNEYS FOR PLAINTIFFS**

VERIFICATION

STATE OF TEXAS )  
COUNTY OF ~~DALLAS~~ HARRIS )  
\_\_\_\_\_ )

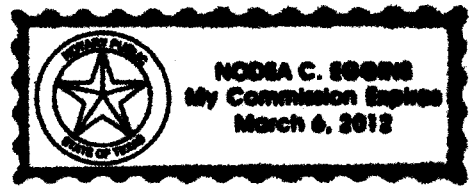
Before me, the undersigned Notary Public, on this day personally appeared Craig Schwimmer, who, after being duly sworn, stated under oath that he is a Plaintiff in this action; that he is authorized to make this Verification on Plaintiffs' behalf; that he has read the above Complaint; and that every factual statement regarding his conduct and the conduct of others observed by him contained in the complaint is within his personal knowledge and is true and correct and that every other statement of fact contained in the Complaint is based upon information and belief and is to the best of his knowledge true and correct.



\_\_\_\_\_  
Craig Schwimmer

SUBSCRIBED AND SWORN TO BEFORE ME on this 2nd day of November, 2010, to certify which witness my hand and official seal.

[Affix Seal]



Nodia C. Eggins



JS 44 (TXND Rev. 2/10)

ORIGINAL

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

CRAIG SCHWIMMER, MD, SNORING CENTER USA, LLC, SNORING CENTERS OF TEXAS, PA, and SNORING CENTER OF HOUSTON, PA

(b) County of Residence of First Listed Plaintiff Dallas County, TX  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Michael K. Hurst and Anthony J. Magee, Gruber Hurst Johansen & Hail LLP, 1445 Ross Avenue, Suite 2500, Dallas, Texas 75202 (214) 855-6800

DEFENDANTS

PRESIDIO INDUSTRIES LLC, WADE A. ZANDER, JASON P. GODFREY, MATTHEW D. MINGRONE, MD, SERENO, INC., SERENO MANAGEMENT LLC, and SNORING SOLUTIONS HOLDI

County of Residence of First Listed Defendant Sacramento, California  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorney <sup>Known</sup>

3-10CV2213-P

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 3 Federal Question (U.S. Government Not a Party)
- 2 U.S. Government Defendant
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |                                         |                            |                            |                                                               |                            |                            |
|-----------------------------------------|----------------------------|----------------------------|---------------------------------------------------------------|----------------------------|----------------------------|
|                                         | PTF                        | DEF                        |                                                               | PTF                        | DEF                        |
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation                                                | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury  <b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability  <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other  <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157  <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input checked="" type="checkbox"/> 840 Trademark  <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))  <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from another district (specify)
- 6 Multidistrict Litigation
- 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

15 U.S.C. 1125 (a)

Brief description of cause:

False Advertising

VII. REQUESTED IN COMPLAINT:

- CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23
- DEMAND \$ \_\_\_\_\_
- CHECK YES only if demanded in complaint:  
JURY DEMAND:  Yes  No

VIII. RELATED CASE(S) (See instructions) PENDING OR CLOSED:

JUDGE \_\_\_\_\_ DOCKET NUMBER \_\_\_\_\_

DATE 11-3-10

SIGNATURE OF ATTORNEY OF RECORD

*[Signature]*

FOR OFFICE USE ONLY

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_

**INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44****Authority For Civil Cover Sheet**

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

**I. (a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)."

**II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), Fed. R. Civ. P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers, or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress, or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

**III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

**IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

**V. Origin.** Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

**VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity** Example U.S. Civil Statute: 47 USC 553  
Brief Description: Unauthorized reception of cable service

**VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, Fed. R. Civ. P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand, such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

**VIII. Related Cases.** This section of the JS 44 is used to reference cases that are related to this filing, if any. If a related case exists, whether pending or closed, insert the docket numbers and the corresponding judge names for such cases. A case is "related" to this filing if the case: (1) involves some or all of the same parties and is based on the same or similar claim; (2) involves the same property, transaction, or event; (3) involves substantially similar issues of law and fact; and/or (4) involves the same estate in a bankruptcy appeal.

**Date and Attorney Signature.** Date and sign the civil cover sheet.