

entered into a contract, and made certain representations to ThermoTek regarding Maldonado Medical's purchase and distribution of ThermoTek products known as NanoTherm and VascuTherm, as more fully described below, and giving rise to the cause of action described herein.

3. GBCS, L.L.C. is an Arizona company located at 1010 E. Kaler Drive, Phoenix, Arizona 85020. GBCS has engaged or is engaged in business in Texas, as more particularly described below. GBCS does not maintain a regular place of business in Texas and has no designated agent for service of process. The cause of action asserted arose from, or is connected with, GBCS's purposeful acts toward Texas because GBCS entered into a contract and made certain representations to ThermoTek regarding GBCS's purchase and distribution of ThermoTek products known as NanoTherm and VascuTherm, as more fully described below, and giving rise to the cause of action described herein.

4. American Surgical Development, LLC ("ASD") is an Arizona company located at 2338 W. Royal Palm Road, Suite 3, Phoenix, Arizona 85021. ASD does not maintain a regular place of business in Texas and has no designated agent for service of process. The cause of action asserted arose from, or is connected with, ASD's purposeful acts toward Texas. ASD is a party to the Supply Agreement proposed to ThermoTek as described below.

5. Upon information and belief, Defendant, Gregory Brian Maxon Maldonado a/k/a Gregory Maxon ("Maldonado") resides in Phoenix, Arizona. Maldonado is the manager, director, and chief operating officer of Maldonado Medical. Maldonado is the alleged inventor of the patent at issue in this Complaint and the assignor of the patent to Maldonado Medical.

JURISDICTION AND VENUE

6. The Court has jurisdiction over ThermoTek's claims pursuant to 28 U.S.C. § 1332 as ThermoTek and Defendants are citizens of different states and the amount in controversy exceeds the jurisdictional threshold of this court \$75,000. This Court has supplemental jurisdiction over the ThermoTek's common law and state law claims pursuant to 28 U.S.C. § 1367.

7. The Court has subject matter jurisdiction over these counterclaims pursuant to 28 U.S.C. §§ 1331, 1338, and 2201.

8. Venue is proper before the Court under 28 U.S.C. § 1391.

FACTS

9. ThermoTek is the original equipment manufacturer ("OEM") for the VascuTherm therapy system, which it designed and developed in its Flower Mound, Texas facility. The product is distributed exclusively from ThermoTek's Texas facility. ThermoTek expended significant time, labor, and resources to develop the VascuTherm system, which is an electronic heating, cooling and compression system used in conjunction with specially designed therapy wraps to transfer pressure, heat and cold to various parts of the body during medically-necessary thermal, compression, contrast therapy and DVT prophylaxis. The specially designed wraps prevent hot or cold fluid from directly contacting the skin. Only ThermoTek-manufactured wraps are approved by the OEM for use on the VascuTherm system.

10. ThermoTek sells its products primarily through a network of distributors. A ThermoTek distributor is contractually appointed for the sale of the NanoTherm, VascuTherm and associated wraps and accessory products during the term of the appointment in a specified territory. Once a distributor has purchased a unit from ThermoTek, pursuant to its distributorship appointment, it is typically permitted to re-sell or rent the purchased unit within its assigned

territory. Because, among other reasons, the ThermoTek units are an FDA approved Class II Medical Device, a distributor may not alter the unit without the express written permission of ThermoTek. Similarly, a distributor may not re-sell or rent altered units.

11. On April 10, 2007, Overton Parish, Niran Balachandran, and Tony Quisenberry filed United States Patent Application No. 11/733,709 for a Method and System for Thermal Compression Therapy Relative to the Prevention of Deep Vein Thrombosis (“the ‘709 Application”). On March 6, 2008, the ‘709 Application published as U.S. Patent Application Publication No. 2008/0058911. The ‘709 Application remains pending. On September 19, 2008, Overton Parish, Tony Quisenberry, Niran Balachandran and Sam McSpadden filed United States Patent Application No. 12/234,394 (“the ‘394 Application”). The ‘394 Application is a continuation in part of the ‘709 Application, filed April 10, 2007 and is also a continuation in part of U.S. Patent Application No. 10/894,369, filed July 19, 2004. The ‘394 Application issued as U.S. Patent No. 8,778,005 on July 15, 2014.

12. On June 12, 2007, ThermoTek and GBCS entered into a Distributor Agreement that provided for GBCS’s purchase and distribution of certain ThermoTek products, including the VascuTherm and NanoTherm, therapy wraps and related accessories. Pursuant to the 2007 GBCS Agreement, GBCS agreed to purchase the VascuTherm, the NanoTherm, therapy wraps and related accessories from ThermoTek and distribute those products within Maricopa County, Arizona.

13. Pursuant to the distributorship appointment, a distributor agrees not to purchase, sell, rent or distribute any products that provide both cold and compression therapy in a combined unit in the territory for which the distributor has been appointed or alter the VascuTherm system in any manner whatsoever.

14. On October 5, 2010, ThermoTek and Maldonado Medical entered into a Distributor Agreement (the “Maldonado Agreement”) that appointed Maldonado as a distributor of NanoTherm and VascuTherm units manufactured by ThermoTek and wraps and accessories sold by ThermoTek. The Maldonado Agreement specifically provided that Distributor may refer to the VascuTherm unit the “T.E.C. System”. The Maldonado distributor agreement included Maricopa, Pinal and Pima counties in Arizona and Los Angeles, Orange, San Diego and San Francisco counties in California.

15. During the term of the Maldonado Agreement, Maldonado agreed not to distribute other products that provided cold and/or compression therapy in the counties in which it had been appointed as a ThermoTek distributor, or alter the VascuTherm system in any manner whatsoever.

16. Maldonado served as a Distributor from the commencement of the Maldonado Agreement until November 13, 2013 (thirty days after ThermoTek received notification of Maldonado’s intent to terminate the agreement).

17. The Maldonado Agreement was for an initial term of three (3) years and, provided Maldonado was in compliance with the terms of the Maldonado Agreement, it provided for automatic renewal for successive one (1) year terms. The Maldonado Agreement provided that after the initial three (3) year term, it could be terminated by either party on thirty (30) days written notice.

18. During the performance of the distribution agreements, Maldonado principals referred to GBCS and Maldonado collectively, typically referring to it as a single entity, “GBCS/Maldonado.”

19. On April 3, 2012, while Maldonado Medical was serving as a ThermoTek distributor, Defendant Gregory B. Maxon Maldonado sent a letter to ThermoTek as President of

American National Medical Management (“ANMM”). On information and belief, ANMM is a medical billing entity specializing in out of network healthcare claims reimbursement. ANMM claims to be a proven leader in increasing reimbursements for healthcare providers through the use of a proprietary billing system designed to ensure that ANMM clients obtain maximized health insurance reimbursements.

20. In his letter, Maldonado advised that ANMM would have a booth next to Pulsar Scientific, LLC. Pulsar Scientific manufactures a cool and heat therapy and compression therapy device. Pulsar Scientific describes its unit as providing high performance cool and heat therapy, with or without pneumatic compression therapy. The plan, as described to ThermoTek, was for Pulsar Scientific to “encourage” companies interested in their product to hire ANMM to undertake the billing function.

21. Unbeknownst to ThermoTek, while Maldonado Medical and GBCS were serving as ThermoTek distributors, on information and belief they sold or rented compression therapy units manufactured by Pulsar Scientific, in their distribution territories in violation of their distributor agreements.

22. Moreover, while Maldonado/GBCS was serving as a ThermoTek distributor, Gregory Brian Maxon Maldonado filed a patent application declaring himself to be the inventor of a System and Method for Thermal Compression Therapy. That application was filed after the ThermoTek application, on July 10, 2009. Maldonado’s “invention” was substantially the same as what he was distributing for ThermoTek. Indeed, the units illustrated in his patent application are ThermoTek units.

23. In what can be described as a brazen, fraudulent act, Maldonado actually substantially copied the key portions of ThermoTek’s application and submitted it as his own,

representing himself as the inventor. The claims are virtually identical to the point of even copying the illustrations. The unit drawn, as part of Maldonado's patent application, is the VascuTherm unit. Maldonado declared that he was the first to invent the case when he knew that the declaration was false and that the claims at the time were copied from ThermoTek's patent application.

24. The Maldonado patent, known as the '995 patent, issued July 16, 2013. Maldonado Medical took an assignment of the '995 Patent.

25. On information and belief, Maldonado, individually and/or through his entities worked with Mike Wilford and his entities contributing to the development of the Pulsar Scientific Recovery+ Unit.

26. Mike Wilford and his entities, including but not limited to, Integrated Orthopedics, Motion Medical, Wabash Medical, Orthoflex, Inc., WMI Enterprises, and Pulsar Scientific used information obtained improperly from ThermoTek to develop the Recovery+ Unit. ThermoTek presently has a related lawsuit pending against Mike Wilford and several of his entities for unfair competition, fraud, and breach of distributorship agreement, styled Orthoflex, Inc. et al v. ThermoTek, Inc.; Civil Action No. 3:11-CV-0870-D, consolidated with Civil Action No. 3:10-CV-2618D pending in this United States District Court for the Northern District of Texas, Dallas Division.¹

27. On information and belief, Maldonado and his entities participated in the development of Pulsar Scientific's Recovery+ Unit and subsequently purchased Recovery+ units, and actively sold or rented the units.

¹ The Court re-aligned ThermoTek as the Plaintiff.

28. In mid-2010, GBCS/Maldonado Medical began raising issues with respect to repair frequency, repair cost, and alleged product failures involving ThermoTek's VascuTherm units. ThermoTek worked with Maldonado even conducting extensive corporate repair analysis.

29. Although Mike Wilford made similar complaints, ThermoTek, at the time, had no reason to suspect that GBCS/Maldonado was conspiring with Mike Wilford. ThermoTek subsequently learned that Mike Wilford had engaged in an elaborate fraud designed from its inception to convince ThermoTek to provide information to him that he was using to design and develop the Pulsar Scientific Recovery+ Unit to unfairly compete with ThermoTek.

30. On information and belief, GBCS/Maldonado contributed to the development of the Recovery+ Unit, improperly obtaining and using ThermoTek information to unfairly compete with ThermoTek. GBCS/Maldonado, Maldonado or their affiliated entities were, on information and belief, acquiring Pulsar Scientific+ units for sale or rent in the area of distribution and using wraps other than OEM approved wraps as part of the ThermoTek VascuTherm system being distributed by GBCS/Maldonado.

31. ThermoTek remained unaware of Maldonado's conduct until October 16, 2014 when it received a letter from David Rogers of Snell & Wilmer's Phoenix, Arizona office. In the letter, Maldonado Medical announced that it was the owner of the '995 Patent and actually stated that it desired to license to ThermoTek its own technology in exchange for a ten (10) year distributorship agreement (later described as a supply agreement to be between American Surgical Development, LLC, Maldonado and ThermoTek. The letter gave ThermoTek an October 31, 2014 deadline.

32. In response to ThermoTek's request for additional information, Maldonado Medical sent a proposed Supply Agreement December 24, 2014. The proposed Supply Agreement

was to between ThermoTek, on the one hand, and Maldonado Medical and American Surgical Development, LLC on the other.

33. The Supply Agreement again asserted the ‘995 Patent and purported to offer a non-exclusive, nontransferable license to make any device purportedly covered by the Patent. Maldonado and ASD are using a Patent obtained under false circumstances in an effort to license to ThermoTek the right to make its own products – the very products that Maldonado Medical and GBCS signed a distributor agreement to distribute. On information and belief, ASD was aware that the agreement was being procured under false circumstances because it is an affiliated entity.

34. Defendants have persisted in sending emails and making overtures to ThermoTek that is was somehow required to license its own technology from Maldonado Medical. Maldonado persists in representing that he is the inventor of ThermoTek’s technology, and Defendants continue to try to force ThermoTek to accept the supply/license agreement under the threat that Maldonado Medical has a patent on ThermoTek’s technology.

CONDITIONS PRECEDENT

35. All applicable conditions precedent, if any, have been met, satisfied, or waived.

CAUSES OF ACTION

Count One: Declaratory Judgment for Patent Misuse and Invalidity of U.S. Patent No. 8,485,995 (Against Maldonado Medical and Maldonado)

36. Plaintiffs incorporate by reference the allegations contained in the paragraphs above and below.

37. United States Patent 8,485,995 (the “995 Patent”) bears an issue date of July 16, 2013. Defendants have alleged that they are the owner of the ‘995 Patent. Maldonado represented and declared that he was the inventor of the subject of the patent.

38. Defendant Maldonado claimed to be the first to have invented the '995 Patent when in reality he copied claims and illustrations from ThermoTek's previously filed patent application. On information and belief, Maldonado is the principal of Patent Assignee Maldonado Medical.

39. The unit Maldonado claims to have invented in the '995 patent is in reality the ThermoTek VascuTherm that Maldonado Medical was appointed to distribute for ThermoTek. Instead of exercising the required degree of fidelity to ThermoTek, Maldonado acquired information through its relationship and misappropriated the information and units for an improper purpose to assist in the development of the Pulsar Scientific unit to compete with ThermoTek using its own technology.

40. Maldonado through fraud sought and obtained a patent on technology that it did not invent to obtain a competitive advantage over ThermoTek, the entity that had appointed Maldonado Medical as a distributor.

41. An actual controversy exists between the parties regarding the validity and of the '995 Patent.

42. Claims in the '995 Patent as asserted are invalid for failing to satisfy one or more of the conditions of patentability set forth in Title 35, United States Code, § 101, *et. seq.*

43. Plaintiff has prior commercial use pursuant to Title 35, United States Code § 273.

Count Two: Breach of Distributorship Agreement (Against GBCS)

44. ThermoTek incorporates by reference all preceding paragraphs as if fully set forth herein.

45. ThermoTek and GBCS entered into a Distributor Agreement on June 12, 2007. ThermoTek performed under the Distributor Agreement until it was terminated by GBCS on November 13, 2013.

46. GBCS breached the Distributor Agreement by misusing ThermoTek's products sold under the Distributor Agreement, failing to return information pursuant to the Distributor Agreement, engaging in fraud, and selling or renting units other than ThermoTek units in the distribution territory, *i.e.*, California when California was not within GBCS territory.

47. On information and belief GBCS also breached the Distributor Agreement by providing information and equipment to Gregory Brian Maxon Maldonado who filed a patent application with the United States Patent and Trademark Office claiming to have invented ThermoTek's technology, the very technology that was, in part, the subject of the Distributor Agreement.

48. All conditions precedent have been satisfied.

49. ThermoTek has suffered actual and consequential damages as the proximate result of GBCS's breach of the Distributor Agreement. It hereby seeks recovery of these damages as well as its reasonable attorneys' fees, court costs, pre- and post-judgment interest and all other relief to which it may be entitled.

Count Three: Breach of Distributorship Agreement (against Maldonado Medical)

50. ThermoTek incorporates by reference all preceding paragraphs as if fully set forth herein.

51. ThermoTek and Maldonado Medical entered into a Distributor Agreement on October 5, 2010. ThermoTek performed under the Distributor Agreement until it was terminated by Maldonado on November 13, 2013 concurrently with the GBCS Distributor Agreement.

52. Maldonado Medical breached the Distributor Agreement by misusing ThermoTek's product sold under the Distributor Agreement, failing to return information pursuant to the Distributor Agreement, engaging in fraud, and selling or renting units other than ThermoTek units in the distribution area.

53. On information and belief Maldonado Medical also breached the Distributor Agreement by providing information and equipment to Gregory Brian Maxon Maldonado who filed a patent application with the United States Patent and Trademark Office claiming to have invented ThermoTek's technology, the very technology that was, in part, the subject of the Distributor Agreement.

54. All conditions precedent have been satisfied.

55. ThermoTek has suffered actual and consequential damages as the proximate result of Maldonado Medical's breach of the Distributor Agreement. It hereby seeks recovery of these damages as well as its reasonable attorneys' fees, court costs, pre- and post-judgment interest and all other relief to which it may be entitled.

Count Four: Fraud (against Maldonado)

56. ThermoTek incorporates by reference all preceding paragraphs as if fully set forth herein.

57. As set forth above, Maldonado knowingly made false, material representations to ThermoTek. More specifically, Maldonado repeatedly informed ThermoTek through e-mails, letters and phone calls to ThermoTek's Texas employees that he and Maldonado Medical wanted to grow and develop the market for ThermoTek's products. For example, in a letter dated June 2007, Maldonado acknowledged that Maldonado Medical "loved" ThermoTek's products and the way that ThermoTek did business. He stated, "Sam simply put, we want to dominate this market or any market we enter with your products." One year later, he demonstrated just how much he loved ThermoTek's products when he filed a provisional application for a patent on ThermoTek's technology.

58. Moreover, Maldonado engaged in a persistent effort to obtain ThermoTek information. For example, on information and belief, Maldonado participated in a coordinated effort with Mike Wilford to obtain ThermoTek's technology and then work together to maximize their profits through the use of that technology, in a competing unit. On information and belief, Maldonado knew that it was not experiencing out of industry standard repair frequencies, yet he represented that Maldonado was experiencing significant financial damage caused by repairs.

59. Maldonado falsely represented that he invented ThermoTek's technology when he knew that ThermoTek manufactured the unit; the very unit that Maldonado Medical agreed to distribute for ThermoTek. Maldonado included in his patent application illustrations and claims that he copied out of ThermoTek's published applications.

60. As a direct and proximate result of Maldonado's false representations, ThermoTek has suffered damages that will have a direct effect in Texas where ThermoTek is headquartered.

61. Accordingly, ThermoTek is entitled to actual damages in an amount sufficient to compensate it for the harm sustained, including lost foreseeable profits.

62. ThermoTek is also entitled to recover exemplary damages in an amount to be determined by the trier of fact.

Count Five: Unfair Competition (Against Maldonado, Maldonado Medical)

63. Plaintiffs incorporate by reference the allegations contained in the paragraphs above and below.

64. ThermoTek owns information and equipment designs created through the expenditure of significant time, labor, skill and money, which is used in the invention of, development, design and manufacture of its VascuTherm system and component therapy wraps exclusively at the Texas facility.

65. Maldonado and his entities exercised possession, custody, and control over information, materials, and equipment that ThermoTek provided to its distributor for the purposes of serving in that capacity, and used ThermoTek's information and equipment without authorization. Moreover, Maldonado copied ThermoTek's patent application claims and illustrations and fraudulently presented them to the Patent and Trademark Office as his own invention. In reality, the products he was claiming to have invented are the very same products that he was supposed to be distributing for ThermoTek.

66. Maldonado and his entities used ThermoTek's information and equipment, to which they had no right individually, to gain a special advantage over ThermoTek in the market because Maldonado and his entities have not been burdened with any of the expense incurred by ThermoTek in the extensive and costly design and manufacture of the VascuTherm device, wraps, and therapy system. Indeed, Maldonado invented nothing; he simply copied the claims and drawings for ThermoTek's products.

67. Such unfair competition has caused significant commercial damage to ThermoTek for which it is entitled to recover.

REQUEST FOR JURY TRIAL

68. ThermoTek requests a jury trial.

EXEMPLARY DAMAGES: AGAINST ALL DEFENDANTS

69. In addition to reimbursement and actual damages, ThermoTek seeks exemplary damages for the malicious conduct of Defendants and to deter such conduct in the future. Because the conduct of Defendants includes, inter alia, efforts to secure execution of documents by deception, Plaintiff pleads that the exemplary damages are not subject to any caps under Texas Civil Practices and Remedies Code Section 41.008.

REQUEST FOR RELIEF

WHEREFORE, ThermoTek requests that judgment be entered in its favor and against Defendants and be granted the following relief:

- a. ThermoTek be granted judgment against Defendants for declaratory relief as specified herein including invalidity of the '995 Patent, actual, consequential, and compensatory damages and injunctive relief;
- b. ThermoTek be granted judgment against Defendants for exemplary damages;
- c. The Court award prejudgment and post-judgment interest as allowed by law;
- d. ThermoTek be granted judgment for reasonable attorneys' fees through appeal;
- e. ThermoTek be granted judgment for all costs of court; and
- f. Any such other and further relief to which ThermoTek may be entitled.

Dated: February 9, 2015

Respectfully submitted,

/s/Martin E. Rose
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