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DEXCOM, INC.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DEXCOM, INC.,

Plaintiff,

v.

MY HEALTH, INC.,

Defendant.

Case No. 3:15-cv-00932-DMS-BLM

**FIRST AMENDED COMPLAINT
FOR DECLARATORY JUDGMENT**

JURY TRIAL DEMANDED

Ctrm: 13A
Judge: Hon. Dana M. Sabraw

Plaintiff DexCom, Inc. ("DexCom") hereby files this First Amended Complaint for Declaratory Judgment against My Health, Inc. ("My Health") and alleges as follows:

NATURE OF THE ACTION

1. This is an action for declaratory judgment of non-infringement of United States Patent No. 6,612,985 ("the '985 patent") pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, and the Patent Laws of the United States, 35 U.S.C. §§ 1 *et seq.*, and for such other relief as the Court deems just and proper.

1 **PARTIES**

2 2. DexCom is a Delaware corporation with its principal place of business
3 in San Diego, California.

4 3. Upon information and belief, My Health is a Delaware corporation
5 with offices in Plano, Texas. Upon information and belief, My Health has an agent
6 for service of process in Carlsbad, California.

7 **JURISDICTION AND VENUE**

8 4. This is an action under the Federal Declaratory Judgment Act, 28
9 U.S.C. §§ 2201 and 2202, against My Health for a declaration that pursuant to the
10 patent laws of the United States, 35 U.S.C. § 1 et seq., the claims of the '985
11 patent are not infringed by DexCom. Jurisdiction as to these claims is conferred on
12 this Court by 28 U.S.C. §§ 1331 and 1338 (a).

13 5. Upon information and belief, this Court has personal jurisdiction over
14 My Health by virtue of its contacts with this forum. My Health's web site
15 represents that the company maintains an office in Silicon Valley, located at 1733
16 Woodside Road, Suite 300, Redwood City, California 94061. My Health's web site
17 also identifies just two corporate officers. On information and belief, both of My
18 Health's corporate officers reside and work in the State of California. Upon
19 information and belief, Michael Edward Eiffert, President of My Health, resides in
20 Thousand Oaks, California. Upon information and belief, Vincent F. Aiello, My
21 Health's Chief Financial Officer and General Counsel, maintains a legal office at
22 5620 Paseo Del Norte in Carlsbad, California, and is a current resident of Carlsbad,
23 California. Mr. Aiello was served with both the Summons and Complaint in his
24 capacity as a corporate officer of My Health at his residence in Carlsbad, California
25 on April 28, 2015, the same day the Complaint was filed. Upon information and
26 belief, both Mr. Eiffert and Mr. Aiello conduct and/or direct My Health's business,
27 licensing and litigation activities from their homes and offices in California. My
28 Health also has attempted to license the '985 patent in this District.

6. Venue is proper in this District under 28 U.S.C. §§ 1391 and 1400(b). My Health does business in this District and a substantial part of DexCom's claims arise in this District. Among other things, My Health has attempted to license the '985 patent in this District.

THE PATENT-IN-SUIT

7. The United States Patent and Trademark Office ("PTO") issued the '985 patent, entitled Method and System for Monitoring and Treating a Patient, on September 2, 2003. A true and correct copy of the '985 patent is attached as Exhibit A.

8. The named inventors of the '985 patent are Michael E. Eiffert and Lisa C. Schwartz. The named assignee of the '985 patent is the University of Rochester.

9. Upon information and belief, the current assignee of the '985 patent is My Health.

10. Upon information and belief, My Health is a patent holding company that does not compete with DexCom. Upon information and belief, My Health does not make or sell any products or services itself.

LITIGATION ACTIVITY INVOLVING THE '985 PATENT

11. Upon information and belief, My Health has brought suit against at least twenty-four different parties for patent infringement of the '985 patent between 2012 and the present. These cases include: *My Health, Inc. v. ZeOmega, Inc.*, No. 2:12-CV-00251 (E.D. Tex.); *My Health, Inc. v. CardioCom, LLC*, No. 2:13-CV-00136 (E.D. Tex.); *My Health, Inc. v. Click4Care, Inc.*, No. 2:13-CV-00137 (E.D. Tex.); *My Health, Inc. v. GenerationOne, Inc.*, No. 2:13-CV-00138 (E.D. Tex.); *My Health, Inc. v. Honeywell HomMed, LLC*, No. 2:13-CV-00139 (E.D. Tex.); *My Health, Inc. v. Philips Medical Systems N. Am., Inc.*, No. 2:13-CV-00140 (E.D. Tex.); *My Health, Inc. v. Alere, Inc.*, No. 2:14-CV-00652 (E.D. Tex.); *My Health, Inc. v. BodyMedia, Inc.*, No. 2:14-CV-00653 (E.D. Tex.); *My Health, Inc. v. Cardiomedix, Inc.*, No. 2:14-CV-00654 (E.D. Tex.); *My Health, Inc. v.*

1 *Confidant Hawaii, LLC*, No. 2:14-CV- 00655 (E.D. Tex.); *My Health, Inc. v. Entra*
 2 *Health Systems, LLC*, No. 2:14-CV-00657 (E.D. Tex.); *My Health, Inc. v.*
 3 *Healthrageous, Inc.*, No. 2:14-CV-00658 (E.D. Tex.); *My Health, Inc. v. Medisana*
 4 *AG*, No. 2:14-CV-00659 (E.D. Tex.); *My Health, Inc. v. Nonin Medical, Inc.*, No.
 5 2:14-CV-00660 (E.D. Tex.); *My Health, Inc. v. Pleio Health Support Systems, Inc.*,
 6 No. 2:14-CV-00661 (E.D. Tex.); *My Health, Inc. v. Robert Bosch Healthcare*
 7 *Systems, Inc.*, No. 2:14-CV-00662 (E.D. Tex.); *My Health, Inc. v. Sotera Wireless,*
 8 *Inc.*, No. 2:14-CV-00663 (E.D. Tex.); *My Health, Inc. v. Vivify Health, Inc.*, No.
 9 2:14-CV-00664 (E.D. Tex.); *My Health, Inc. v. Biotronik, Inc.*, No. 2:14-CV-00680
 10 (E.D. Tex.); *My Health, Inc. v. CardioNet, Inc.*, No. 2:14-CV-00681 (E.D. Tex.);
 11 *My Health, Inc. v. Health Dialog, Inc.*, No. 2:14-CV-00682 (E.D. Tex.); *My Health,*
 12 *Inc. v. LifeScan, Inc.*, No. 2:14-CV-00683 (E.D. Tex.); *My Health, Inc. v. Tandem*
 13 *Diabetes Care, Inc.*, No. 2:14-CV-00684 (E.D. Tex.); and *My Health, Inc. v.*
 14 *Tunstall Healthcare USA, Inc.*, No. 2:14-CV-00685 (E.D. Tex.).

15 12. Upon information and belief, seven other companies in the health care
 16 industry have filed declaratory judgment actions seeking declarations that the '985
 17 patent is not infringed. These cases include: *Authentidate Holding Corp. v. My*
 18 *Health, Inc.*, No. 1:13-CV-01616 (D. Del.); *Voxiva, Inc. v. My Health, Inc.*, No.
 19 1:14-CV-00910 (D. Del.); *Fitango, Inc. v. My Health, Inc.*, No. 1:14-CV-01085 (D.
 20 Del.); *Allscripts Healthcare Solutions, Inc. v. My Health, Inc.*, No. 1:14-CV-01436
 21 (D. Del.); *Draeger Medical Systems, Inc. v. My Health, Inc.*, No. 1:15-CV-00248
 22 (D. Del.); *Medecision, Inc. v. My Health, Inc.*, No. 3:15-CV- 00726 (N.D. Tex.);
 23 *HealthLoop, Inc. v. My Health, Inc.*, No. 3:15-CV-00671 (N.D. Cal.); and *Kurbo*
 24 *Health, Inc. v. My Health, Inc.*, No. 5:15-CV-01351 (N.D. Cal.).

25 **MY HEALTH'S THREATS AGAINST DEXCOM INVOLVING THE '985** 26 **PATENT**

27 13. On April 16, 2015, the Patent Licensing Alliance ("PLA"), acting as
 28 the licensing agent of My Health, sent a letter ("the April 16 Letter") to DexCom

1 asserting that the DexCom G4 System employs the technology claimed and
 2 disclosed in the '985 patent. A true and correct copy of the April 16 Letter is
 3 attached as Exhibit B. Specifically, the letter stated that DexCom's "G4 System
 4 employs the technology claimed and disclosed in" the '985 Patent. The letter also
 5 reported that PLA's "research group and legal team have thoroughly reviewed the
 6 Dexcom G4 System and believe that it utilizes the technology claimed and
 7 disclosed in the" '985 patent. (Ex. B at 1 (emphasis added).)

8 14. In the April 16 Letter, My Health, through its agent PLA, stated that it
 9 had been a licensee of the '985 patent since 2008 and was assigned the patent in
 10 2015. (*Id.*) The letter further stated that "My Health has been enforcing its
 11 intellectual property rights" in the '985 patent due in part to "ever-increasing
 12 instances of improper use without a license." (*Id.*)

13 15. In the April 16 Letter, My Health, through its agent PLA, asserted that
 14 "[t]he Patent requires a license if [DexCom] intend[s] to continue to sell these
 15 products." The letter then cited and quoted the entirety of the statutory tests for
 16 direct and induced infringement, 35 U.S.C. § 271(a) and (b). (*Id.*) The letter also
 17 contained several attachments, including a two-page "Notice" purportedly
 18 describing the subject matter of the patent addressed to DexCom's CEO, Kevin
 19 Sayer, with a "re:" line reading "Infringement of U.S. Patent No. 6,612,985." (*Id.*
 20 at 3-4 (emphasis added).) The letter also attached a 5-page claim chart titled "Pre-
 21 filing Investigation Claim Chart" purporting to detail how the DexCom G4 System
 22 allegedly meets every limitation of Claim 1 of the '985 patent (*id.* at 31-35), as
 23 well as 31 pages of exhibits which My Health alleges, through its agent PLA,
 24 supports its infringement claim.¹ (*Id.* at 36-67.)

25 ¹ Although the Pre-Filing Claim Chart bears a heading that it is "Subject to
 26 Confidentiality Agreement," no such agreement between PLA/My Health and
 27 DexCom exists. The Pre-Filing Claim Chart also is marked as "Rule 408
 28 Confidential Communications," but DexCom attaches it here to support the Court's
 subject matter jurisdiction; it is not offered to establish liability. *See* Fed. R. Evid.
 408(b).

1 16. By virtue of PLA/My Health's correspondence with DexCom and the
2 numerous patent infringement actions filed by My Health over the past three years,
3 My Health has created a reasonable apprehension and substantial likelihood that
4 DexCom will be sued by My Health for infringement of the '985 patent unless
5 DexCom pays and agrees to enter into a license agreement with My Health.

6 17. An actual and justiciable controversy exists between the parties
7 concerning DexCom's liability for the alleged infringement of the claims of the
8 '985 patent. DexCom now seeks a declaratory judgment of non-infringement as to
9 the claims of the '985 patent.

10 **FIRST CAUSE OF ACTION**

11 **(Declaratory Judgment of Non-infringement of the '985 Patent)**

12 18. DexCom repeats and realleges paragraphs 1-17 of this Complaint as if
13 fully set forth herein.

14 19. My Health claims to be the owner and assignee of all rights, title, and
15 interest in and under the '985 patent.

16 20. My Health communicated to DexCom that it has the right to assert the
17 '985 patent, that DexCom's G4 System utilizes the technology claimed and
18 disclosed in the '985 patent and that DexCom must obtain a license under the '985
19 patent if it intended to continue to sell its products.

20 21. As a result of My Health's allegations against DexCom and in light of
21 My Health's litigious history, an actual controversy exists as to the infringement of
22 the claims of the '985 patent.

23 22. DexCom does not and has not infringed any valid and enforceable
24 claim of the '985 patent, whether directly or indirectly, by inducement or
25 contributory infringement, literally or under the doctrine of equivalents.

26 23. A judicial determination of non-infringement is necessary and
27 appropriate so that DexCom may ascertain its rights regarding the '985 patent.
28

PRAYER FOR RELIEF

WHEREFORE, DexCom prays that the Court enter judgment in its favor and against My Health as follows:

1. A declaration that DexCom does not and has not infringed any valid and enforceable claim of the '985 patent;
2. A determination that this is an exceptional case within the meaning of 35 U.S.C. § 285; and
3. Such further relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

DexCom hereby demands a jury trial on all issues so triable

Dated: June 11, 2015

MORRISON & FOERSTER LLP

By: s/M. Andrew Woodmansee
M. Andrew Woodmansee

Attorneys for Plaintiff
DEXCOM, INC.

CERTIFICATE OF SERVICE

I certify that on June 11, 2015, I caused a copy of the foregoing to be filed electronically and that the document is available for viewing and downloading from the ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

By: /s M. Andrew Woodmansee
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