

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

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EXERGEN CORPORATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:15-cv-13387
	)	
MICROLIFE CORPORATION AND	)	
KAZ USA, INC.,	)	
	)	
Defendants.	)	

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**EXERGEN CORPORATION’S FIRST AMENDED COMPLAINT  
FOR PATENT INFRINGEMENT AND DEMAND FOR JURY TRIAL**

Exergen Corporation, for its complaint against defendants Microlife Corporation and Kaz USA, Inc., alleges as follows:

**PARTIES**

1. Plaintiff, Exergen Corporation (“Exergen”) is a corporation organized and existing under the laws of the Commonwealth of Massachusetts and having its principal place of business at 400 Pleasant Street, Watertown, Massachusetts, within this judicial district.

2. Defendant, Microlife Corporation (“Microlife”) is, upon information and belief, a corporation organized under the laws of Taiwan having its principal place of business at 9F, 431 RuiGuang Road, NeiHu, Taipei 11492, Taiwan, R.O.C.

3. Defendant Kaz USA, Inc. (“Kaz”) is, upon information and belief, a corporation organized under the laws of Massachusetts having its principal executive offices at 250 Turnpike Road, Southborough Massachusetts, and doing business in this judicial district, including business related to the claims asserted in this Complaint.

### **JURISDICTION AND VENUE**

4. This action is for patent infringement. The Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1338(a).

5. This Court has personal jurisdiction over Microlife. Microlife has conducted and continues to conduct business in the Commonwealth of Massachusetts. Microlife has caused and is continuing to cause tortious injury in the Commonwealth of Massachusetts. Microlife, directly or through intermediaries, has transacted and continues to transact business in the United States and the Commonwealth of Massachusetts by: using or causing to be used; making or causing to be made; importing or causing to be imported; offering to sell or causing to be offered for sale; and selling or causing to be sold directly, through intermediaries and as an intermediary, infrared thermometers that infringe the patent in suit to consumers in the United States, including consumers in the Commonwealth of Massachusetts.

6. This Court has personal jurisdiction over Kaz. Kaz is a Massachusetts corporation. Kaz has conducted and solicited and continues to conduct and solicit business in the Commonwealth of Massachusetts. Kaz has caused and is continuing to cause tortious injury in the Commonwealth of Massachusetts. Upon information and belief, Kaz, directly or through intermediaries, uses, offers for sale, imports, or distributes to others for such purposes, infrared thermometers, in the United States and Commonwealth of Massachusetts.

7. Venue in this district is proper under 28 U.S.C. §§ 1391(b) and (c) and 1400(b), as, *inter alia*, Microlife and Kaz are subject to personal jurisdiction in this district.

### **FACTUAL BACKGROUND**

8. On March 18, 2008, United States Patent No. 7,346,386 (“the ’386 Patent”), entitled “Temporal Artery Temperature Detector” was lawfully issued.

9. Exergen is the sole owner of the '386 Patent and all rights of recovery thereunder.

10. The '386 Patent has not expired and is in full force and effect.

11. Exergen has marked its products in connection with the '386 Patent in compliance with 35 U.S.C. § 287(a).

12. On November 24, 2015, United States Patent No. 9,194,749 ("the '749 Patent"), entitled "Temporal Artery Temperature Detector" was lawfully issued.

13. Exergen is the sole owner of the '749 Patent and all rights of recovery thereunder.

14. The '749 Patent has not expired and is in full force and effect.

15. Exergen has marked its products in connection with the '749 Patent in compliance with 35 U.S.C. § 287(a).

16. Microlife has indirectly infringed the '386 Patent and the '749 Patent by making infringing products, and causing such products to be used, offered for sale, and sold in the United States and in the Commonwealth of Massachusetts, and to be imported into the United States, including infrared forehead thermometers sold in the United States by Kaz under the names Vicks V977 Forehead Thermometer ("Vicks Forehead Thermometer") and Braun FHT 1000 Forehead Thermometer ("Braun Forehead Thermometer"). For example, Microlife indirectly infringes at least claims 1-4, 22, and 24 of the '386 Patent and at least claims 6-7 of the '749 Patent by these actions.

17. Microlife has induced and continues to induce the infringement of the '386 Patent and the '749 Patent in the United States.

18. Microlife maintains a relationship with Kaz, which is located in Massachusetts, by manufacturing and supplying infringing thermometers for import, offering for sale, sale, and

use of its infringing infrared thermometer products in the United States, and by communicating with Kaz regarding the infringing infrared thermometer products.

19. Microlife's affiliate, Microlife Intellectual Property GMBH, filed a 510(K) submission for approval to market its infringing infrared thermometer product, known as FR1DM1 in the United States.

20. Microlife Intellectual Property GMBH filed a United States Patent Application (U.S. Patent App. No. 10/802,050) to cover Microlife's forehead thermometer, which published on May 2, 2005.

21. On July 8, 2005, the USPTO issued a final rejection of the broadest infrared forehead thermometer claims in Microlife's US application, on the ground that these claims were obvious and "unpatentable" over Exergen's U.S. Patent No 6,692,685 (the '685 Patent). The narrower claims were rejected as obvious over the '685 Patent in combination with other prior art references. This rejection put Microlife on notice of Exergen's '685 Patent. The '386 patent in suit is a continuation of the '685 Patent, as is the '749 patent in suit. Microlife acquiesced in the rejection, eventually abandoning its application.

22. Microlife manufactures its infrared forehead thermometer products, including the Vicks Forehead Thermometer and the Braun Forehead Thermometer, with the knowledge and intent that they will be imported into and sold in the United States.

23. Kaz has directly infringed the '386 Patent and the '749 Patent by using, selling, offering to sell, and/or importing infringing products into the United States, including infrared thermometers sold under the name Vicks Forehead Thermometer or Braun Forehead Thermometer. For example, Kaz directly infringes at least claims 1-4, 22, and 24 of the '386 Patent and claims 6-7 of the '749 Patent by such actions.

24. Kaz has also indirectly infringed the '749 Patent because it has used and is using, has offered and is offering to sell, and/or has sold and is selling infrared thermometers the use of which infringes the '749 Patent, including but not limited to selling thermometers sold under the name Vicks Forehead Thermometer or Braun Forehead Thermometer.

25. The instructions provided to consumers with the Vicks Forehead Thermometer and the Braun Forehead Thermometer (the "Vicks Manual" and "Braun Manual," respectively) explicitly instruct users to use the product in an infringing manner. Likewise, the instructions provided to consumers regarding how to use the Braun FHT 1000 Forehead Thermometer, which are publicly available on Kaz's website at <http://www.braunthermometers.com/thermometers/forehead> (the "Braun webpage"), also explicitly instruct users to use this product in an infringing manner. Upon information and belief, Kaz specifically intends for its customers to follow these instructions and to use the thermometers to infringe the '386 and '749 Patents. At least some consumers do follow these instructions and use the thermometers in an infringing manner.

26. The Vicks Manual, Braun Manual, and Braun webpage are clear and specific about how the forehead thermometers should be used.

27. The Vicks Manual, Braun Manual, and Braun webpage instruct use of the product only in a manner that would infringe the '386 Patent and the '749 Patent.

28. For example, the "Quick Start Guide" section of the Vicks Manual on page 2 instructs users in part, as follows, "Move hair away from forehead and place scanner in the center of the forehead. Press and release power button and scan forehead slowly from the center of the forehead to the temple – wait for confirmation beep." The image adjacent to this text in the instruction manual is:



29. The “Directions for Use” section on page 8 of the Vicks Manual instructs users in part, as follows, “Place the probe gently and flush onto the area approximately ½ inch above the center of the eyebrow. If the eyebrow area is covered with hair, sweat, or dirt, please clean the area beforehand to improve the reading accuracy. Press the Power button and release it. Start to move the instrument steadily from ½ inch above the center of the eyebrow to ½ inch above the tail of the eyebrow area and back up again. A long beep will sound after 3 seconds to signal measurement complete.”

30. On page 4 of the Vicks Manual, there is a heading, “How the Forehead Thermometer Measures Body Temperature,” which explains, “The Forehead Thermometer measures infrared energy radiated from the skin above the eyebrow area and the surrounding tissue. This energy is collected through the lens and converted to a temperature value. Temperature readings obtained by scanning above the eyebrow area will provide the greatest accuracy.”

31. The Vicks Forehead Thermometer and the Braun Forehead Thermometer include a radiation sensor.

32. The Vicks Manual, Braun Manual, and the Braun webpage instruct users to use the device over an artery.

33. The temporal artery, for example, is located at the side of the face just in front of the ear. The temporal artery normally branches into a parietal branch and a frontal branch. The frontal branch extends along the forehead.

34. The directions quoted herein and the description on page 4, among other evidence in the Vicks Manual, as well as evidence from product use and from scientific principles, demonstrate that use of the Vicks Forehead Thermometer constitutes an act of direct infringement of the '386 Patent and the '749 Patent.

35. In the “First time use” section of the Braun Manual, Kaz instructs users in part, as follows: “Position the thermometer on the forehead, just above the eyebrow. Be sure to hold the thermometer flush against the forehead.” The following image is adjacent to this text in the manual, and clearly shows the starting point to be the center of the forehead:



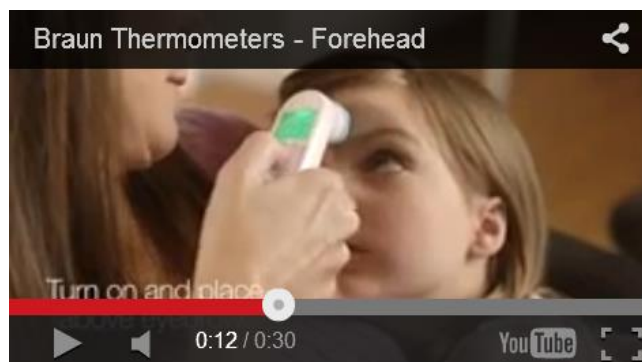
36. In the “Temperature taking hints” section on page 8 of the Braun Manual, Kaz instructs users to “Hold the thermometer flush against the forehead and swipe slowly from above the eyebrow down to the temple, and back again.” The following image is next to the text in the manual, and indicates the nature of the scan that proceeds parallel to the eyebrow:



37. Kaz provides additional instructions to consumers through its Braun forehead thermometer webpage at <http://www.braunthermometers.com/thermometers/forehead>. This webpage states, “The Braun Forehead Thermometer is designed to measure the temperature of the skin surface over the temporal artery, a major artery of the head. This temporal artery is connected to the heart, offers constant blood flow, and is the only artery positioned close enough to the skin surface for an accurate, non-invasive temperature measurement.”

38. The Braun webpage contains an instructional video which shows a woman placing the Braun forehead thermometer in the center of a child’s forehead, then swiping horizontally toward the temple and back to the center of the forehead (the “Braun video”).

39. Still images from the Braun video, which demonstrate the nature of the scan that customers are instructed to perform, are provided below:







40. Thus, the directions and evidence found in the Braun Manual, Braun webpage, and Braun video, as well as evidence from product use and from scientific principles, demonstrate that use of the Braun Forehead Thermometer constitutes an act of direct infringement of the '386 Patent and the '749 Patent.

41. The Vicks Forehead Thermometer was made to be used in the manner directed in the Vicks Manual.

42. The Braun Forehead Thermometer was made to be used in the manner directed in the Braun Manual.

43. In fact, the Vicks Manual (page 5) implies that other methods of use would be undesirable, stating, “The Forehead Thermometer has been clinically tested and proven to be safe and accurate when used in accordance with its operating instruction manual.” Likewise, the Braun Manual (page 5) also implies that other methods of use would be undesirable, stating: “The Forehead Thermometer has been clinically tested and proven to be safe and accurate when used in accordance with its operating instruction manual.”

44. The Vicks Forehead Thermometer and the Braun Forehead Thermometer infringe the '386 Patent.

45. By way of example, Claim 1 of the '386 Patent reads: “A body temperature detector comprising: a temperature detector; electronics which measure peak temperature from at least three readings per second during scan of the temperature detector across an artery and which process the detected peak temperature to provide a temperature display based on a model of heat balance relative to a detected arterial temperature.” Upon information and belief, the Vicks Forehead Thermometer and Braun Forehead Thermometer each meet every limitation of the claim, and thus infringe this claim of the '386 Patent.

46. The Vicks Forehead Thermometer and the Braun Forehead Thermometer were made and intended by Microlife and Kaz to be used in a manner that infringes the '749 Patent.

47. The use of the Vicks Forehead Thermometer as directed by the Vicks Manual, and/or the use of the Braun Forehead Thermometer as directed by the Braun Manual and Braun webpage and video, infringes a number of claims of the '749 Patent. For example, using either

thermometer as directed by its respective instruction manual infringes claims including, but not limited to, claims 6-7 of the '749 Patent by such actions.

48. By way of example, Claim 6 of the '749 Patent reads: "A method of providing an internal body temperature approximation of a human body, the method comprising: measuring infrared radiation by scanning a thermopile radiation detector across a target surface of a forehead, wherein the target surface of the forehead is skin surface over the superficial temporal artery passing over the skull bone directly between the skin and the skull very close to the skin, the radiation detector providing an electrical output; sensing ambient temperature to which the body is exposed; and in electronic circuitry, determining the internal body temperature approximation by processing the measured infrared radiation and the sensed ambient temperature to which the body is exposed." The use of the Vicks Forehead Thermometer as directed by the Vicks Manual, and/or the use of the Braun Forehead Thermometer as directed by the Braun Manual and Braun webpage and video, constitutes infringement of this claim of the '749 Patent.

49. Upon information and belief, the Vicks Forehead Thermometer and the Braun Forehead Thermometer remained on sale and their respective manuals remained unchanged subsequent to defendants' actual knowledge of the '386 Patent.

50. Upon information and belief, the Vicks Forehead Thermometer and the Braun Forehead Thermometer remained on sale and their respective manuals remained unchanged subsequent to defendants' actual knowledge of the '749 Patent.

51. Upon information and belief, Microlife and Kaz have been aware of the existence of Exergen's '386 Patent since shortly after the issuance of the '386 Patent on March 18, 2008.

52. Upon information and belief, Microlife and Kaz have been aware of the existence of Exergen's '749 Patent since the issuance of the '749 Patent on November 24, 2015.

**COUNT I  
INFRINGEMENT OF THE '386 PATENT**

53. Exergen incorporates by reference paragraphs 1-52 above as though fully set out herein.

54. On information and belief, Kaz has infringed and continues to infringe one or more claims of the '386 Patent.

55. On information and belief, Microlife has infringed and continues to infringe, indirectly through contributory and/or induced infringement, one or more claims of the '386 Patent, and manufactures and sells the infringing thermometers with the knowledge and intent that they will be imported into and sold in the United States, and the intent that such thermometers infringe the '386 Patent.

56. Microlife and Kaz are direct competitors of Exergen with respect to the subject matter of the '386 patent.

57. On information and belief, Microlife and Kaz were aware of the existence of the '386 Patent and their infringement of the '386 Patent has been intentional, deliberate, and willful.

58. By reason of the aforesaid infringement, Exergen is damaged and is entitled to damages adequate to compensate for defendants' infringement.

59. Defendants' infringement of the '386 Patent has caused and is causing irreparable injury to Exergen, for which Exergen has no adequate remedy at law. Defendants will continue their unauthorized conduct unless enjoined by this Court.

**COUNT II  
INFRINGEMENT OF THE '749 PATENT**

60. Exergen incorporates by reference paragraphs 1-59 above as though fully set out herein.

61. On information and belief, Kaz has infringed and continues to infringe, directly and indirectly through contributory and/or induced infringement, one or more claims of the '749 Patent, and sells the infringing thermometers with the knowledge and intent that they will be used by end users and that such use infringes the '749 Patent, and the intent that such thermometers are especially designed to be and are used in a manner which infringes the '749 Patent. As evidenced by, *inter alia*, the instructions for use, such thermometers practice a method of use that infringes the '749 Patent, constituting a material part of the invention of the patent, are known and intended by Kaz to be especially made and adapted for use in practicing a method of use that infringes the '749 Patent, and are not staple items or commodities of commerce suitable for substantial non-infringing use.

62. On information and belief, Microlife has infringed and continues to infringe, indirectly through contributory and/or induced infringement, one or more claims of the '749 Patent, and manufactures and sells the infringing thermometers with the knowledge and intent that they will be imported into and sold in the United States, and the intent that such thermometers are especially designed in a manner which infringes the '749 Patent.

63. Microlife and Kaz are direct competitors of Exergen with respect to the subject matter of the '749 patent.

64. On information and belief, Microlife and Kaz were aware of the existence of the '749 Patent, and their infringement of the '749 Patent has been intentional, deliberate, and willful.

65. By reason of the aforesaid infringement, Exergen is damaged and is entitled to damages adequate to compensate for defendants' infringement.

66. Defendants' infringement of the '749 Patent has caused and is causing irreparable injury to Exergen, for which Exergen has no adequate remedy at law. Defendants will continue their unauthorized conduct unless enjoined by this Court.

### **PRAYER FOR RELIEF**

WHEREFORE, Exergen respectfully requests this Court to grant the following relief, and any other relief the Court may deem proper:

1. Enter judgment in favor of Exergen determining that Kaz directly infringes the '386 Patent in violation of 35 U.S.C. § 271(a).

2. Enter judgment in favor of Exergen determining that Kaz directly infringes the '749 Patent in violation of 35 U.S.C. § 271(a).

3. Enter judgment in favor in Exergen determining that Kaz induces infringement of, and has induced infringement of, the '749 Patent in violation of 35 U.S.C. § 271(b);

4. Enter judgment in favor in Exergen determining that Kaz contributorily infringes, and has contributorily infringed, the '749 Patent in violation of 35 U.S.C. § 271(c);

5. Enter judgment in favor of Exergen determining that Microlife induces infringement of, and has induced infringement of, the '386 Patent in violation of 35 U.S.C. § 271(b);

6. Enter judgment in favor of Exergen determining that Microlife induces infringement of, and has induced infringement of, the '749 Patent in violation of 35 U.S.C. § 271(b);

7. Enter judgment in favor of Exergen determining that Microlife contributorily infringes, and has contributorily infringed, the '386 Patent in violation of 35 U.S.C. § 271(c);

8. Enter judgment in favor of Exergen determining that Microlife contributorily infringes, and has contributorily infringed, the '749 Patent in violation of 35 U.S.C. § 271(c);

9. Permanently enjoin Kaz and its officers, agents, divisions, affiliates, subsidiaries, successors, employees, and representatives, and all those controlled by or acting in concert or privity with them from infringing, inducing the infringement, and/or contributing to the infringement of the '386 Patent and '749 Patent;

10. Permanently enjoin Microlife and its officers, agents, divisions, affiliates, subsidiaries, successors, employees, and representatives, and all those controlled by or acting in concert or privity with them from inducing the infringement, and/or contributing to the infringement of the '386 Patent and '749 Patent;

11. Award Exergen damages in an amount to be determined at trial;

12. Award Exergen treble damages for willful infringement pursuant to 35 U.S.C. § 284; and

13. Award such other relief that this Court deems just and proper.

**DEMAND FOR JURY TRIAL**

Exergen hereby demands a trial by jury.

Date: December 2, 2015

Respectfully submitted,

EXERGEN CORPORATION

By its attorneys,

/s/ Kerry L. Timbers

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