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Apnea Sciences Corporation

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

APNEA SCIENCES
CORPORATION, a California
corporation with a principal place of
business in California,

Plaintiff,

v.

KONCEPT INNOVATORS, INC. a,
South Carolina corporation; Sylvan
Newby, an Individual, and Does 2-10,
inclusive,

Defendants.

**FIRST AMENDED COMPLAINT
FOR DAMAGES AND EQUITABLE
RELIEF:**

- 1. PATENT INFRINGEMENT;**
- 2. COPYRIGHT INFRINGEMENT;**
- 3. CALIFORNIA UNFAIR
COMPETITION LAW (UCL)
UNDER B&P CODE SECTION
17200 ET SEQ; AND**
- 4. CALIFORNIA COMMON LAW
UNFAIR COMPETITION.**

DEMAND FOR JURY TRIAL

1 Plaintiff Apnea Sciences Corporation (“Apnea Sciences” or “Plaintiff”)
2 makes the following allegations against Defendant Koncept Innovators, Inc.
3 (“Koncept Innovators”), Sylvan Newby (“Newby”) and Does 2 through 10
4 (collectively “Defendants”) for infringement of U.S. Patent No. 8,833,374 (“Patent-
5 in-Suit”) and Copyrighted Instruction Sheet Reg. App. No. 1-3767178014
6 (“Copyrighted Instruction Sheet”).

7
8 **THE NATURE OF THE ACTION**
9

10 1. This action is the result of Defendants’ manufacture, use, sale, offer to
11 sell, copying, distribution, and importation of infringing intra-oral mandibular
12 advancement devices, namely the Snore Eliminator Pro and/or the IntelliGuard
13 and/or Tranquility (“Accused Device”) that incorporate Apnea Sciences’ patented
14 technology. Defendants’ Accused Devices also include instruction sheets
15 (“Infringing Instructions Sheet”) that are substantially similar, if not identical, to
16 Apnea Sciences’ Copyrighted Instruction Sheet. Apnea Sciences seeks temporary,
17 preliminary and permanent injunctive relief, as well as monetary damages.
18

19 2. Defendants are selling the Accused Devices directly and through third
20 party retailers, such as www.amazon.com and www.ebay.com, to consumers,
21 customers, resellers, partners, and/or end users, and providing instructions, user
22 manuals, advertising, and/or marketing materials, including the Infringing
23 Instruction Sheet that facilitate, direct, or encourage infringement with knowledge
24 thereof.
25

26 3. Upon information and belief, Defendants Does 2 through 10 are
27 manufacturing, using, selling, offering to sell, copying, distributing, importing,
28

1 causing to be manufactured, used, sold, offered for sale, copied, distributed, and
2 imported the above Accused Devices that include the Infringing Instruction Sheet
3 in the packaging of the Accused Devices, sold by Defendant Koncept Innovators
4 and Defendant Newby, and these Defendants are not authorized or licensed by
5 Plaintiff to manufacture, distribute offer for sale, or sell the Accused Devices.

6
7 4. This action is one for direct, contributory, and inducement to
8 infringement of Plaintiff Apnea Sciences' patented and copyrighted material
9 together with related claims under state law. Plaintiff seeks temporary, preliminary,
10 and permanent injunctive relief, damages, an accounting of Defendants' profits, and
11 all other appropriate relief arising from Defendants' willful acts of infringement and
12 unfair competition.

13 14 **JURISDICTION AND VENUE**

15
16 5. Plaintiff files this action against Defendants for patent infringement
17 and copyright infringement under 35 U.S.C. § 271 and 17 U.S.C. § 101 et seq.,
18 together with related claims under the statutory and common law of the state of
19 California. This Court has subject matter jurisdiction over the claims alleged in this
20 action pursuant to 28 U.S.C. §§ 1331, 1332, and 1338.

21
22 6. This Court has supplemental jurisdiction over the Defendants with
23 respect to the California state law unfair competition claims pursuant to 28 U.S.C.
24 §1367(a).

25
26 7. This Court has personal jurisdiction over Defendants because
27 Defendants are incorporated, domiciled, and/or does business within this judicial
28

1 district. Defendants have, directly or through intermediaries, availed themselves of
2 the rights and benefits of California and this forum by engaging in substantial
3 business activities herein. This includes, but is not limited to, Defendants placing
4 the Accused Devices into the stream of commerce, via an established distribution
5 channel, with the knowledge and/or understanding that such products are sold in
6 the State of California, including in this District. Upon information and belief,
7 Defendants have derived substantial revenues from its infringing acts occurring
8 within the State of California and within this District.

9
10 8. In addition, Defendants have, and continue to, knowingly induce
11 infringement within this District by advertising, marketing, offering for sale and/or
12 selling the Accused Devices to consumers, customers, resellers, partners, and/or end
13 users, and providing instructions, user manuals, advertising, and/or marketing
14 materials, including the Infringing Instruction Sheet, that facilitate, direct, or
15 encourage infringement with knowledge thereof.

16
17 9. This action arises out of wrongful acts by Defendants within this
18 judicial district and Plaintiff is located and has been injured in this judicial district
19 by Defendants' alleged wrongful acts. Venue is proper in this district pursuant to
20 28 U.S.C. § 1391 as Defendants may be found or transact business in this district,
21 and the violations alleged arose and are continuing to occur in this district. Venue
22 is proper in this district under 28 U.S.C. § 1391(b)(2), because a substantial part of
23 the events or omissions giving rise to the claims occurred within this district.

PARTIES

10. Plaintiff Apnea Sciences is a corporation existing and organized under the laws of the state of California and has its principal place of business at 27121 Aliso Creek Road Building 140, Aliso Viejo, CA 92656.

11. Upon information and belief, Defendant Konzept Innovators, Inc. is a corporation existing and organized under the laws of the state of South Carolina and has its principal place of business at 2603 Marsh Glen Drive, North Myrtle Beach, SC 29582. Plaintiff is informed and believes that Defendant Konzept Innovators is owned and operated by Defendant Newby.

12. Upon information and belief, at the time of its creation, now, and at all times relevant to this First Amended Complaint, Defendant Konzept Innovators did not and does not have sufficient funding to assume responsibility for its foreseeable and actual liabilities.

13. Upon information and belief, since the time of its creation, now, and at all times relevant to this Complaint, Defendant Konzept Innovators was undercapitalized.

14. Upon information and belief, since the time of its creation now, and at all times relevant to this First Amended Complaint, Defendant Konzept Innovators failed to observe corporate formalities required by law.

15. Upon information and belief, Defendant Newby is an individual residing at 2603 Marsh Glen Drive, North Myrtle Beach, SC 29582. Plaintiff is

1 informed and believes that Defendant Newby is a moving force behind the actions
2 complained herein against Defendant Koncept Innovators.

3
4 16. Plaintiff is ignorant of the true names and capacities of Defendants
5 sued as Does 2 through 10, inclusive, and therefore sues these Defendants by such
6 fictitious names. Plaintiff will amend this First Amended Complaint to allege their
7 true names and capacities when ascertained. Plaintiff is informed and believes, and
8 thereon alleges, that each of the fictitiously named Defendants is responsible in
9 some manner for the occurrences herein alleged, and that Plaintiff's injuries herein
10 alleged were caused by their conduct.

11
12 17. Plaintiff is informed and believes, and thereon alleges, that at all times
13 herein mentioned, each of the Defendants was the agent and employee of each of
14 the remaining Defendants, and in doing the things hereinafter alleged, was acting
15 within the course and scope of such agency and employment.

16
17 18. Plaintiff further alleges that Defendants Koncept Innovators, Newby,
18 and DOES 2-10, inclusive, sued herein by fictitious names, are jointly, severally
19 and concurrently liable and responsible with one another upon the causes of action
20 hereinafter set forth.

21
22 **STATEMENT OF FACTS COMMON TO ALL CLAIMS**

23
24 ***Plaintiff and Its Patented Intra-Oral Mandibular Advancement Appliance***

25
26 19. Plaintiff Apnea Sciences was founded in 2009 and has been engaged
27 in the design, distribution, marketing, offering for sale, and sale of FDA cleared
28

1 intra-oral mandibular advancement appliances in interstate commerce, including
2 the *SnoreR_x*[®] mouth piece device (the “Patented Device”). Apnea Sciences designs
3 and develops high quality products that are made in the U.S.A. Their superior dental
4 lab quality design provides a precise custom fit for each individual. The Patented
5 Device does not have any moving parts, ensuring the safety of every user. The
6 Patented Device is constructed out of premium, medical-grade copolymers to assure
7 maximum patient comfort and peace of mind to sleep throughout the entire night.
8

9 20. On September 16, 2014, the United States Patent and Trademark
10 Office duly and legally issued the Patent-in-Suit, namely United States Patent No.
11 8,833,374 entitled “Intra-Oral Mandibular Advancement Appliance” to inventors
12 James C. Fallon, Richard Jung, and James S. Fallon. Apnea Sciences is the assignee
13 of the Patent-in-Suit. An accurate copy of the United States Patent No. 8,833,374 is
14 attached hereto as Exhibit-1 and incorporated in this Complaint.
15

16 21. Apnea Sciences is, and at all relevant times has been, the owner of the
17 Patent-in-Suit. Apnea Sciences has never assigned the Patent-in-Suit to any other
18 entity.
19

20 22. The Patent-in-Suit, at a high level, covers an intra-oral mandibular
21 advancement appliance that can be inserted in the mouth of a patient so as to
22 maintain an open airway to the patient’s throat and thereby improve breathing
23 during sleep. The mandibular advancement appliance has particular application for
24 use by those wishing to reduce the effects of snoring and/or sleep apnea. The
25 appliance includes an upper tray assembly against which is seated the patient’s teeth
26 carried by his upper jaw and a lower tray assembly against which the patient’s teeth
27 carried by his lower jaw are seated. The lower tray assembly is mated to and slidably
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1 adjustable by the patient relative to the upper tray assembly. By virtue of these
2 features, the position of the patient's lower jaw can be selectively and continuously
3 moved forward with respect to the position of the upper jaw to prevent an occlusion
4 of the airway as the patient's condition changes over time.

5
6 23. Oral appliances have been proposed to be inserted in the patient's
7 mouth and used while sleeping. Such devices enable the patient's upper and lower
8 jaws to be positioned relative to one another as needed to maintain an open
9 breathing passage. Following a trial period, the settings in some conventional oral
10 appliances are fixed and locked. However, no future adjustments can be made to
11 account for patient discomfort and ineffectiveness of the device. Therefore, these
12 appliances can prove to be ineffectual over time as a consequence of their being
13 unable to respond to the changing conditions of the patient.

14
15 24. In certain other conventional oral appliances, adjustments are possible
16 after the original settings have been made. The adjustments in this case often require
17 the use of special tools, springs, the often complicated removal and installation of
18 fasteners, and the assistance of healthcare workers. Hence, the patient may be
19 unable to quickly or easily make the needed adjustments by himself. What is more,
20 such adjustments are frequently course in nature (e.g., low, medium and high)
21 which inhibits making fine adjustments to the position of the patient's upper or
22 lower jaw as might be required to satisfy the specific needs of the patient on a
23 continuous basis.

24
25 25. Apnea Sciences includes the Copyrighted Instruction Sheet, in the
26 packaging of the Patented Device. Apnea Sciences owns copyrights in the
27
28

1 Copyrighted Instruction Sheet. Apnea Sciences' copyrights have been applied for
2 with the United States Copyright Office.

3
4 26. Apnea Sciences created the Copyrighted Instruction Sheet and first
5 published it in the United States on or about 01/04/2012. The Copyrighted
6 Instruction Sheet is copyrightable subject matter under the Copyright Act, 17
7 U.S.C. § 101 et seq.

8
9 27. Apnea Sciences has complied in all respects with the provisions of the
10 Copyright Act, and on June 28, 2016, Apnea Sciences filed an application with the
11 United States Copyright Office in order to register its Copyrighted Instruction
12 Sheet. An accurate copy of the Copyright Application for the Copyrighted
13 Instructions Sheet is attached hereto as Exhibit-2 and incorporated in this
14 Complaint.

15
16 28. Apnea Sciences is, and at all relevant times has been, the owner of the
17 Copyrighted Instructions Sheet. Apnea Sciences has never assigned the copyright
18 in the Copyrighted Instructions Sheet to any other entity.

19
20 29. Throughout the years, Apnea Sciences has established market
21 recognition and market presence through distribution of its intra-oral mandibular
22 advancement devices. Apnea Sciences manufactures and sells several products
23 including the Patented Device which is an FDA cleared medical device.

24
25 30. Apnea Sciences' Patented Device has been one of its most popular
26 products. Apnea Sciences has sold these products nationwide in stores and online
27 since 2009, prior to the acts complained of herein, and is continuing to do so today.

1 It has extensively advertised the Patented Device on its website and through online
2 retailers, including www.amazon.com and www.ebay.com.

3
4 31. Upon information and belief, Defendants have been well-aware of
5 Apnea Sciences and the Patent-in-Suit at least as of December 21, 2015 when
6 Apnea Sciences' attorney sent a cease and desist letter to Defendant Koncept
7 Innovators to stop infringing the Patent-in-Suit. In the same letter, Apneas Sciences
8 also demanded that Koncept Innovators cease and desist infringing Apnea Sciences'
9 Copyrighted Instruction Sheets.

10
11 ***Defendants' Wrongful Conduct***

12
13 32. Upon information and belief, Defendants are, and have been, engaged
14 in the business of manufacturing, and/or having manufactured, selling, and/or
15 offering to sell in the United States, and/or importing into the United States, the
16 Accused Devices infringing one or more claims of the Patent-in-Suit, including, but
17 not limited to, Claims 1-3, 5-12, 14-18, and 20 of the Patent-in-Suit. An accurate
18 copy of a photograph of Defendants' Accused Device is attached hereto as Exhibit-
19 3 and incorporated in this First Amended Complaint.

20
21 33. Upon information and belief, Defendants are, and have been copying
22 Plaintiff's Copyrighted Instructions Sheets and distributing them by placing them
23 inside the packaging of the Accused Devices. The Infringing Instruction Sheet is
24 substantially similar, if not identical, to Apnea Sciences' Copyrighted Instruction
25 Sheet. An accurate copy of Defendant's Infringing Instruction Sheet is attached
26 hereto as Exhibit-4 and incorporated in this First Amended Complaint.

1 34. Upon information and belief, Defendants advertise and distribute the
2 Accused Devices in interstate commerce and these Accused Devices are not FDA
3 cleared medical devices. By way of example, the Snore Eliminator Pro,
4 IntelliGuard, and Tranquility on information and belief, have been sold within this
5 judicial district, through distribution channels, including, but not limited to,
6 www.stop-snoring-mouthpiece.org and the website and retail locations of third
7 parties such as www.amazon.com and www.ebay.com. Accurate copies of the
8 webpages of www.stop-snoring-mouthpiece.org, www.amazon.com, and
9 www.ebay.com are attached hereto as Exhibit-5, Exhibit-6, Exhibit-7, respectively,
10 and incorporated in this First Amended Complaint.

11
12 35. Upon information and belief, Defendants purposefully direct sales and
13 offers for sale of the Accused Devices, including those specifically identified above,
14 toward the State of California, including this District.

15
16 36. Upon information and belief, Defendants maintain established
17 distribution channels within the United States that permit Defendants to ship the
18 Accused Devices, including those specifically identified above, to and from the
19 State of California, including this District.

20
21 37. Without any authorization or license from Plaintiff, Defendants have
22 knowingly and willfully infringed and continue to infringe Plaintiff's patent and
23 copyright rights.

24
25 38. Upon information and belief, Defendant Koncept Innovators and
26 Defendant Newby caused to be manufactured and/or purchased or received the
27 Accused Devices from Defendants Does 2 through 10, sources that were not
28

1 authorized by Plaintiff to manufacture, distribute, offer for sale, or sell products
2 using the Plaintiff's patent and copyright rights.
3

4 39. The Accused Devices are not Plaintiff's genuine Patented Devices.
5 Plaintiff did not manufacture, inspect or package the Accused Devices and did not
6 approve them for sale and/or distribution.
7

8 40. The Accused Devices are made abroad and are of inferior quality to
9 Plaintiff's genuine goods and Defendants have not obtained FDA clearance for the
10 Accused Devices.
11

12 41. By reason of Defendants' acts complained of herein, Plaintiff has
13 suffered and continues to suffer monetary damages in an amount thus far not
14 determined.
15

16 42. Defendants' wrongful conducts have deprived Plaintiff of good will
17 and injured Plaintiff's relationship with the general public and its retailers.
18

19 43. As a result of Defendants' conducts, Plaintiff is suffering and will
20 continue to suffer irreparable harm and damage. Defendants will, unless restrained
21 and enjoined, continue to act in the unlawful manner complained of herein, to
22 Plaintiff's irreparable injury. Plaintiff's remedy at law is not adequate to
23 compensate for the injuries suffered and threatened.
24

25 44. On December 21, 2015, Plaintiff's counsel mailed a cease and desist
26 letter to Defendant Koncept Innovators demanding that it stop selling the Accused
27
28

1 Devices. In the letter, Apnea Sciences also demanded that Koncept Innovators cease
2 and desist from copying and distributing the Infringing Instructions Sheets.

3
4 45. On January 20, 2016, counsel for Koncept Innovators replied by
5 stating that it will investigate Apnea Sciences' claims and allegations and "will
6 respond in substance in due course." As of the filing of the Complaint, neither
7 Defendant Koncept Innovators nor its counsel had responded to Plaintiff or its
8 counsel and continue to infringe upon Apnea Sciences' intellectual properties
9 without permission.

10
11 **COUNT ONE: FEDERAL PATENT INFRINGEMENT (35 U.S.C. §§ 271)**

12
13 46. Apnea Sciences realleges and incorporates by reference the allegations
14 of paragraphs 1-45 inclusive, as though fully set forth.

15
16 47. Apnea Sciences is the sole owner of the entire right, title, and interest
17 in and to the Patent-in-Suit, including the right to sue and recover for any and all
18 infringements thereof.

19
20 48. Defendants are directly infringing, either literally or through the
21 doctrine of equivalents, the Patent-in-Suit by making, using, selling, and/or offering
22 to sell within the United States, and/or importing into the United States, the Accused
23 Devices, which practice one or more claims of the Patent-in-Suit, including, but not
24 limited to, claims 1-3, 5-12, 14-18, and 20 of the Patent-in-Suit, in violation of 35
25 U.S.C. § 271.

1 49. For example, claim 1 is directed towards an intra-oral mandibular
2 advancement appliance which permits the position of the lower jaw of the patient
3 to be adjusted relative to the upper jaw to maintain an airway to the throat through
4 which the patient can breathe while sleeping. The appliance comprises an upper tray
5 assembly having an arcuate shape against which the teeth of the patient's upper jaw
6 are seated, said upper tray assembly having a front and a pair of sides lying opposite
7 and spaced from one another, a lower tray assembly having an arcuate shape against
8 which the teeth of the patient's lower jaw are seated, said lower tray assembly also
9 having a front and a pair of sides lying opposite and spaced from one another, a
10 position adjustment block located at each of the pair of sides of one of said upper
11 tray assembly and said lower tray assembly, and a locking channel located at each
12 of the pair of sides of the other one of said upper tray assembly and said lower tray
13 assembly, each position adjustment block being slidably received within a
14 respective locking channel, whereby said lower tray assembly is mated in releasable
15 locking engagement to said upper tray assembly to prevent a displacement of said
16 lower tray assembly relative to said upper tray assembly, said lower tray assembly
17 being responsive to a lateral compressive squeezing force simultaneously applied
18 to the opposite sides thereof to temporarily change the shape of and deform said
19 lower tray assembly to enable each position adjustment block to slide through its
20 respective locking channel so as to release the locking engagement of said lower
21 tray assembly to said upper tray assembly and thereby permit the positions of said
22 lower tray assembly and the patient's lower jaw to be adjusted relative to the
23 positions of said upper tray assembly and the patient's upper jaw.

24
25 50. Upon information and belief, the Accused Device comprises each and
26 every limitation of claim 1. Specifically, the Accused Device comprises an upper
27 tray assembly having an arcuate shape against which the teeth of the patient's upper
28

1 jaw are seated, said upper tray assembly having a front and a pair of sides lying
2 opposite and spaced from one another.

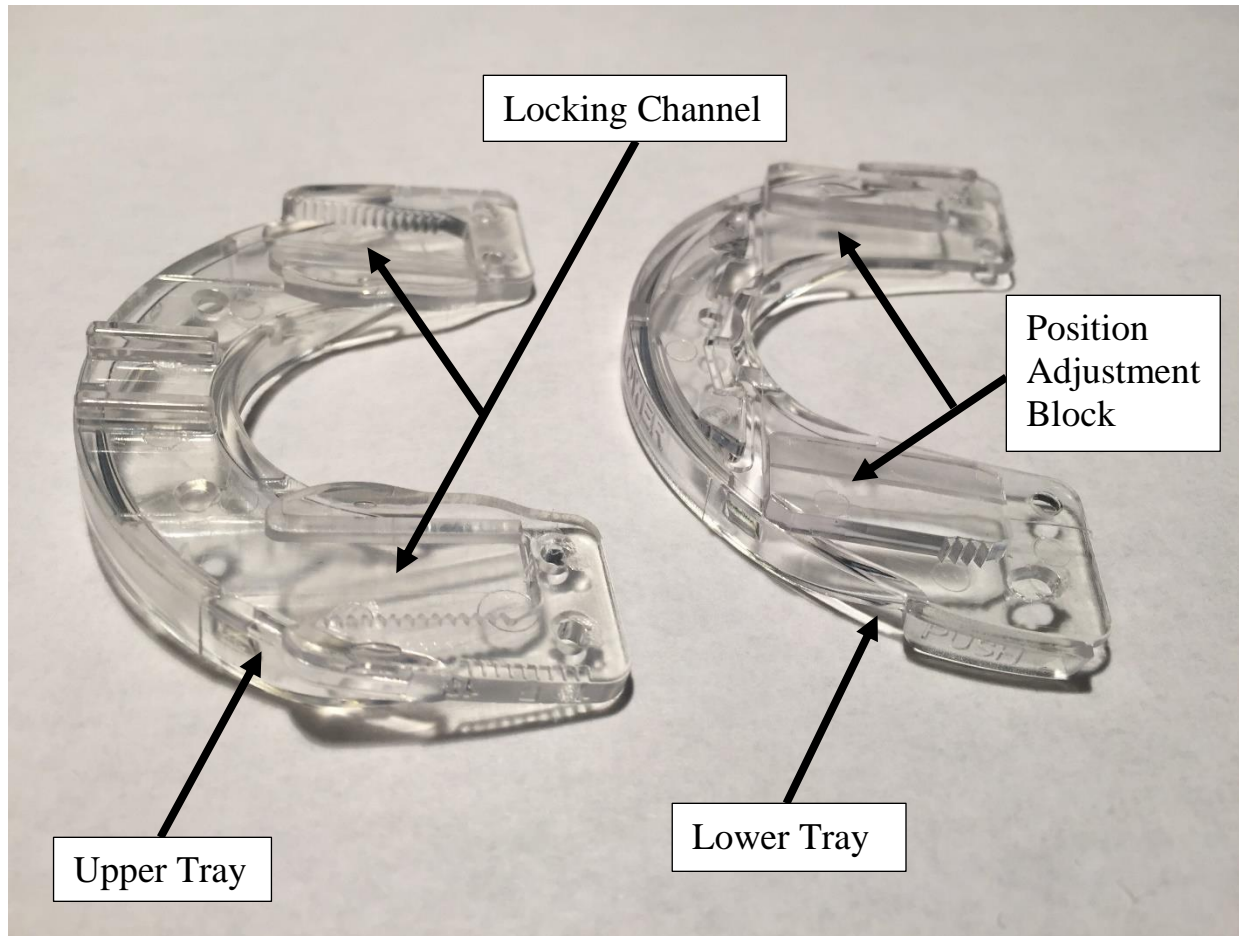
3
4 51. Upon information and belief, the Accused Device further comprises a
5 lower tray assembly having an arcuate shape against which the teeth of the patient's
6 lower jaw are seated, said lower tray assembly also having a front and a pair of sides
7 lying opposite and spaced from one another.

8
9 52. Upon information and belief, the Accused Device further comprises a
10 position adjustment block located at each of the pair of sides of one of said upper
11 tray assembly and said lower tray assembly.

12
13 53. Upon information and belief, the Accused Device further comprises a
14 locking channel located at each of the pair of sides of the other one of said upper
15 tray assembly and said lower tray assembly, each position adjustment block being
16 slidably received within a respective locking channel.

17
18 54. Upon information and belief, the Accused Device's features and
19 components cooperate whereby its lower tray assembly is mated in releasable
20 locking engagement to its upper tray assembly to prevent a displacement of said
21 lower tray assembly relative to said upper tray assembly, said lower tray assembly
22 being responsive to a lateral compressive squeezing force simultaneously applied
23 to the opposite sides thereof to temporarily change the shape of and deform said
24 lower tray assembly to enable each position adjustment block to slide through its
25 respective locking channel so as to release the locking engagement of said lower
26 tray assembly to said upper tray assembly and thereby permit the positions of said
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28

1 lower tray assembly and the patient's lower jaw to be adjusted relative to the
 2 positions of said upper tray assembly and the patient's upper jaw.



Accused Device

22 55. Defendants are also indirectly infringing the Patent-in-Suit at least by
 23 virtue of their inducement of direct infringement of the Patent-in-Suit by customers,
 24 end users, and others who use Defendant's Accused Devices.

26 56. Defendants have induced, and continue to induce, others to infringe
 27 the Patent-in-Suit in violation of 35 U.S.C. § 271(b) by taking active steps to
 28

1 encourage and facilitate others' direct infringement of the Patent-in-Suit with
2 knowledge or willful blindness of that infringement. Upon information and belief,
3 these affirmative acts include, without limitation, advertising, marketing,
4 promoting, offering for sale and/or selling the above-referenced Accused Devices
5 to consumers, customers, manufacturers, distributors, resellers, partners, and/or end
6 users, and providing instructions, user manuals, advertising, and/or marketing
7 materials including the Infringing Instruction Sheet which facilitate, direct or
8 encourage the direct infringement of the Patent-in-Suit by others with knowledge
9 thereof.

10
11 57. Defendants have contributorily infringed the Patent-in-Suit in
12 violation of 35 U.S.C. § 271(c), without limitation, by offering to sell, selling, or
13 importing the Accused Devices with knowledge that they are or constitute a
14 material part of the inventions claimed in the Patent-in-Suit and/or are especially
15 made or adapted for use by others, including consumers or end users, to infringe the
16 Patent-in-Suit, and are not staple articles or commodities suitable for substantial,
17 non-infringing uses.

18
19 58. By reasons of Defendants' infringing activities, Apnea Sciences has
20 suffered, and will continue to suffer, substantial damages in an amount to be
21 determined at trial. Defendants have had actual notice of the Patent-in-Suit, and
22 upon information and belief, have known or should have known that their activities
23 described above infringe the Patent-in-Suit directly or indirectly. Defendants have
24 nonetheless continued to engage in its infringing acts. Accordingly, Defendants'
25 infringement is willful and deliberate, and this case is exceptional under 35 U.S.C.
26 § 285.

1 64. Upon information and belief, Defendants have infringed copyright in
2 the original Copyrighted Instruction Sheet by reproducing the copyrighted work in
3 copies, and by distributing copies of the copyrighted work.

4
5 65. Defendants have been notified about their infringing activities but
6 refused to cease their acts of infringement.

7
8 66. Apneus Sciences has been damaged by Defendants' acts of
9 infringement.

10
11 67. Apneus Sciences has suffered injury as the result of Defendants' acts
12 of infringement that is irreparable in nature. Apneus Sciences is without an adequate
13 remedy at law.

14
15 **COUNT THREE: CALIFORNIA UCL (B&P CODE § 17200 ET SEQ)**

16
17 68. Plaintiff realleges and incorporates by reference the allegations of
18 paragraphs 1-67 inclusive, as though fully set forth.

19
20 69. As its third ground for relief, Plaintiff hereby alleges that Defendants
21 has violated the California Unfair Competition Law (B&P Code§ 17200 et seq.).

22
23 70. Defendants' infringement of Plaintiff's Patent-in-Suit, Copyrighted
24 Instruction Sheet, and passing off its Accused Devices as being FDA cleared
25 medical devices, as alleged herein, constitute a violation of the California Unfair
26 Competition Law (B&P Code § 17200 et seq.).

1 71. The deceptive, unfair and fraudulent practices set forth herein have
2 been undertaken with knowledge by Defendants willfully with the intention of
3 causing harm to Plaintiff and for the calculated purpose of misappropriating
4 Plaintiff's intellectual property rights, goodwill, and business reputation, and to
5 deceive the public by passing off its Accused Devices as being FDA cleared medical
6 devices.

7
8 72. Defendants' infringement of Plaintiff's patent and copyright rights,
9 and public deception, as alleged herein, has deprived Plaintiff of the right to control
10 the use of its intellectual property.

11
12 73. As a direct and proximate result of Defendants' unlawful infringement
13 and public deception, Plaintiff has suffered damages and will continue to suffer
14 damages in an amount that is not presently ascertainable but will be proven at trial.
15 Plaintiff is entitled to all available relief provided for in California Unfair
16 Competition Law (B&P Code § 17200 et seq.) including permanent injunctive
17 relief.

18
19 74. Defendants committed the acts alleged herein intentionally,
20 fraudulently, maliciously, willfully, wantonly and oppressively, with intent to injure
21 Plaintiff in its business and with conscious disregard for Plaintiff's rights, thereby
22 justifying awards of punitive and exemplary damages in amounts sufficient to
23 punish and to set an example for others.

**COUNT FOURTH: CALIFORNIA COMMON LAW UNFAIR
COMPETITION**

75. Plaintiff realleges and incorporates by reference the allegations of paragraphs 1-74 inclusive, as though fully set forth.

76. As its fourth ground for relief, Plaintiff hereby alleges that Defendants has violated the California Common Law Unfair Competition.

77. Defendants' infringement of Plaintiff's Patent-in-Suit, Copyrighted Instruction Sheet, and passing off its Accused Devices as being FDA cleared medical devices, as alleged herein, constitutes unfair competition in violation of the common law of the state of California.

78. Defendants are competitors of Plaintiff and have infringed Plaintiff's patent and copyright rights, as alleged herein, in an effort to exploit Plaintiff's reputation in the market.

79. Defendants' infringing acts were intended to capitalize on Plaintiff's goodwill associated therewith for Defendants' own pecuniary gains. Plaintiff has expended substantial time, resources and effort to obtain an excellent reputation for its Patented Device. As a result of Plaintiff's efforts, Defendants are now unjustly enriched and is benefiting from intellectual property rights that rightfully belong to Plaintiff.

80. Defendants' acts are willful, deliberate, and intended to deceive the public and to injure Plaintiff.

1 81. Plaintiff has no adequate remedy at law to compensate it fully for the
2 damages that have been caused and which will continue to be caused by
3 Defendants' infringing conduct, unless they are enjoined by this Court.
4

5 82. The conduct herein complained of was extreme, outrageous, and was
6 inflicted on Plaintiff in reckless disregard of Plaintiff's rights. Said conduct was
7 despicable and harmful to Plaintiff and as such supports an award of exemplary and
8 punitive damages in an amount sufficient to punish and make an example of
9 Defendants and to deter it from similar such conduct in the future.
10

11 83. In light of the foregoing, Plaintiff is entitled to injunctive relief
12 prohibiting Defendants from infringing Plaintiff's patent and copyright rights, and
13 deceiving the public by passing off their Accused Devices as being FDA cleared
14 medical devices, and to recover all damages, including attorneys' fees, that Plaintiff
15 has sustained and will sustain, and all gains, profits and advantages obtained by
16 Defendants as a result of their infringing acts alleged herein in an amount not yet
17 known, and the costs of this action.
18

19 **REQUEST FOR RELIEF**
20

21 **WHEREFORE**, in consideration of the foregoing, Plaintiff respectfully
22 requests that this Court:
23

24 I. That Defendants have directly infringed, indirectly infringed, and
25 induced others to infringe the Patent-in-Suit;
26
27
28

1 II. That Defendants be ordered to pay damages adequate to compensate
2 Plaintiff for Defendants' infringement of the Patent-in-Suit, including, but not
3 limited to, lost profits and/or price erosion, in addition to or in lieu of a reasonable
4 royalty measure of damages, together with prejudgment interest and postjudgment
5 interest thereon;

6
7 III. That Defendants' infringement is deliberate and willful and that
8 Defendants be ordered to pay treble damages under 35 U.S.C. § 284;

9
10 IV. Issue a temporary, preliminary, and permanent injunction enjoining
11 Defendants and their corresponding officers, agents, servants, employees,
12 attorneys, affiliates, divisions, subsidiaries, and all persons in active concert or
13 participation with any of them, from infringing the Patent-in-Suit, and/or
14 contributing to or inducing anyone to do the same, including manufacture, use, offer
15 to sell, sale, and/or importation of Accused Device before expiration of the Patent-
16 in-Suit and ordering Defendants' Accused Devices to be turned over to Plaintiff and
17 destroyed;

18
19 V. That this is an exceptional case under 35 U.S.C. § 285 and that Plaintiff
20 Apnea Sciences be awarded its reasonable attorneys' fees, costs, and expenses;

21
22 VI. Enter judgment that Defendants have violated federal laws under 17
23 U.S.C. § 106 and that said infringements were willful.

24
25 VII. Issue a temporary, preliminary, and permanent injunction enjoining
26 Defendants and each of its agents, employees, officers, attorneys, successors,
27 assigns, affiliates and any persons in privity or active concert or participation with
28

1 any of them from continued acts of infringement of the copyright rights at issue in
2 this litigation;

3
4 VIII. After a hearing on the merits, grant Apneas Sciences an award of actual
5 or statutory damages at Apneas Sciences' election against Defendants under 17
6 U.S.C. § 504, where any award of actual damages should be increased for willful
7 infringement and grant Apneas Sciences' costs and reasonable attorneys' fees under
8 17 U.S.C. § 505 associated with pursuing this action, and prejudgment and post-
9 judgment interest, against Defendants;

10
11 IX. After a hearing on the merits, grant Apneas Sciences an award of all
12 profits realized by Defendants by reason of Defendants' unlawful acts herein
13 alleged.

14
15 X. Awarding Plaintiff punitive damages in connection with its claims
16 under California law; and

17
18 XI. Grant Plaintiff such other and further relief as the Court may deem just.

19
20 Dated September 7, 2016,

21
22 By: 

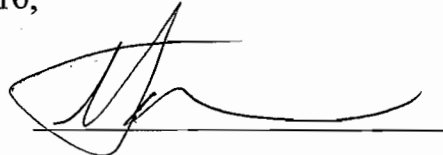
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DEMAND FOR JURY TRIAL

Pursuant to Fed. R. Civ. P. 38(b), Plaintiff demands a trial by jury on all matters to which it is entitled by law.

Dated September 7, 2016,

By:



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