

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LAWRENCE M. FALLAT, DPM,

Plaintiff,

vs.

Case No.

Hon.

CRYOMED, LLC, a Utah Limited
Liability Company,

Defendant.

**COMPLAINT FOR INJUNCTIVE RELIEF
AND DAMAGES AND DEMAND FOR JURY TRIAL**

NOW COMES Plaintiff, LAWRENCE M. FALLAT, DPM (“Dr. Fallat” or “Plaintiff”), by and through his attorneys, THAV, GROSS, STEINWAY & BENNETT, P.C. and for his Complaint against Defendant, CRYOMED, LLC, a Utah Limited Liability Company (“Cryomed” or “Defendant”), states as follows:

JURISDICTIONAL STATEMENT

1. This Court has original subject matter jurisdiction over the federal law claims in this action pursuant to the provisions of 15 U.S.C. §1121, 35 U.S.C. §271 *et seq.*, and 28 U.S.C. §1331 and §1338.

2. This Court has supplemental jurisdiction over certain state law claims set forth below pursuant to 28 U.S.C. §1367.

VENUE

3. Venue is based upon 28 U.S.C. § 1391(b) and/or §1400 and is proper in this judicial district because it is a civil action wherein jurisdiction is not founded

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solely upon diversity of citizenship and a substantial part of the events or omissions giving rise to the claim occurred in this district.

GENERAL ALLEGATIONS

4. Dr. Fallat is a citizen of the State of Michigan and is resident within this judicial district. Dr. Fallat has been a Michigan certified podiatrist since 1978, with his principal place of business located in Taylor, Michigan.

5. Upon information and belief, Cryomed is a Utah Limited Liability Company, with an address listed with the State of Utah at 843 South 100 W, Logan, Utah 84321; a registered agent address at 84 East 2400 N, North Logan, Utah 84341, and an advertised address at 1565 W Hillfield Rd, Suite 102, Layton, Utah 84041.

6. Over the past 30 years, Dr. Fallat has treated and performed surgical foot and ankle procedures on thousands of patients suffering from a variety of foot and ankle conditions, including Morton's Neuroma and Plantar Fasciitis.

7. Since at least 2001, Dr. Fallat has investigated surgical treatments for Morton's Neuroma and Plantar Fasciitis. Dr. Fallat's investigations of Morton's Neuroma and Plantar Fasciitis ultimately led to his creation and development of a method of using a cryogenic probe for the surgical treatment of those conditions. The methodology used by Dr. Fallat involved using a probe to "freeze" the tissue portion of the neuroma or fasciitis, in or adjacent to the foot and ankle. Based on the successful results experienced by his patients, Dr. Fallat published studies and treatment results in numerous publications.

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8. Dr. Fallat filed a Provisional United States Patent Application on February 27, 2002, and a related non-provisional application on February 25, 2003 (Application No. 10/374,519) directed to his treatment method.

9. On July 31, 2007, the United States Patent and Trademark Office duly and lawfully issued U.S. Patent No. 7,250,046 to Dr. Fallat, which is entitled Treatment of Lower Extremity Pain and that included claims directed to Dr. Fallat's treatment method.

10. In April, 2008, representatives of Dr. Fallat met with Mr. Stewart Rickersey, Vice President of Sales and Marketing for Cryomed. At that April meeting, Plaintiff was advised by Mr. Rickersey that Cryomed was a new entity comprised of investors, with an office in Utah, and that was created for the purpose of manufacturing and selling CryoPac Units, which devices necessarily used the method of the '046 Patent.

11. At the April 2008 meeting, Mr. Rickersey expressed surprise and dismay that Dr. Fallat had obtained the '046 Patent. Plaintiff was also advised that the CryoPac Units were either sold or being used by approximately 140 podiatrists in the United States. Plaintiff further learned that single probe CryoPac Units are marketed by Cryomed for approximately \$10,000.00 with multiple probe CryoPac Units going for as much as \$30,000.00.

12. By correspondence dated May 2, 2008, Cryomed was provided written notice by counsel for Dr. Fallat that Cryomed's sale of approximately 110 CryoPac Units without authorization or remuneration to Dr. Fallat constituted patent infringement under U.S. law. Cryomed was further advised that it was not the only

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one liable for such infringement, each podiatrist to whom it sold a CryoPac Unit was also liable.

13. Cryomed was also requested in May 2008 to cease and desist from the manufacture, sale, marketing or training of any CryoPac Units or any other product/device that infringed the '046 Patent. However, despite such patent infringement, Dr. Fallat still offered Cryomed the option to market and sell CryoPac Units using the '046 Patent if Cryomed would agree to certain license terms. However, no response was ever received by Dr. Fallat.

14. On or about September 17, 2008, Dr. Fallat was shocked to review a full page advertisement in "Podiatry Today" magazine marketing the "CryoPac" Units as "state of the art cryo-analgesic pain management system for podiatrists." As identified by the advertisement, Cryomed has marketed the cryogenic device for the treatment of Morton's Neuroma and Plantar Fasciitis. In particular, Cryomed's own advertisement notes that with respect to Plantar Fasciitis, "Dr. L. Fallat holds a U.S. Patent for his technique on this condition." This advertisement was repeated again in the November issue. Upon further review of Cryomed's website at www.cryomed.co.uk, the following evidence of Patent infringement was identified:

- A. Defendant is marketing the CryoPac Unit at a starting price of \$9,995.00;
- B. The website quotes a testimonial from Dr. Fallat with respect to the success of cryosurgery for Plantar Fasciitis and Morton's Neuroma in an attempt to assist Defendant in marketing the units; and
- C. Defendant has listed four articles published by Dr. Fallat, in an effort to provide credibility to the CryoPac Unit.

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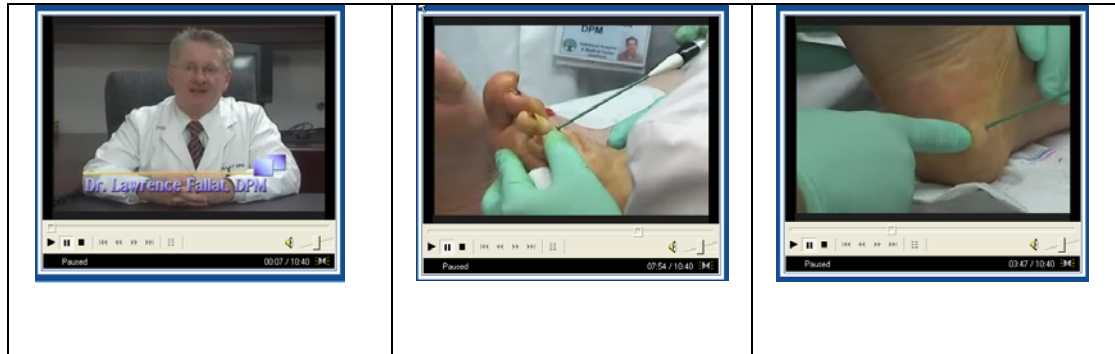
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15. The website of Defendant posted to www.cryomed.us also features the following image:



The caption on the webpage for the image states: "Photo courtesy of Lawrence M. Fallat, DPM". However, Dr. Fallat did not provide the image to the Defendant. In addition, the webpage on which the image is posted concerns "podiatry" with the image clearly showing the probe of a CryoPac Unit being applied to a human foot. The human hands displayed in the image are the hands of Dr. Fallat.

16. The website of Defendant posted to www.cryomed.us also features a video of Dr. Fallat practicing the method of the patent, with images from the video being shown below:



However, Dr. Fallat did not provide the video to the Defendant.

17. The promotion and sale of CryoPac Units by Cryomed, as evidenced above, constitutes intentional patent infringement. Cryomed was notified in writing

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by counsel for Dr. Fallat on May 2, 2008, and again on June 9, 2008, that the marketing of any device using Dr. Fallat's patented technology methods must be licensed prior to the sale or marketing of any such devices by Cryomed or Cryotech, LLC. However, the marketing efforts of Cryomed confirm that such requests have in fact been ignored.

FIRST CAUSE OF ACTION
INDUCING INFRINGEMENT OF THE '046 PATENT

18. Plaintiff incorporates by reference into this First Cause of Action the allegations of Paragraphs 1 through 17.

19. Defendant has been and still is indirectly infringing the '046 Patent under 35 U.S.C. §271(b) by actively inducing direct infringement by other persons who use products that embody one or more of the claims of the '046 Patent when Defendant had knowledge of the '046 Patent, knew or should have known that its actions would induce direct infringement by others and intended that its actions would induce direct infringement by others. Defendants will continue to induce infringement unless enjoined by this Court.

20. Plaintiff has provided Defendant with written notice of Defendant's infringement of the '046 Patent.

21. Defendant has knowingly and willfully infringed the '046 Patent.

22. As a result of Defendant's infringement, Plaintiff has suffered monetary damages in an amount not yet determined, and will continue to suffer harm in the future unless Defendant's infringing activities are enjoined by this Court.

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23. Plaintiff will be greatly and irreparably harmed, including but not limited to the inability to offer exclusive licenses to third-parties, unless preliminary and permanent injunctions are issued enjoining Defendant and its agents, servants, employees, attorneys, representatives, and all others acting on its behalf from infringing the '046 patent.

SECOND CAUSE OF ACTION
CONTRIBUTORY INFRINGEMENT OF THE '046 PATENT

24. Plaintiff incorporates by reference into this Second Cause of Action the allegations of Paragraphs 1 through 23.

25. Defendant has been and still is indirectly infringing the '046 Patent under 35 U.S.C. §271(c) by contributory infringement by providing non-staple articles of commerce to others for use in an infringing system with knowledge of the '046 Patent and knowledge that these non-staple articles of commerce are used as a material part of the claimed inventions of the '046 Patent. Defendants will continue to induce infringement unless enjoined by this Court.

26. Plaintiff has provided Defendant with written notice of Defendant's infringement of the '046 Patent.

27. Defendant has knowingly and willfully infringed the '046 Patent.

28. As a result of Defendant's infringement, Plaintiff has suffered monetary damages in an amount not yet determined, and will continue to suffer harm in the future unless Defendant's infringing activities are enjoined by this Court.

29. Plaintiff will be greatly and irreparably harmed, including but not limited to the inability to offer exclusive licenses to third-parties, unless preliminary

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and permanent injunctions are issued enjoining Defendant and its agents, servants, employees, attorneys, representatives, and all others acting on its behalf from infringing the '046 patent, including but not limited to the ability to offer exclusive licenses to third parties.

THIRD CAUSE OF ACTION
DEFAMATION

30. Plaintiff incorporates by reference into this Third Cause of Action the allegations of Paragraphs 1 through 29.

31. Defendant has posted to its website a video and an image of Dr. Fallat practicing his patented method on a patient with a caption for the image that states: "Photo courtesy of Lawrence M. Fallat, DPM". The same website also included a testimonial that is attributed to Dr. Fallat.

32. Dr. Fallat did not provide the testimonial, or the image or the video that is post to the website to Defendant.

33. Defendant knowingly or negligently published of the image and false caption to the general public via its website. Further, in order to garner support for its own device, Defendant also knowingly or negligently used and published a testimonial and video of Dr Fallat, that Dr Fallat provided to another in support of a different device.

34. As a result of Defendant knowingly or negligently publication of the image and false caption to the general public, and the publication of the testimonial and video, Dr. Fallat's business as a licensed podiatrist, including his business interest and ability to license the '046 patent, will be damaged.

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35. As a result of Defendant's actions, Plaintiff has suffered monetary damages in an amount not yet determined, and will continue to suffer harm in the future unless Defendant's infringing activities are enjoined by this Court.

36. Dr. Fallat will be greatly and irreparably harmed, including but not limited to the inability to offer exclusive licenses to third-parties, unless preliminary and permanent injunctions are issued enjoining Defendant and its agents, servants, employees, attorneys, representatives, and all others acting on its behalf from continuing to use the caption for image, the image itself and any other material that defames Dr. Fallat.

WHEREFORE, Dr. Fallat prays for entry of an Order and Judgment that:

A. Defendant has infringed Plaintiff's patent, including the '046 Patent, in violation of 35 U.S.C. §271;

B. Defendant and its officers, agents, servants, employees, owners and representatives, and all other persons, firms or corporations in active concert or participation with them be enjoined and restrained from further acts that infringe Dr. Fallat's rights in the '046 patent;

C. Dr. Fallat be awarded damages to compensate Dr. Fallat for Defendant's infringing acts pursuant to 35 U.S.C. §284, increased up to three times as provided by applicable law;

D. Dr. Fallat be awarded its reasonable attorneys' fees pursuant to 35 U.S.C. §285;

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E. Defendant and its officers, agents, servants, employees, owners and representatives, and all other persons, firms or corporations in active concert or participation with them be enjoined and restrained from further acts that make use of Dr. Fallat's name or that otherwise defame Dr. Fallat to the trade or public;

F. Dr. Fallat be granted, an accounting and an award of damages, lost profits and/or royalties accruing from Defendant's activity defaming Dr. Fallat;

G. Dr. Fallat be awarded his costs; and

H. A Judgment be entered in Dr. Fallat's favor granting him such other further relief as the Court deems just and proper.

JURY DEMAND

Plaintiff hereby makes a formal demand for a Jury Trial based on the facts and issues involved in this cause of action.

Respectfully submitted,

THAV, GROSS, STEINWAY & BENNETT, P.C.

/s/ David L. Steinberg

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Date: November 20, 2008

Signatures continued on next page

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