

TRASK BRITT

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Attorneys for Defendants

**IN THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF UTAH,
CENTRAL DIVISION**

<p>SORENSEN MEDICAL, INC., a Utah corporation,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>BALLARD MEDICAL PRODUCTS, a Utah corporation; KIMBERLY-CLARK CORPORATION, a Delaware Corporation;</p> <p>Defendants.</p>	<p style="text-align: center;">COMPLAINT</p> <p>Civ. No. 2001 CV 0115 - BK</p> <p>JUDGE _____</p> <p style="text-align: center;">JURY TRIAL REQUESTED</p>
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Plaintiff, SORENSON MEDICAL, INC. ("SORENSON"), hereby complains and alleges against defendants and each of them as follows:

PARTIES, JURISDICTION & VENUE

1. Plaintiff, SORENSON, (formerly known as SORENSON CRITICAL CARE, INC.), is a Utah corporation,, with its principal place of business at 2511 South West Temple, Salt Lake City, Utah.

2. Defendant, BALLARD MEDICAL PRODUCTS (“BALLARD”), is a Utah corporation with a business address at 12050 Lone Peak Parkway, Draper, Utah.

3. Defendant, KIMBERLY-CLARK CORPORATION (“KIMBERLY-CLARK”), is a Delaware corporation with a business address at 2010 N. Rulon White Blvd., Ogden, Utah.

4. KIMBERLY-CLARK owns all of the stock of BALLARD and, therefore, has the power to control BALLARD.

5. On or about December 23, 1997, BALLARD brought suit against SORENSON, et al. for, *inter alia*, patent infringement, trade dress infringement and theft of trade secrets. KIMBERLY-CLARK has participated actively in that litigation, which remains pending in the United States District Court in the District of Utah, Central Division, under Civil No. 2:97 CV 0985J.

6. This is an action for declaratory judgment of non-infringement under 28 U.S.C. §§ 1338 and 2201. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1338, 2201 and 2202, as a declaratory judgment action arising under the Patent Laws, Title 35 of the United States Code.

7. Venue is proper in this district by virtue of Title 28 U.S.C. §§ 1391 and 1400(b) because plaintiff's acts of alleged infringement took place within this jurisdiction and because defendants are either found in this District, or are otherwise subject to personal jurisdiction in this District.

GENERAL ALLEGATIONS

8. On or about June 24, 1999, BALLARD announced that it had acquired a portfolio of patents covering endotracheal suctioning catheter inventions of professor Walter J. Jinotti of New Brunswick, New Jersey (Professor Jinotti). On information and belief, included among the Jinotti Patents are: United States Patents Nos. 5,813,402, issued September 29, 1998 (the '402 patent); 5,511,545, issued April 30, 1996 (the '545 patent); 5,496,287, issued March 5, 1996 (the '287 patent); 5,487,381, issued January 30, 1996 (the '381 patent); 5,346,478, issued September 13, 1994 (the '478 patent); 5,255,672, issued October 26, 1993 (the '672 patent); 5,140,983, issued August 25, 1992 (the '983 patent); 5,088,486, issued February 18, 1992 (the '486 patent); 4,995,387, issued February 26, 1991 (the '387 patent); and 4,595,005, issued June 17, 1986 (the '005 patent) (hereinafter, the "Jinotti Patents"). A copy of a public announcement of this acquisition is attached to this Complaint as Attachment 1.

9. SORENSON makes and sells closed suction catheters to health care providers under the trademarks SPUTUM TRAP, AIRLIFE and TRACH-EZE (the "TRACH-EZE Assembly").

10. The internal structure of the TRACH-EZE Assembly is illustrated by the three pages of diagrams attached to this Complaint as Attachment 2.

11. On information and belief, during the pendency of Civil No. 2:97 CV 0985J, a then-licensee of the Jinotti Patents advised the business organization responsible

for marketing the TRACH-EZE Assembly that Professor Jinotti had requested that the then-licensee bring suit to enforce the Jinotti Patents against the TRACH-EZE Assembly.

12. Subsequent to the events set forth in immediately preceding paragraph 11 of this Complaint, and during the pendency of Civil No. 2:97 CV 0985J, Professor Jinotti contacted Sorenson and advised one of the attorneys employed by Sorenson that he (Jinotti) had inspected the TRACH-EZE Assembly, and had concluded that it infringed one or more of his patents covering endotracheal suctioning catheter inventions.

13. During the discovery phase of Civil No. 2:97 CV 0985J, BALLARD'S counsel, including in house counsel, were provided copies of documents under a protective order intended to keep the substance of those documents confidential. Included among those documents was a collection of correspondence and attorney opinions dealing with certain of the Jinotti Patents (the "Jinotti Opinions"). The Jinotti Opinions were marked "for attorney eyes only," and were provided several months prior to BALLARD'S acquisition of the Jinotti Patents.

14. On information and belief, BALLARD has no present intention of making, using or selling any device for which a license under the Jinotti Patents would be required, but does intend to enforce those patents against competitors.

FIRST CLAIM FOR RELIEF
(Declaratory Judgment of Non-infringement)

15. Plaintiff SORENSON hereby incorporates the allegations of paragraphs 1-14 of this Complaint and further alleges as follows:

16. All of the closed suction catheter systems made and sold by SORENSON are sold under the trademark TRACH-EZE and are consistent in structure and use to that illustrated by the three pages of diagrams attached as Attachment 3 to this Complaint.

17. The accused TRACH-EZE catheter systems do not infringe any of the claims of any of the Jinotti Patents.

18. SORENSON is entitled to a judgment declaring that the TRACH-EZE catheter systems do not infringe, either literally or by virtue of the doctrine of equivalents, any of the Jinotti Patents.

SECOND COUNTERCLAIM
(Declaratory Judgment of Invalidity).

19. Plaintiff SORENSON hereby incorporates the allegations of paragraphs 1-14 of this Complaint and further alleges as follows:

20. Each of the claims of the Jinotti Patents is invalid under 35 U.S.C. § 102 because patentability of the inventions defined by each such claim is barred by one or more of the provisions of that statute.

21. Each of the claims of the Jinotti Patents is invalid under 35 U.S.C. § 103 because the inventions defined by each such claim would have been obvious at the time it was made to one of ordinary skill in the relevant art.

22. Each of the claims of the Jinotti Patents is invalid under 35 U.S.C. § 112 because each such claim fails to define that which the inventor considered to be his invention and/or the specification fails to provide an adequate disclosure of said invention and/or is not enabling of the claimed invention(s).

23. SORENSON is entitled to a judgment declaring that each claim of the Jinotti Patents is invalid.

SORENSON'S PRAYER FOR RELIEF

WHEREFORE, SORENSON prays that this court enter judgment as follows:

a. Declaring that the Jinotti Patents are invalid, and that defendants are without right or authority to enforce or threaten to enforce any claims of those patents against SORENSON or any customer of SORENSON.

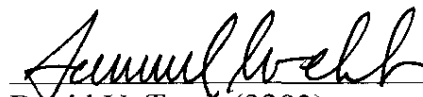
b. Declaring that the Jinotti Patents are not now and have never been infringed by SORENSON, and contain no claims which read, either literally or by application of the doctrine of equivalents, upon any product marketed by SORENSON or any customer of SORENSON under the trademark TRACH-EZE;

c. Granting SORENSON such other and further equitable and legal relief, whether general or special, as the court deems appropriate under the circumstances of this case.

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, SORENSON demands a jury trial on all issues so triable.

DATED this 15 day of February, 2001.

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Attorneys for Defendants