

LITE DEPALMA GREENBERG & RIVAS, LLC

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Attorneys for Plaintiff

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

VITAL SIGNS, INC.,)	Civil Action No.
)	
Plaintiff)	
)	
v.)	COMPLAINT FOR
)	DECLARATORY JUDGMENT
NELLCOR PURITAN BENNETT, INC.)	
)	
Defendant.)	
)	

Plaintiff Vital Signs, Inc. ("Vital Signs"), for its complaint against defendant Nellcor Puritan Bennett, Inc. ("Nellcor"), alleges as follows:

PARTIES

1. Plaintiff Vital Signs is a New Jersey corporation having its principal place of business at 20 Campus Road, Totowa, New Jersey 07512.

2. Defendant Nellcor is a Delaware corporation and a subsidiary of Mallinckrodt, Inc. (which is a subsidiary of Tyco Healthcare Group, LP), having its principal place of business at 4280 Hacienda Drive, Pleasanton, California 94588.

NATURE OF ACTION

3. This is an action for a declaratory judgment of patent invalidity and noninfringement. Vital Signs seeks a declaration that the claims of Nellcor's United States Patent Nos. 5,166,075 ("the '075 patent") and 5,179,002 ("the '002 patent") are invalid and not infringed by any Vital Signs medical products made in, used in, sold in, or imported into, the United States incorporating BreGas colorimetric CO₂ detecting technology.

JURISDICTION AND VENUE

4. This action arises under the patent laws of the United States, Title 35, United States Code, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1338(a), 1367, and 2201-02, as Vital Signs' request for a declaratory judgment of invalidity and noninfringement arises under the patent laws of the United States and the Declaratory Judgment Act.

5. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391 and 1400(b). Nellcor has conducted continuous and systematic commercial activity in this judicial district and has, in this judicial district, accused Vital Signs of infringing Nellcor's patents.

Declaratory Judgment of Invalidity and Noninfringement

6. Vital Signs repeats and re-avers the allegations of paragraphs 1-5, above.

7. On information and belief, the '075 patent, entitled METHOD FOR DETERMINING WHETHER RESPIRATORY GAS IS PRESENT IN A GASEOUS SAMPLE, issued on November 24, 1992, to Carl G. Fehder.

8. On information and belief, the '002 patent, entitled APPARATUS FOR DETERMINING WHETHER RESPIRATORY GAS IS PRESENT IN A GASEOUS SAMPLE, issued on January 12, 1993, to Carl G. Fehder.

9. On October 21, 2002, Nellcor sent Vital Signs a letter (attached as Exhibit A) claiming to be the exclusive licensee of the '075 and '002 patents.

10. In its October 21, 2002 letter, Nellcor charged that the introduction in the United States market by Vital Signs of medical products having colorimetric CO₂ detection capability would infringe at least the '075 and '002 patents.

11. At the time of the October 21, 2002 letter, Vital Signs had not yet introduced any medical products having colorimetric CO₂ detection capability.

12. In addition, in the October 21, 2002 letter, Nellcor told Vital Signs that it intended to vigorously enforce its patent rights and pointed to its patent infringement lawsuit against Engineered Medical Systems, Inc., filed in San Francisco on September 24, 2002, as evidence of the seriousness of its intent.

13. Further, in its October 21, 2002 letter, Nellcor told Vital Signs that its infringement charges are based on the inclusion of BreGas technology in medical equipment.

14. Since its October 21, 2002 letter to Vital Signs, Nellcor has asserted the '075 and '002 patents against Mercury Enterprises and BreGas AB in the United States District Court for the Middle District of Florida and against Portex, Inc. and BreGas AB in the United States District Court for the Northern District of California.

15. Vital Signs has now decided to introduce in the United States medical products incorporating BreGas colorimetric CO₂ detecting technology, and intends to do so before the end of this year.

16. Given Nellcor's October 21, 2002 threat letter and Nellcor's history of attempting to litigate its '075 and '002 patents against BreGas and others, Vital Signs has a reasonable apprehension that Nellcor will institute litigation against Vital Signs for alleged infringement of the '075 and '002 patents.

17. Based on the foregoing, an actual and justiciable controversy exists between Nellcor and Vital Signs with respect to Nellcor's '075 and '002 patents.

18. Vital Signs alleges that the '075 and '002 patents are invalid for failure to comply with the requirements of Title 35 U.S.C, including §§ 102, 103, and/or 112.

19. Vital Signs alleges that it has not, and is not, infringing any claim of the '075 and '002 patents and will not infringe any claim of those patents, by making, using, offering to sell or selling in the United States medical products incorporating BreGas colorimetric CO₂ detecting technology.

20. Vital Signs alleges that it has not induced or contributed to, and is not inducing or contributing to, the infringement of any claim of the '075 and '002 patents and will not induce or contribute to the infringement of any claim of those patents, by making, using, offering to sell or selling in the United States medical products incorporating BreGas colorimetric CO₂ detecting technology.

21. Nellcor is barred by prosecution history and equitable estoppel from asserting that medical products incorporating BreGas colorimetric CO₂ detecting technology infringe one or more claims of the '075 and '002 patents.

PRAYER FOR RELIEF

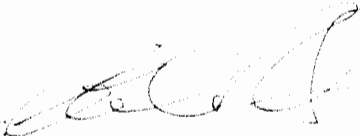
WHEREFORE, Vital Signs prays for judgment as follows:

- A. A declaration that the '075 and '002 patents are invalid;
- B. A declaration that Vital Signs has not infringed and is not infringing the '075 and '002 patents;
- C. A declaration that Nellcor and all officers, agents, employees, representatives and counsel thereof, all licensees, and persons in active concert or participation with any of them, directly or indirectly, are enjoined from charging infringement of, or instituting any action for infringement of, the '075 and '002 patents against Vital Signs, their customers, or any distributor or user of medical products incorporating BreGas colorimetric CO₂ detecting technology;
- D. A declaration that this case is exceptional pursuant to 35 U.S.C. § 285 and an award to Vital Signs of its reasonable attorney fees;

- E. An award to Vital Signs of its interest and costs; and
- F. An award of such other and further relief as this Court deems just and proper.

Dated: January 19, 2005

LITE DEPALMA GREENBERG & RIVAS, LLC

By: 

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CERTIFICATION PURSUANT TO LOCAL CIVIL RULE 11.2

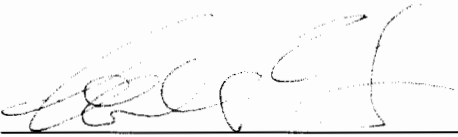
Plaintiff, by its attorneys, hereby certifies that to the best of its knowledge, the matter in controversy is related not related to any case.

Plaintiff is not currently aware of any party who should be joined in this action.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: January 19, 2005

LITE DEPALMA GREENBERG & RIVAS, LLC

By:  _____

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Attorneys for Plaintiff

tyco
Healthcare

**Jeffrey
Wright Bennett**

October 21, 2002

Via Federal Express

Mr. Terry D. Wall
President and Chief Executive Officer
Vital Signs, Inc.
20 Campus Road
Totowa, New Jersey 07512

Dennis E. Kovach
Staff V.P., Intellectual Property
Legal Department

4280 Hacienda Drive
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Re: HME with Colorimetric CO₂ Detection

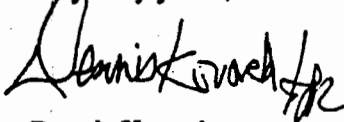
Dear Mr. Wall:

At the American Society of Anesthesiology Conference in Orlando, Florida this month, we heard that Vital Signs was planning on soon introducing an HME device into the U.S. market which has colorimetric CO₂ detection capability using chemistry provided by Bregas AB, formally ICOR AB.

Though we haven't seen or examined any actual or proposed product you may or may not be releasing soon into the U.S., we suspect if it exists it will infringe one or more of our carbon dioxide colorimetric detection patents, in particular, one or more of our U.S. patents 5,166,075; 5,179,002; and 4,879,999 (exclusively licensed to us) (copies enclosed). As you may or may not know, we have had infringement correspondence with Bregas and ICOR for over eight years and they are well aware of our infringement concerns and opinions. We will not hesitate to vigorously enforce our patent rights against you if you choose to infringe. For your information, we sued Engineered Medical Systems, Inc. in San Francisco on September 24, 2002 for infringing the '075 and '002 patents by virtue of their manufacture and sale of their VentisSure and CO₂ Check products. These products incorporate Bregas technology.

Please feel free to contact me should you have any questions regarding the above.

Very truly yours,



Dennis Kovach
Staff VP, Intellectual Property

DEK/jmr

cc: Doris Engibous

Enclosures