

U.S. DISTRICT COURT  
Southern District of Georgia  
Filed in Office

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF GEORGIA  
WAYCROSS DIVISION

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5-20-05 20 05

Deputy Clerk

KEVIN C. HARMON,

Plaintiff,

v.

THOMAS J. WOOD, INNOMED  
TECHNOLOGIES, INC. (a Nevada  
corporation), and NASAL AIRE  
TECHNOLOGIES, INC. (a Georgia  
corporation),

Defendants.

) CIVIL ACTION FILE

) NO. CV505-6

) **JURY TRIAL DEMANDED**

**THIRD AMENDED COMPLAINT**

COMES NOW KEVIN C. HARMON, Plaintiff in the above-styled action ("Plaintiff"), and, pursuant to Rules 15(a) and 19(a) of the Federal Rules of Civil Procedure, files this Third Amended Complaint, showing the Court as follows:

**PARTIES, JURISDICTION, AND VENUE**

1.

Plaintiff is a citizen of the State of Georgia.

2.

Thomas J. Wood ("Defendant Wood") is a citizen of the State of Georgia who, upon information and belief, resides at 840 St. Marys Drive, Waycross, Ware County, Georgia 31501. As a resident of the Southern District of Georgia, jurisdiction and venue regarding Defendant Wood are proper before this Court.

3.

Innomed Technologies, Inc. f/k/a E. Barter Solutions, Inc. ("Defendant Innomed") is a Nevada corporation, incorporated on July 7, 2000, with an office located at 23257 State Road 7, Suite 207, Boca Raton, Florida 33428. Defendant Innomed transacts business within the State of Georgia, including within the Southern District of Georgia, and Defendant Innomed has filed a counterclaim in this action. During portions of the time relevant to this complaint, Defendant Wood was a significant shareholder and agent of Defendant Innomed. Jurisdiction and venue regarding Defendant Innomed are proper before this Court.

4.

Nasal Aire Technologies, Inc. ("Defendant NAT") is a Georgia corporation with an office located at 101 South Augusta Avenue, Waycross, Georgia 31503. The registered agent of Defendant NAT is Eldon L. Mixon, Sr., who is authorized to accept service of the Summons and a copy of Plaintiff's Third Amended Complaint. During portions of the time relevant to this action, Defendant Wood was an officer and agent of Defendant NAT. Jurisdiction and venue regarding Defendant NAT are proper before this Court.

## **FACTS**

### **A. The Atlanta Meeting**

5.

Plaintiff first heard of Defendant Wood in September 1998 when an acquaintance, Will Griffin, told him about Defendant Wood and a patented medical breathing device that Defendant Wood was continuing to develop.

6.

After meeting Mr. Griffin in person and later receiving more information from him by fax, Plaintiff decided to call Defendant Wood during the later part of 1998. At this time, Defendant Wood was having difficulty developing and commercializing his medical breathing device, in large part because he lacked the necessary funds.

7.

On December 11, 1998, Plaintiff had a meeting (“the Atlanta Meeting”) with Defendant Wood at Plaintiff’s home in the Atlanta area. Defendant Wood’s wife, Laura Wood, and his son; his sister-in-law, Evelyn Crews; Mr. Griffin; and Plaintiff’s wife, Sarah Harmon, also attended this meeting, along with Greg Hall. When Defendant Wood, Ms. Crews, Ms. Wood, and Mr. Hall drove to Atlanta from Waycross, Georgia, on December 11, 1998, Defendant Wood expressed his feelings and thoughts about how he needed an investor to develop and commercialize his medical breathing device and why he believed that Plaintiff would be a good and suitable investor.

8.

As part of the Atlanta Meeting, Plaintiff, Defendant Wood, and Mr. Griffin discussed a business plan, including sales projections, regarding various medical breathing devices that Defendant Wood planned on developing if he and Plaintiff reached an agreement.

9.

Prior to the Atlanta Meeting, Defendant Wood had worked with nCore, Inc. ("nCore") of 2870 Perrowville Road, Forest, Virginia, on developing various medical breathing devices. At the Atlanta Meeting, Plaintiff insisted that Defendant Wood obtain a release of the joint venture agreement that he had with nCore if he wanted to move forward with Plaintiff. A release by nCore, Inc. was faxed directly to Plaintiff's home during the Atlanta Meeting.

**B. The Agreement Between Plaintiff and Defendant Wood**

10.

As a result of the Atlanta Meeting, Plaintiff and Defendant Wood agreed to form a corporation that they planned on naming "Breathing Technologies Corporation" ("BTC"). Plaintiff and Defendant Wood agreed that said corporation would own all patents related to medical devices developed by Defendant Wood.

11.

To this effect, Plaintiff and Defendant Wood signed an agreement ("the Agreement") on January 4, 1999 and on January 5, 1999, respectively, a true and accurate copy of which is attached hereto as Exhibit "A." The date "1/4/98" on the Agreement reflected a scrivener's error because Plaintiff was accustomed to writing the year 1998 and simply forgot to change the "8" to a "9" after the New Year in 1999.

12.

Pursuant to the Agreement, a corporation named "Breathing Technologies of Georgia, Inc." was incorporated under the laws of the State of Georgia, on February 1, 1999, as the records from the Office of the Secretary of State reflect. The address of said corporation was 1909 Tebeau Street, Waycross, Georgia 31501. Plaintiff was listed as the registered agent of said corporation, as the records of the Office of the Secretary of State then reflected and still reflect. A certified copy of the original articles of incorporation filed with the Secretary of State and a true and correct copy of a recent record obtained from the Secretary of State's website showing Plaintiff as the registered agent are attached hereto as Exhibit "B."

13.

The Agreement allowed Plaintiff to contribute up to \$80,000.00 in exchange for up to a 49% interest in BTC. The Agreement provides that its purpose "is to establish \$80,000.00 for the development of a corporation to be named 'Breathing Technologies Corporation' at the expense of Kevin C. Harmon in exchange for a 49% ownership of the corporation."

14.

The Agreement required Defendant Wood to transfer "all patents related to medical devices developed by Thomas J. Wood" to BTC.

15.

On July 9, 1996, Defendant Wood obtained United States Patent ("USP") No. 5,533,506 ("the '506 Patent"), entitled "Nasal Tube Assembly." The '506 Patent claims a nasal tube assembly ("the '506 Device") that Wood had advised the United States Patent & Trademark Office ("USPTO") that he had invented. A copy of the '506 Patent is attached hereto as Exhibit "C."

16.

During the time Plaintiff was dealing with Defendant Wood, Defendant Wood informed him that the '506 Patent was assigned to a corporation owned by Defendant Wood called Medlife, Inc. A copy of such an assignment was recorded by the USPTO on or about August 7, 1995. Defendant Wood promised Plaintiff that he would transfer the '506 Patent to BTC once it was organized and established.

17.

After filing this action, Plaintiff learned that Medlife, Inc. was registered with the State of North Carolina, having been incorporated on May 25, 1995. As of October 27, 1997, Medlife, Inc. had been administratively dissolved for failure to file Annual Reports, although Defendant Wood never told Plaintiff this. Nor did Defendant Wood ever tell Plaintiff that he had reinstated Medlife, Inc. on December 27, 1999.

**C. The Failed Efforts to Complete the Formation of BTC**

18.

Regarding BTC, Plaintiff signed the Bylaws, the Subscription Agreement for his shares, and the Board and Shareholder Consent documents in May of 1999. Defendant Wood never signed any of these documents relating to the organization of BTC despite the requirements of the Agreement and the fact that he was sent copies of these documents on multiple occasions.

19.

The attorney handling the incorporation and organization process, Joseph R. Delgado, Jr., wrote several letters during 1999 to Defendant Wood at the 1909 Tebeau Street address in Waycross requesting that he sign the Bylaws, the Subscription Agreement for his shares, and

Consents by the Board of Directors and Shareholders in lieu of initial meetings of the company. The last such letter by Mr. Delgado to Defendant Wood was dated September 21, 1999.

20.

In a letter dated September 9, 1999, Plaintiff wrote to Mr. Delgado stating in part that Defendant Wood had represented to him that he had signed the corporate documents relating to BTC. Plaintiff came to learn that Defendant Wood never signed any of the documents required to complete the organization of BTC.

21.

Plaintiff's efforts to have Defendant Wood complete the organization process of BTC were unsuccessful, and BTC never became a vital, functioning corporation because its organization was never completed.

**D. Efforts to Promote BTC and Develop its Products**

22.

Defendant Wood acted in the name of BTC, promoted BTC, and associated himself with BTC throughout 1999 and into 2000 when he was dealing with Plaintiff. He did so despite not having signed various papers he had been sent for completing the organization of BTC.

23.

Defendant Wood also promoted BTC and associated himself with BTC while he worked with Eldon Mixon in late 1999 and 2000, and with Defendant NAT after its formation in June 2000. On numerous occasions, he identified himself to other persons and entities as the CEO of BTC and on other occasions as President of BTC and on other occasions as V.P. Development of BTC, and he otherwise frequently used the BTC name in connection with efforts to patent and develop various medical breathing devices.

24.

As financial needs arose, Plaintiff, pursuant to the Agreement, began depositing money into a business checking account ("the Account") at SunTrust Bank. The name on the Account was "Breathing Technologies Corp." and the account number was 9800291768. The first deposit by Plaintiff into the Account was on December 17, 1998, shortly after the Atlanta Meeting, in the amount of \$3,000.00. Plaintiff frequently made deposits into the Account after discussing matters with Defendant Wood.

**E. The Provisional Application Resulting Patents and Applications**

25.

In working with Plaintiff and as a result of progress made with the funds Plaintiff was depositing into the Account, Defendant Wood decided that he and Plaintiff needed to obtain a second patent, which decision resulted in a provisional patent application, No. 60/124,323, being filed with the USPTO on March 13, 1999 ("the Provisional Application"). Defendant Wood specifically told Plaintiff of this decision and enlisted his help.

26.

The Provisional Application subsequently resulted in the issuance of several patents, including but not limited to USP No. 6,478,026 ("the '026 Patent"), that issued on November 12, 2002, and USP No. 6,595,215 ("the '215 Patent"), that issued on July 22, 2003. A copy of the '026 Patent is attached as Exhibit "D." A copy of the '215 Patent is attached as Exhibit "E."

27.

In addition to the '026 Patent and the '215 Patent, several other patents have been issued that claim priority to the Provisional Application, and are otherwise derived from the efforts directed to the BTC Devices, these being: USP No. 6,776,162, USP No. 6,807,967, and USP No.



6,863,069 (these five patents, plus other patents and applications that have issued or might issue and claim priority from the Provisional Application, collectively hereinafter being, "the Provisional Application Resulting Patents and Applications").

28.

The ventilation interface that is disclosed and claimed in the '026 Patent ("the '026 Device") and the nasal ventilation interface that is disclosed and claimed in the '215 Patent ("the '215 Device"), were the subject of disclosures by Defendant Wood in February or March 1999, according to John W. Greenwald, Esq., the attorney who prepared the Provisional Application.

29.

Upon information and belief, Mr. Greenwald and Jason A. Bernstein, Esq., an attorney working with Mr. Greenwald, were counsel regarding the filing of the Provisional Application. Mr. Greenwald communicated with both Plaintiff and Defendant Wood, and Mr. Bernstein communicated with Defendant Wood. Both of these attorneys were associated with the law firm of Bernstein & Associates.

30.

The contents of the Provisional Application included a four page summary, two proposed claims and seven pages of drawings or figures.

31.

On April 5, 1999, by check number 1051 drawn on the Account, payment was made to Bernstein & Associates for filing fees associated with the Provisional Application. The language "Patent filing fees" was on the "FOR" line of this check, and the money used to make this payment was deposited into the Account by Plaintiff. Defendant Wood used additional funds from the Account to pay the legal fees and/or other expenses of Bernstein & Associates.

32.

As a result of the foregoing, Plaintiff has a rightful interest in the Provisional Application Resulting Patents and Applications.

**F. The Continued Promotion and Development of the BTC Devices**

33.

With the Provisional Application on file with the USPTO as of March 13, 1999, substantial additional efforts were undertaken by Defendant Wood and funded by Plaintiff relating to the medical breathing devices that were being developed and patented in the name of BTC. Commencing in December 1998 and continuing through much of 1999, Defendant Wood would write checks against the Account in order to pay for a variety of activities relating to his promotion of and association with BTC and developments that resulted in the '026 Device and the '215 Device and variations thereof (collectively, "the BTC Devices").

34.

Defendant Innomed wrongfully claims ownership to all right, title, and interest in the Provisional Application Resulting Patents and Applications.

35.

Defendant Wood worked with Ben Rubin of Technical Solutions, located in Jacksonville, Florida, who prepared drawings relating to the BTC Devices and provided them to Defendant Wood. Some of these drawings were provided to Plaintiff by Defendant Wood and included his handwritten remarks on them. Defendant Wood paid Technical Solutions for these drawings with funds drawn on the Account, as Check Nos. 1001, 1009, 1015, 1024, 1047 and an unnumbered check in December 1998 for \$500.00 indicate.

36.

Two of the Technical Solution drawings, dated December 18, 1998, and December 31, 1998, were included as part of the Provisional Application.

37.

Another company that Defendant Wood worked with and paid from the Account was 3 Dimensional Engineering, of Pompano Beach, Florida, relating to stereo lithography, as Check Nos. 1010, 1018, 1030, 1032, 1055, 1058 and 1080 indicate.

38.

As a result of the foregoing, Plaintiff has a rightful interest in the BTC Devices.

**G. FDA Approval of the Nasal Aire Device**

39.

Using funds from the Account, on or about February 11, 1999, Defendant Wood caused to have filed a 510(k) Pre-market Notification with the FDA to permit commercial marketing of the BTC Devices ("the 510(k) filing"). In the 510(k) filing, the BTC Devices were called the "Nasal-Aire." Defendant Wood listed "Breathing Technologies Corp." at the 1909 Tebeau Street address in Waycross, Georgia as the Applicant. The contact person on this application was listed as being "Tom Wood, CEO, Breathing Technologies Corp."

40.

The FDA assigned the number K990659 to the 510(k) filing. Defendant Innomed has used that same number as its FDA approval.

41.

One of the individuals that assisted with the 510(k) filing was Terry McMahon of ClinTrials Research, Inc., Research Triangle Park, North Carolina. In the 510(k) filing, Mr.

McMahon was identified as the Chief Device Regulatory Strategist of ClinTrials. By means of a check dated January 8, 1999 and drawn on the Account, check number 1002, payment in the amount of \$3,500.00 was made to ClinTrials Research for "FDA 510 (k) filing," as the "FOR" line on the check indicates. These funds came from deposits into the Account by Plaintiff.

42.

Another entity that assisted with the FDA 510(k) filing was JSL Consulting, Inc, which was owned by Jonathan Lee. Among other activities, Defendant Wood paid JSL Consulting from the Account regarding a deficiency letter that BTC received from the FDA on or about May 27, 1999. On or about July 7, 1999, Mr. Lee represented BTC during a teleconference with the FDA regarding the 510(k) filing, for the purpose of addressing the deficiency. Mr. McMahon also represented BTC during this teleconference. Defendant Wood also participated in the teleconference and was identified as the President/CEO of BTC. Subsequently, JSL Consulting undertook the testing necessary for addressing the deficiency, and arranged for submission of this information to the FDA on behalf of BTC by September 1999. By means of check dated July 23, 1999 and drawn on the Account, Check No. 1088, payment in the amount of \$1,344.00 was made to JSL Consulting for "FDA regulatory consulting," as the "FOR" line on the check indicates. By means of a check dated September 4, 1999 and drawn on the Account, Check No. 1114, payment in the amount of \$7,566.63 was made to JSL Consulting.

43.

The 510(k) filing was submitted to the USPTO to be included as part of the Provisional Application by Mr. Greenwald and/or Mr. Bernstein, of Bernstein & Associates.

44.

In a letter dated November 26, 1999, the FDA informed Defendant Wood of "Breathing Technologies, Corp." at 1909 Tebeau Street, Waycross, Georgia that the BTC Devices were approved for commercial marketing and sale. A true and accurate copy of said letter is attached hereto as Exhibit "F."

45.

As a result of the foregoing, Plaintiff has a rightful interest in the FDA approval of the Nasal Aire device.

**H. The Nasal-Aire Trademark**

46.

On or about April 20, 1999, a trademark application was filed with the USPTO for the word mark, Nasal-Aire ("the Nasal-Aire Trademark Application"). The Nasal-Aire Trademark Application was given Serial Number 75687118 by the USPTO. The applicant and owner of the Nasal-Aire Trademark Application was BTC. A true and correct copy of said application is attached hereto as Exhibit "G."

47.

The attorney of record for the Nasal-Aire Trademark Application was Carolyn Herman of 1831 N. 3<sup>rd</sup> St., Jacksonville Beach, Florida 32250. Ms. Herman and Mr. Rubin are understood to be husband and wife. Ms. Herman was paid by Defendant Wood from the Account, by check number 1048, dated April 5, 1999. The "FOR" line on the check states, "Trademark."

48.

As a result of the foregoing, Plaintiff has a rightful interest in the Nasal-Aire Trademark.

**I. The First Commercial Device**

49.

At the end of 1998 and for much of 1999, Defendant Wood paid himself monies from the Account for a wide variety of activities on behalf of BTC, relating to the BTC Devices, but not directly tied to actual expenses. The payment of these monies was for Defendant Wood to promote and develop the BTC Devices.

50.

In March of 1999, on or about March 17-20, 1999, Plaintiff and Defendant Wood attended an industry trade show sponsored by the American Association of Respiratory Care to promote the activities of BTC.

51.

By the summer of 1999, the design of the first embodiment of the BTC Devices that was intended for use in a commercial product was essentially finalized ("the First Commercial Device") by Defendant Wood. The First Commercial Device was the result of the promotion and work of Defendant Wood and the promotion, time and money invested by Plaintiff.

52.

The development of the First Commercial Device was of great value to Plaintiff and Defendant Wood.

53.

In the summer of 1999, Defendant Wood having the First Commercial Device, contacted two businesses, Drafting Designs and Designer Services, both of Stuart, Florida, for purposes of preparing the computer aided design (CAD) drawings and room temperature vulcanization

(RTV) models that would reflect the First Commercial Device. Defendant Wood contacted Drafting Designs and Designer Services using the BTC name.

54.

Defendant Wood subsequently received CAD drawings that were prepared by Mr. Carson, who owned Drafting Designs. These drawings were directed to the First Commercial Device and entitled "Nasal-Air Breather." These drawings provide on their face that the design is "proprietary to . . . Breathing Technologies, 1909 Tebeau St., Waycross, Georgia," which is the same address listed on the Account and also the address then listed with the Georgia Secretary of State for "Breathing Technologies of Georgia, Inc."

55.

There existed at least two alleged embodiments of the First Commercial Device by October of 1999. One of these First Commercial Devices had bleed ports in the connectors between the cannula and the supply tubes. The other had bleed ports that were integral to the cannula and generally axially aligned with the nasal inserts.

56.

Defendant Wood subsequently received RTV models through Michael Theim, who was a Vice President of Designer Services. On August 30, 1999, by means of check number 1108 drawn on the Account, Defendant Wood paid Designer Services for some of its services.

57.

Commencing in late 1998 and throughout much of 1999, Plaintiff deposited funds into the Account in accordance with the terms of the Agreement. Throughout this time period, Defendant Wood was continuing to ask for, accept, and use the funds Plaintiff was depositing

into the Account. During this time, Plaintiff had no reason to think that Defendant Wood was not going to sign the appropriate papers regarding the organization of BTC.

58.

Plaintiff's monetary investments in Defendant Wood's efforts to develop further the BTC Devices continued until September 9, 1999. The total amount of Plaintiff's monetary investments was approximately \$47,000.00.

59.

The development of the First Commercial Device was of great value and the property, at least in part, of Plaintiff.

**J. The Involvement by Eldon Mixon Commences and the Waycross Meeting**

60.

Late in 1999, Defendant Wood informed Plaintiff over the telephone that he was seeking financial assistance from his father-in-law, whom Plaintiff subsequently learned was Mr. Mixon. Defendant Wood assured Plaintiff that his father-in-law knew of Plaintiff's interest in the BTC Devices, including the '506 Patent and the Provisional Application, based on his investment of approximately \$47,000, plus his time and energy regarding BTC.

61.

Sometime during late 1999, Defendant Wood ceased frequent communications with Plaintiff regarding his efforts to develop the BTC Devices and his other undertakings relating to BTC. On at least one occasion, Defendant Wood referred to Plaintiff's investment in BTC and the patents that were to be owned by BTC as a "loan," and Defendant Wood also told Plaintiff that Mr. Mixon would insure that Plaintiff was paid back.



62.

Plaintiff's efforts to communicate with Defendant Wood during this time were largely unsuccessful, which Plaintiff initially attributed to a busy travel schedule and other obligations of Defendant Wood. With time, however, Plaintiff became concerned. Eventually, concerned over the characterization as a "loan" and that he had never met or communicated with Mr. Mixon, Plaintiff asked Defendant Wood to set up a meeting between the three of them in Waycross in the spring of 2000.

63.

On March 6, 2000, a meeting took place in Waycross between Plaintiff and Defendant Wood ("the Waycross Meeting"). The Waycross Meeting was supposed to occur at a trailer owned by Mr. Mixon, but when Plaintiff arrived there, he found that it was locked up. Plaintiff was able to reach Defendant Wood by phone and they went to a restaurant in Waycross.

64.

At the Waycross Meeting, Defendant Wood initially told Plaintiff that Mr. Mixon was not available. However, Defendant Wood promised that Mr. Mixon would be available later that day. During the Waycross Meeting, Plaintiff discussed with Defendant Wood his ownership in BTC and the patents that were to be transferred into the corporation. Told that his investments were "loans," Plaintiff showed Defendant Wood the Agreement that they had executed. When Plaintiff said that he wanted to discuss the Agreement with Mr. Mixon, Defendant Wood became visibly angry. Defendant Wood's show of anger was a tactic he used to prevent Plaintiff from inquiring about matters further. Defendant Wood denied Plaintiff access to Mr. Mixon during the Waycross Meeting. Thus, Plaintiff was never able to meet with Mr. Mixon during his trip to Waycross.

65.

During the Waycross Meeting, Defendant Wood told Plaintiff that marketing the BTC Devices was hopeless without a least \$1,000,000 more of investment funds and that, for this reason, he and Mr. Mixon were instead working on a sleep laboratory in Waycross where they would study sleep habits relating to sleep apnea. Defendant Wood knew that these statements were false, and he intended for Plaintiff to rely on them, with the intent that Plaintiff be dissuaded from further pursuing any of his interests in the matters relating to BTC.

66.

During the Waycross Meeting, Plaintiff also learned that Defendant Wood was separated from his wife Laura and had moved out of the house. Plaintiff asked for a new telephone number so that he could reach Defendant Wood, but Defendant Wood said he had only a cell phone number that he had been using previously.

67.

After returning home on the evening of March 6, 2000, Plaintiff made additional efforts to contact Defendant Wood in order to follow up and figure out what he was doing.

68.

In view of the Waycross Meeting, events leading to the Waycross Meeting, and being unable to reach Defendant Wood or have him return Plaintiff's calls, Plaintiff concluded that Defendant Wood had in fact abandoned work on the BTC Devices and all patent applications relating thereto. At this point, Plaintiff reasonably relied on Defendant Wood's false statements about running a sleep laboratory and the abandonment of the work on the BTC Devices and all patent applications relating thereto.

69.

Defendant Wood, however, had not abandoned the work on the BTC Devices, the Provisional Application, the marketing of the First Commercial Device, or any other undertakings relating to the activities of BTC.

**K. Defendant Wood's Continued Efforts After Misleading Plaintiff**

70.

In September 1999, Mr. Mixon provided a check to Laura Wood in the amount of \$23,379.16. The check was written on an account of MCI d/b/a Breathing Technologies. The fourth line of the check states, "purchase of Patent, Patent Rights & Trademark Nasal Aire TM." Defendant Wood never advised Plaintiff of this transaction.

71.

Commencing by at least the end of 1999 and throughout at least the first half of 2000, Defendant Wood along with Mr. Mixon were attempting to sell at great profit the technology and intellectual property that was the subject of the Agreement, all of which was unknown to Plaintiff.

72.

Throughout this time, at the end of 1999 and early 2000, Defendant Wood continued to use the BTC name, holding himself out as the V.P. of Development and/or the President of BTC. Mr. Mixon held himself out to be a Vice President of BTC.

73.

On information and belief, in December 1999, and using the BTC name, Defendant Wood commenced negotiations with AirSep Corp. ("AirSep"), of Buffalo, New York, which would provide sales and marketing capabilities. Mr. Mixon assisted Defendant Wood in these

negotiations. Defendant Wood used the RTV molds of the First Commercial Device that had been made by Designer Services, and supplied AirSep with several samples.

74.

On information and belief, in early 2000, and using the BTC name, Defendant Wood commenced negotiations with Radiation Centers of America ("RCA"), of Ft. Lauderdale, Florida, to sell BTC, including its products, patents and names. The two officers of RCA involved in these negotiations were Bryan Miller and Dr. Oscar Ramirez. Defendant Wood was assisted in these negotiations by Mr. Mixon, who held themselves out as the owners of BTC. Defendant Wood was also assisted by his brother, David Wood and several others including Mr. Lee, of JSL Consulting, and Jason M. Baker, then of Raymond James Financial Services. Defendant Wood used the RTV molds of the First Commercial Device that had been made by Designer Services, and supplied RCA with samples.

75.

As a result of the foregoing negotiations with AirSep and RCA, Defendant Wood confirmed that the property of Plaintiff was of great value and undertook further efforts to conceal their activities from Plaintiff.

76.

On information and belief, in early 2000, and using the BTC name, Defendant Wood commenced negotiations with various other entities, besides AirSep and RCA, which would provide sales and marketing capabilities.

77.

During the first half of 2000, Defendant Wood had various communications with other individuals and entities regarding the First Commercial Device, and while using the BTC name.

These discussions included those with physicians and others who gave testimonials to Defendant Wood.

78.

On March 13, 2000, the patent application that directly led to the issuance of the '026 Patent, which claimed priority to the Provisional Application, was filed by Bernstein & Associates, P.C. As part of said application, Defendant Wood represented that the patent application had not been assigned, granted, conveyed, or licensed to any person, concern or organization, nor was there an obligation under contract or law to assign, grant, convey or license any rights in the invention. At the time, Plaintiff was not advised of this March 13, 2000 filing.

79.

In early May 2000 and after Plaintiff had undertaken actions to determine the activities of Defendant Wood, Defendant Wood undertook additional steps to hide his activities from Plaintiff. Among these steps was to cease using the BTC name, and instead function under the name, Nasal-Aire Technologies, Inc. ("NAT"), which was incorporated in Georgia around June 2000. Thus, for example, AirSep was advised in May 2000 that Defendant Wood was now a Vice President of NAT, which was a corporation set-up especially for the Nasal-Aire device, which was the name used by Defendant Wood to identify the First Commercial Device.

80.

In view of Defendant Wood's position and authority at Defendant NAT, Defendant NAT had at all times actual or constructive knowledge and notice of the claims and interests of Plaintiff in the '506 Patent, the Provisional Application, the Provisional Application Resulting Patents and Applications, the Nasal-Aire Trademark, and the FDA 510(k) Registration for the Nasal Aire device.

81.

During the second half of 2000, and the first half of 2001, Defendant Wood undertook various activities from which he sought to exploit for financial gain the development efforts undertaken by BTC and funded by Plaintiff commencing in late 1998 and continuing in 1999, including the development of the First Commercial Device. Defendant Wood operated under the NAT name, or other names, including the names Zap Online and Innomed.

82.

During the fall of 2000, Defendant Wood participated in developing a scheme to greatly profit from the sale of property owned by Plaintiff. The scheme involved fraudulent stock sales. Participants in this scheme included Defendant Wood, David Wood, the brother of Defendant Wood, Clinton Walker and Jason Baker.

83.

In November 2000, Defendant Wood engaged the services of Mr. Greenwald to fraudulently transfer the '506 Patent from NAT to Zap Online.

**L. Commencing September 27, 2002, Plaintiff Begins Learning of Defendant Wood's Deception**

84.

For well over two years, Plaintiff knew nothing about the activities of Defendant Wood regarding the BTC Devices, the '506 Patent, the Provisional Application Resulting Patents and Applications, the 510(k) filing for the Nasal Aire device, and the Nasal-Aire Trademark Application, and based on the representations of Defendant Wood the Plaintiff had reasonably concluded that all of these activities were abandoned.

85.

Then, on September 27, 2002, Plaintiff spoke with Ms. Wood on the telephone. An acquaintance of Ms. Wood, with a first name of Sabrina, called Plaintiff and told Plaintiff that he should speak with Ms. Wood. When he did, Ms. Wood told Plaintiff that Defendant Wood had transferred the interface technology to a company that was actively marketing and selling a nasal ventilation device.

86.

Plaintiff immediately began investigating matters. Plaintiff found out that a lawsuit had been filed by Defendant NAT against Defendant Wood in the Superior Court of Ware County, Civil Action Number 01V-015 ("the NAT/Wood Litigation"). The NAT/Wood Litigation had been filed on or about January 5, 2001, and a temporary restraining order and permanent injunction and money damages were sought by NAT ("the NAT/Wood Complaint").

87.

In the NAT/Wood Complaint, NAT stated that "Thomas J. Wood was Vice President of Nasal Aire Technologies, Inc." The NAT/Wood Complaint further stated that Defendant Wood had been removed as Vice President on November 1, 2000, and thereafter had executed an unauthorized patent assignment of November 10, 2000 to Zap Online, Corp. As part of the relief sought, NAT demanded \$350,000 and a permanent injunction against Defendant Wood.

**M. Plaintiff Learns Of The March 2001 Asset Purchase Agreement**

88.

After September 27, 2002, Plaintiff also learned that, in a March 13, 2001 Asset Purchase Agreement ("the APA"), assets that were purportedly owned by NAT were sold to E. Barter Solutions, Inc. (prior to its name being changed to Innomed Technologies, Inc.). In return, as

part of the consideration for entering the APA, Defendant NAT received cash in the amount of at least \$430,000.00. The date of the APA was one day prior to a permanent injunction hearing set for March 14, 2001 in the Superior Court of Ware County that, if a permanent injunction had been granted, would have enjoined Defendant Wood from taking any further actions associated with a nasal ventilation system allegedly owned by Defendant NAT.

89.

Plaintiff also learned that as part of the settlement of the NAT/Wood Litigation, Defendant Wood received stock in Defendant Innomed in exchange for fraudulently transferring intellectual property to Defendant Innomed, including the '506 Patent.

90.

Plaintiff did not know about the fraudulent transfer of any intellectual property allegedly owned by Defendant Wood, including that fraudulently transferred in connection with the APA, until he began investigating matters after September 27, 2002.

91.

As a result of the APA, Defendant Innomed wrongfully claims ownership to the '506 Patent and the Provisional Application Resulting Patents and Applications.

92.

As part of the APA, acquiring the ownership of the '506 Patent was of great concern to Defendant Innomed. Therefore, in connection with the APA, Mr. Bernstein of Bernstein & Associates, P.C. was hired to draft an opinion regarding the assignment of the '506 Patent from Defendant Wood and Defendant NAT to Defendant Innomed (at the time E. Barter Solutions, Inc.), and that the '506 Patent was free of all liens, pledges, or other encumbrances. Said opinion was provided to Defendant Innomed in a letter dated April 5, 2001.



93.

Defendant Wood represented in connection with signing the APA, at Section 9.5, that he knew of no entity or persons that might lay claim to any of the rights or benefits of the '506 Patent. This representation was false, and Defendant Innomed (at the time E. Barter Solutions, Inc.) had notice that it was false.

94.

Prior to the execution of the APA, Defendant Innomed (at the time E. Barter Solutions, Inc.) had seen and examined various drawings of the BTC Devices with "Breathing Technologies" written on them and various letters to Defendant Wood of "Breathing Technologies, Corp." concerning the BTC Devices.

95.

As of the time of the APA, Defendant Innomed (at the time E. Barter Solutions, Inc.) had seen and examined BTC's 510(k) approval, K990659. (Exhibit "F" hereto.) The 510(k) approval was attached as Exhibit 8.2(k) of the APA.

96.

As part of the consideration for entering the APA, at Section 13, Defendant Wood received a consulting agreement and 49% of the stock in the company that is now known as Defendant Innomed. Defendant Wood, for a period of 36 months, would formulate and devise enhancements and improvements to the '506 Patent and assist in framing Defendant Innomed's business plan, and in the overall development of the '506 Patent technology.

97.

Upon information and belief, Defendant Wood's purported stock in Defendant Innomed has never been issued to him in certificate form. Furthermore, upon information and belief,

Defendant Wood does not possess any documentation beyond the APA that shows his purported stock ownership in Defendant Innomed.

98.

Defendant Wood was an Agent of Defendant Innomed (or of E. Barter Solutions, Inc.) beginning at the time of the APA and through, at least, December 2004.

99.

In view of Defendant Wood's position and authority at Defendant Innomed, Defendant Innomed had at all times actual or constructive knowledge and notice of the claims and interests of Plaintiff in the '506 Patent, the Provisional Application, the Provisional Application Resulting Patents and Applications, the 510(k) filing for the Nasal Aire device, and the Nasal-Aire Trademark Application

100.

On or before March 13, 2001, Defendant Innomed (at the time E. Barter Solutions, Inc.) had, at a minimum, constructive notice that Plaintiff had equitable ownership claims to the intellectual property that it was acquiring as part of the APA. This notice came from documents and things that Defendant Innomed (at the time E. Barter Solutions, Inc.) received either in connection with the APA or through documents and things that it and its agents received from Defendant Wood prior to the execution of the APA. Furthermore, this notice also came from matters that Defendant Innomed learned from those with whom it dealt in the process of negotiating and executing the APA, and from matters that were available to it as a matter of public record.

101.

If not prior to the time of the APA, then shortly thereafter, Defendant Innomed learned of the Provisional Application and the then-pending application, claiming priority to the Provisional Application, that subsequently resulted in the issuance of the '026 Patent. Defendant Innomed (at the time E. Barter Solutions, Inc.) obtained a written assignment from Defendant Wood, dated May 22, 2001, to the application.

102.

Even a superficial review of the Provisional Application, or simply contacting Mr. Bernstein, would have led Defendant Innomed to the understanding that the Provisional Application was prepared and filed on behalf of BTC. A simple and inexpensive corporate computer search would have uncovered the existence of Breathing Technologies of Georgia, Inc. and its Articles of Incorporation and the fact that Plaintiff was listed as its Registered Agent. Defendant Innomed either recklessly or intentionally did not undertake such investigations, or undertook them and learned of Plaintiff's interest prior to the APA.

**N. Fraudulent Transfer of the Nasal-Aire Trademark**

103.

In early March 2000, Defendant Wood was notified that a notice of Allowance was received for the Nasal-Aire Trademark. On or about June 1, 2000, Defendant NAT was formed and registered with the Georgia Secretary of State. Mr. Mixon was an officer and CEO of NAT, and Defendant Wood was an officer and held himself out to be a vice president of NAT. On information and belief, Defendant Wood, acting individually and as an agent of NAT, instructed Ms. Herman to abandon the Nasal-Aire Trademark Application and the application was abandoned on or about August 30, 2000.

104.

Defendant Wood and Defendant NAT abandoned the Nasal-Aire Trademark Application with the intent of re-filing the application in a different name. Unbeknownst to Plaintiff, on or about January 16, 2001, the Nasal-Aire Trademark Application was refilled identifying Defendant NAT as the owner. The re-filed Nasal-Aire Trademark Application was assigned Serial No. 76194461.

105.

The Nasal-Aire Trademark Application was fraudulently conveyed to Defendant Innomed by Defendant Wood and Defendant NAT as part of the APA in March of 2001. .

106.

The Nasal-Aire Trademark Application was published for opposition by the USPTO on August 21, 2001. The Nasal Aire word mark was registered on October 22, 2002 as Registration No. 2640687, and it is now claimed to be owned by Defendant Innomed. A true and correct copy of said registration is attached hereto as Exhibit "H."

107.

Plaintiff had no knowledge of the fraudulent transfer of the Nasal-Aire Trademark Application until after September 27, 2002.

**O. Fraudulent Transfer of the FDA 510(k) Registration for the Nasal Aire Device**

108.

On information and belief, in the spring of 2000, Defendant Wood began to undertake efforts to fraudulently transfer the FDA 510(k) approval for the Nasal Aire device to Defendant NAT.

109.

On information and belief, Defendant Wood and Defendant NAT sought the assistance of consultants Jonathan Lee and Terry McMahon to assist in fraudulently transferring the FDA 510(k) approval for the Nasal Aire device from BTC to NAT.

110.

Subsequently, the FDA changed its Device Listing records to reflect that Defendant NAT was the Owner and Registered Establishment for the Nasal Aire device.

111.

The FDA 510(k) Registration for the Nasal Aire device was fraudulently conveyed to Defendant Innomed by Defendant Wood and Defendant NAT as part of the APA in March of 2001. At the time of the conveyance, all of the Defendants knew or should have known that Plaintiff rightfully had an ownership interest in the FDA 510(k) Registration.

112.

Plaintiff had no knowledge of the fraudulent transfer of the FDA 510(k) Registration until after September 27, 2002.

**P. Continuing Work on the Provisional Application Resulting Patents and Applications**

113.

On May 24, 2001, the USPTO issued an Office Action that was responsive to the filing of the patent application filed on March 13, 2000, claiming priority to the Provisional Application which led to the issuance of the '026 patent.

114.

On or about June 1, 2001, Defendant Innomed (at the time E. Barter Solutions, Inc.) filed the assignment to the patent application that led to the issuance of the '026 patent with the USPTO. Defendant Innomed made this filing knowing that the patent application had been fraudulently conveyed from Defendant Wood to Defendant Innomed.

115.

Mr. Bernstein apparently responded to the May 24, 2001 Office Action on October 24, 2001, but this was not recorded by the USPTO until January 8, 2002.

116.

On or about February 27, 2002, Defendant Innomed (at the time E. Barter Solutions, Inc.) filed a new Power of Attorney relating to the patent application, filed on March 13, 2000, that led to the issuance of the '026 patent, wherein the Litman Law Offices, Ltd., Richard C. Litman, Esq., took over the prosecution of the application, along with John R. Weinzal, Esq. These attorneys also assisted Defendant Innomed in filing the patent application that led to the issuance of the '215 patent, which also claimed priority to the Provisional Application.

117.

Various other patent applications have been filed by various lawyers representing Innomed, all of which claim priority to the Provisional Application.

**Q.     The Florida Patent Litigation and the Altered Drawing**

118.

While wrongfully holding possession of the Provisional Application Resulting Patents and Applications, Defendant Innomed and Defendant Wood intentionally undertook actions that they knew had the likelihood of greatly damaging the Plaintiff.