

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:05-cv-02325-WYD-MJW

A MAJOR DIFFERENCE, INC.,
a Colorado corporation,

Plaintiff,

v.

ERCHONIA MEDICAL, INC., an Arizona corporation,
ERCHONIA MEDICAL LASERS, L.L.C., an Arizona limited liability company,
STEVEN SHANKS, an individual,
KEVIN TUCEK, an individual,
RICHARD AMY, an individual,
JOHN BRIMHALL, an individual, and
DANIEL MURPHY, an individual,

Defendants.

ERCHONIA MEDICAL, INC., an Arizona corporation,
ERCHONIA PATENT HOLDINGS, LLC, an Arizona limited liability company,

Counterclaimants and Third Party Plaintiffs,

v.

A MAJOR DIFFERENCE, INC., a Colorado corporation,
ROBERT E. MORONEY,
ROBERT E. MORONEY, L.L.C., a Colorado limited liability company,
MIKI SMITH,
KMS MARKETING, INC., a Colorado corporation, and
STARGATE INTERNATIONAL INC., a Colorado corporation,

Counterdefendants and Third Party Defendants.

**A MAJOR DIFFERENCE, INC.'S FIRST AMENDED COMPLAINT
AND JURY DEMAND**

Plaintiff A Major Difference, Inc. (“AMD”), for its Complaint against Defendants Erchonia Medical, Inc. (“Erchonia Medical”), Erchonia Medical Lasers, L.L.C. (“EML”), Steven Shanks (“Shanks”), Kevin Tucek (“Tucek”), Richard Amy (“Amy”), John Brimhall (“Brimhall”) and Daniel Murphy (“Murphy”) (sometimes collectively “Defendants”), alleges as follows:

I. THE PARTIES

1. AMD is a Colorado corporation with its principal place of business located at 2950 S. Jamaica Court, Aurora, Colorado 80014.

2. Erchonia Medical is an Arizona corporation with its principal place of business at 4751 East Indigo Street, Mesa, Arizona 85205.

3. EML is an Arizona limited liability company with its principal place of business at 4751 East Indigo Street, Mesa, Arizona 85205.

4. Shanks is an individual residing at 1365 South Sandstone Street, Gilbert, Arizona 85296. Mr. Shanks is an officer, director and substantial shareholder in Erchonia Medical and EML.

5. Tucek is an individual residing at 1640 South Cholla Street, Gilbert, Arizona 85233. Tucek is an officer, director and substantial shareholder in Erchonia Medical and EML.

6. Amy is an individual residing at 4270 Mount Davis, San Diego, California 92117. Amy is a chiropractor who teaches seminars and/or otherwise sells product on behalf of Erchonia Medical.

7. Brimhall is an individual residing at 1618 East Fairfield Street, Mesa, Arizona 85203. Brimhall is a chiropractor who teaches seminars and/or otherwise sells product on behalf of Erchonia Medical.

8. Murphy is an individual residing at 12546 Shadow Brook Court, Auburn, California 95602-9309. Murphy sells product on behalf of Erchonia Medical at seminars sponsored by Erchonia Medical.

II. JURISDICTION AND VENUE

9. The present action is for willful infringement of U.S. Patent No. 5,272,716 (“the ‘716 patent”), generally claiming a “Hand Held Laser Apparatus” and now owned by AMD. The Court has subject matter jurisdiction over these claims pursuant to at least 28 U.S.C. §§ 1331 and 1338.

10. Erchonia Medical and EML generally conduct business in this judicial district and have offered for sale and sold infringing products in this judicial district. Amy, Brimhall and Murphy also generally conduct business in this judicial district by conducting seminars in this judicial district at which they have used, demonstrated, offered for sale and/or sold infringing products. Shanks and Tucek have actively directed, induced and contributed to Erchonia Medical’s, EML’s, Amy’s, Brimhall’s and Murphy’s infringing activities, including their infringing activities conducted within this judicial district. Shanks and, upon information and belief, Tucek, have also attended Erchonia Medical-sponsored seminars held in this judicial district where infringing products were demonstrated, offered for sale and/or sold. Upon information and belief, Shanks and Tucek have also themselves demonstrated and/or used and/or offered for sale and/or sold infringing products in this judicial district. All Defendants thus conduct business within this judicial district and are subject to personal jurisdiction in this judicial district.

11. The Court is a proper venue for this action under 28 U.S.C. §§ 1391(b) and (c).

III. GENERAL ALLEGATIONS

12. AMD is in the business of marketing a variety of healthcare products. Among these are therapeutic laser devices which include multiple semiconductor laser diodes housed within a hand-held wand.

13. The '716 patent is valid and enforceable. The '716 patent covers, among other things, a device having at least two semiconductor laser diodes housed within a hand-held wand.

14. AMD is the owner, by assignment dated November 10, 2005, of the '716 patent. Pursuant to that assignment, AMD has the right to pursue and collect all damages, injunctive relief and other remedies for past, current and future infringement of the '716 patent.

15. Erchonia Medical has made, offered for sale and sold in the United States a PL4 laser, PL5 laser and Pro-Performance laser, and currently makes, offers for sale and sells in the United States a PL5 laser and Pro-Performance laser. Each of these products include at least two semiconductor laser diodes housed within a hand-held wand and infringes claims of the '716 patent.

16. EML has made, offered for sale and sold, and currently makes, offers for sale and sells in the United States a EML laser and a DermaLaser. Each of these products include at least two semiconductor laser diodes housed within a hand-held wand and infringes claims of the '716 patent.

17. Upon information and belief, Erchonia Medical and/or EML has made, offered for sale and/or sold in the United States, and is currently making, offering for sale and selling in the United States, a Base Station laser product. Upon information and belief, the Base Station laser product includes at least two semiconductor diodes housed within a hand-held wand and infringes claims of the '716 Patent.

18. AMD and Erchonia Medical directly compete against each other for the sale of laser products.

19. Amy, Brimhall and Murphy have used, demonstrated, offered for sale and/or sold at least PL4 lasers, PL5 lasers and Pro-Performance lasers.

20. Shanks and Tucek have used in the United States the PL4 laser, PL5 laser, Pro-Performance laser, DermaLaser and EML laser.

IV. FIRST CLAIM FOR RELIEF
(Patent Infringement - All Defendants)

21. AMD incorporates paragraphs 1 through 20 as though fully set forth herein.

22. Defendants have infringed upon the '716 patent.

23. At least Erchonia and EML have been on notice of the '716 patent since at least as early as January 4, 2005.

24. These acts of infringement have caused and are continuing to cause irreparable injury to AMD, which has no adequate remedy at law.

25. Defendants' conduct will continue to damage AMD unless enjoined by this Court.

26. AMD is entitled to judgment against Defendants in an amount to be proven at trial.

V. SECOND CLAIM FOR RELIEF
(Contributory Patent Infringement - Shanks and Tucek)

27. AMD incorporates paragraphs 1 through 26 as though fully set forth herein.

28. Shanks and Tucek are principals of Erchonia and EML and are actively involved in the activities of Erchonia Medical and EML.

29. Shanks and Tucek knew or should have known that Erchonia Medical's and EML's activities infringe upon the '716 patent.

30. Despite such knowledge, Shanks and Tucek have directed Erchonia Medical and EML to continue their infringing activities.

31. Such activities constitute contributory patent infringement.

32. The activities of Shanks and Tucek have caused and are continuing to cause irreparable injury to AMD, which has no adequate remedy at law. The activities of Shanks and Tucek will continue to damage AMD unless enjoined by this Court.

33. AMD is also entitled to judgment against Shanks and Tucek in an amount to be proven at trial.

VI. THIRD CLAIM FOR RELIEF
(Induced Infringement - Shanks, Tucek, Brimhall, Amy and Murphy)

34. AMD incorporates paragraphs 1 through 33 as though fully set forth herein.

35. Shanks, Tucek, Brimhall, Amy and Murphy have encouraged others to use and purchase the PL4 laser, PL5 laser, Pro-Performance laser, EML laser and/or DermaLaser. Such activities constitute inducement of infringement of the '716 patent.

36. The acts described above have caused and are continuing to cause irreparable injury to AMD, which has no adequate remedy at law. The acts described above will continue to damage AMD unless enjoined by this Court.

37. AMD is also entitled to judgment against Shanks, Tucek, Brimhall, Amy and Murphy in an amount to be proven at trial.

VII. PRAYER FOR RELIEF

WHEREFORE, AMD prays that the Court enter an Order for Judgment as follows:

A. That Defendants, their agents, servants, officers, directors, employees, attorneys, privies, representatives, successors, assigns and parent and subsidiary entities, and

any and all persons in act of concert or participation with any of them be preliminarily and permanently enjoined from any and all acts of infringement of the '716 patent, including making, using, selling, offering for sale, advertising, marketing or promoting the sale of the PL4 laser, PL5 laser, Pro-Performance laser, EML laser, the DermaLaser and/or the Base Station, or any substantially similar laser sold, advertised, marketed or promoted under a different name;

- B. that the Court award AMD damages in an amount to be proven at trial, but not less than damages based upon a reasonable royalty;
- C. that the Court award treble damages, pursuant to 35 U.S.C. § 284; and
- D. that such other and further preliminary and permanent relief be awarded to AMD as the Court deems appropriate.

VIII. JURY DEMAND

AMD demands a jury trial on all issues so triable.

Respectfully submitted,

Dated: June 2, 2006

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June, 2006, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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