

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

ENCORE MEDICAL, LP,)
VITALSTIM, LLC, and ESD, LLC)
)
Plaintiffs,)
)
v.)
)
TERESA P. BIBER,)
)
Defendant.)

CASE NO. 03-61160-CIV-GOLD/SIMON

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U.S. DISTRICT COURT
S.D. OF FLA - MIA
D.C.

FIRST AMENDED COMPLAINT FOR PATENT INFRINGEMENT

Encore Medical, LP ("Encore") hereby amends its Complaint as of right before Defendant has filed a responsive pleading and adds as co-Plaintiffs VitalStim, LLC ("VitalStim") and ESD, LLC ("ESD"). For the Plaintiffs' claim against the Defendant, Teresa P. Biber ("Biber"), Plaintiffs state as follows:

Jurisdiction

1. This is an action for patent infringement under the laws of the United States, Title 35, United States Code. Subject matter jurisdiction and venue are based on §§1331, 1338(a), 1391(b), and/or 1400(b) of Title 28, United States Code.

2. Biber is a resident of this judicial district, and therefore this Court has personal jurisdiction over Biber and venue is proper in this Court.

Parties

3. Encore is a limited partnership organized under the laws of the State of Delaware, whose principal place of business is located at 9800 Metric Boulevard, Austin, Texas 78758.

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4. VitalStim is a limited liability company organized under the laws of the State of Ohio, whose principal place of business is 3011 Kersdale Road, Pepper Pike, Ohio 44124.

5. ESD is a limited liability company organized under the laws of the State of Ohio, whose principal place of business is 3011 Kersdale Road, Pepper Pike, Ohio 44124.

6. ESD is the entity to which the original inventors of the patents in suit (hereinafter, collectively, "the VitalStim patents") assigned the patents. ESD gave Dysphagia, LLC an exclusive license under the VitalStim patents. Dysphagia, LLC subsequently changed its name to VitalStim, LLC. Encore is VitalStim's exclusive sublicensee under the VitalStim patents.

7. Biber is a resident of the State of Florida and of this judicial district, and may be served with process at Cleveland Clinic Hospital, 3100 Weston Road, Weston, Florida 33331.

**The Patents In Suit
("The VitalStim Patents")**

8. United States Patent No. 5,725,564 ("the '564 Patent") entitled "Method and Apparatus for Treating Dysphagia with Electrical Stimulation" duly issued March 10, 1998. A copy of the '564 Patent is attached as Exhibit 1.

9. United States Patent No. 5,891,185 ("the '185 patent") entitled "Method and Apparatus for Treating Oropharyngeal Disorders with Electrical Stimulation" duly issued April 6, 1999. A copy of the '185 Patent is attached as Exhibit 2.

10. United States Patent No. 5,987,359 ("the '359 Patent") entitled "Method for Treating Dysphagia with Electrical Stimulation" duly and legally issued on November 16,

1999. A copy of the '359 Patent is attached as Exhibit 3.

11. United States Patent No. 6,104,958 ("the '958 Patent") entitled "Device for Treating Dysphagia with Electrical Stimulation" duly issued August 15, 2000. A copy of the '958 Patent is attached as Exhibit 4.

12. United States Patent No. 6,198,970 ("the '970 Patent") entitled "Method and Apparatus for Treating Oropharyngeal Respiratory and Oral Motor Neuromuscular Disorders with Electrical Stimulation" duly issued March 6, 2001. A copy of the '970 Patent is attached as Exhibit 5.

Claims for Patent Infringement

13. Biber has infringed one or more claims of one or more of the VitalStim Patents, in violation of 35 U.S.C. §271(a), by practicing the methods of one or more claims of the VitalStim Patents.

14. Biber has infringed one or more claims of one or more of the VitalStim Patents, in violation of 35 U.S.C. §271(b), by actively inducing the infringement of one or more claims of the VitalStim Patents by others.

15. Notice of infringement of the VitalStim Patents has been given to Biber.

16. Biber's infringement of the VitalStim Patents has been willful and deliberate.

17. Biber's infringement of the VitalStim Patents has caused Encore, VitalStim and ESD to suffer irreparable harm for which there is no adequate legal remedy.

Consequently, Encore, VitalStim and ESD are entitled to injunctive relief enjoining and restraining Biber from committing further acts of infringement.

18. Encore, VitalStim and ESD have suffered damages as a direct and proximate

result of Biber's infringement of the VitalStim Patents, which has been willful.

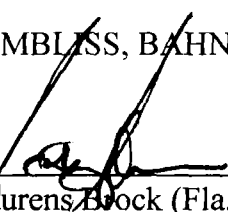
WHEREFORE Encore, VitalStim and ESD pray for judgment and relief against Biber, including:

- A. Adjudging that Biber has infringed one or more claims of the VitalStim Patents;
- B. Issuing a Preliminary Injunction, followed by a Permanent Injunction against Biber, and those persons in active concert or participation with Biber who receive notice of the injunction, from continuing acts of infringement of the VitalStim Patents;
- C. Adjudging that an accounting be had for damages caused by Biber's infringement, together with prejudgment and post-judgment interest;
- D. Adjudging that Biber is a willful infringer and trebling the aforesaid damages pursuant to 35 U.S.C. § 284;
- E. Adjudging that this case is an exceptional case and awarding Encore, VitalStim and ESD their costs, expenses, and reasonable attorney's fees pursuant to 35 U.S.C. § 285; and
- F. Such other and further relief as this Court may deem just and proper.

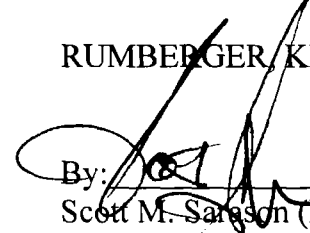
Dated this 16th day of July, 2003.

Respectfully submitted,

CHAMBLISS, BAHNER & STOPHEL, P.C.

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