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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MEDI-TEMP, LLC, an Arizona company,

Plaintiff,

v.

CVS PHARMACY, INC., a Rhode Island
corporation; RITE-AID CORPORATION,
a Delaware corporation; and THERA-
MED, INC., a Texas corporation;

Defendants.

No. CV05-3241-PCT-JAT

**CONSOLIDATED AMENDED
COMPLAINT AND DEMAND FOR
TRIAL BY JURY**

(Assigned to the Hon. James A. Teilborg)

GENERAL ALLEGATIONS

Plaintiff Medi-Temp, LLC for its complaint against Defendants CVS
Pharmacy, Inc., Rite-Aid Corporation, and Thera-Med, Inc., alleges and states as follows:

Parties and Introduction

1. Plaintiff Medi-Temp, LLC (“Medi-Temp”) is a small company
headquartered in Flagstaff, Arizona. Medi-Temp’s founder and President, Randy Allan
Evans, through his experience and diligent research has developed superior quality
hot/cold therapy products. Mr. Evans filed for and received United States Patent No.
6,083,254 (the “254 Patent”), which patent was issued on July 4, 2000, to protect his
unique hot/cold therapy products. Medi-Temp has been marketing and selling its superior

1 hot/cold therapy products under its label and unique blue trade dress for many years.
2 Defendants CVS Pharmacy, Inc. (“CVS”), Rite-Aid Corporation (“Rite-Aid”), and Thera-
3 Med, Inc. (“Thera-Med”) (collectively, “Defendants”) have knowingly and intentionally
4 copied Medi-Temp’s patented hot/cold therapy products. Defendants’ slavish copies
5 incorporate Medi-Temp’s unique blue trade dress, evidencing Defendants’ intent to rob
6 Medi-Temp of the goodwill it has developed.

7 2. Upon information and belief, Defendant CVS is a large Rhode Island
8 corporation with its principal place of business in Woonsocket, Rhode Island. CVS is
9 authorized to do, and is conducting business in Arizona, including multiple locations in
10 the greater metropolitan Phoenix area, and most other states in the United States.

11 3. Upon information and belief, Defendant Rite-Aid is a Delaware corporation
12 with its principal place of business in Camp Hill, Pennsylvania. Rite-Aid is authorized to
13 do, and is conducting business in Arizona, including locations in Yuma and Sedona, and
14 most other states in the United States.

15 4. Upon information and belief, Defendant Thera-Med is a Texas corporation
16 with its principal place of business in Waco, Texas. Thera-Med is authorized to do, and is
17 conducting business in Arizona, including supplying infringing products to various retail
18 locations in Arizona, and in most other states in the United States.

19 Jurisdiction and Venue

20 5. This action involves claims of (a) patent infringement under the patent laws
21 of the United States, 35 U.S.C. § 1 *et seq.*, (b) trade dress infringement under the Lanham
22 Act, 15 U.S.C. § 1051 *et seq.*, and (c) unfair competition under Arizona common law.

23 6. This Court has jurisdiction over the federal claims by virtue of 15 U.S.C. §
24 1121, 35 U.S.C. § 271, and 35 U.S.C. § 281. This Court has supplemental jurisdiction
25 over the state claim by virtue of 28 U.S.C. § 1338 and 28 U.S.C. § 1367. This Court also
26 has diversity jurisdiction over this action pursuant to 28 U.S.C. § 1332 because the parties
27 are citizens of different states and the amount in controversy exceeds the jurisdictional
28 amount of \$75,000, excluding interest and attorneys’ fees.

1 7. This Court has personal jurisdiction over CVS by virtue of its presence,
2 conduct and business activities in the State of Arizona, and because CVS has caused
3 events to occur in the State of Arizona out of which the claims herein arise.

4 8. This court has personal jurisdiction over Rite-Aid by virtue of its presence,
5 conduct and business activities in the State of Arizona, and because Rite-Aid has caused
6 events to occur in the State of Arizona out of which the claims herein arise.

7 9. This Court has personal jurisdiction over Thera-Med by virtue of its conduct
8 and business activities in the State of Arizona, and because Thera-Med has caused events
9 to occur in the State of Arizona out of which the claims herein arise.

10 10. Venue is proper in this Court under 28 U.S.C. § 1391 and under 28 U.S.C. §
11 1400(b) because CVS has at least one place of business within the District of Arizona,
12 generally conducts business in Arizona, and is responsible for the acts alleged herein,
13 some of which occurred in Arizona; Rite-Aid has at least one place of business within the
14 District of Arizona, generally conducts business in Arizona, and is responsible for the acts
15 alleged herein, some of which occurred in Arizona; and Thera-Med is selling products
16 within the District of Arizona, generally conducts business in Arizona, and is responsible
17 for the acts alleged herein, some of which occurred in Arizona.

18 **FACTUAL ALLEGATIONS**

19 **The Medi-Temp Patent**

20 11. On July 4, 2000, the '254 Patent, entitled: "Reusable Hot/Cold Therapeutic
21 Compress Appliance" was issued to Randy Allan Evans. A copy of the '254 Patent is
22 included as Exhibit 1 and is incorporated by this reference herein.

23 12. The '254 Patent was assigned by Randy Allan Evans to Medi-Temp, with
24 rights to protect the patent rights and sue infringers conferred to Medi-Temp.

25 13. Medi-Temp sells products under the '254 Patent marked in compliance with
26 35 U.S.C. § 287.

Medi-Temp Hot/Cold Therapy Products

14. In 1996, Medi-Temp introduced and began selling hot/cold therapy products. Since that time, Medi-Temp has continuously sold hot/cold therapy products, and its hot/cold therapy products have become known and recognized as the “blue” hot/cold therapy products.

15. Medi-Temp’s hot/cold therapy products have been sold with a unique overall image and appearance, which is, has been, and continues to be inherently distinctive and/or has acquired distinctive secondary meaning. Said image and appearance includes, but is not limited to:

- a. Hot/Cold therapy products having a distinctive, visible blue outward surface when worn; and
- b. Hot/Cold therapy products having one or more distinctive black straps located proximate to the blue outward surface.

16. Examples of Medi-Temp’s hot/cold therapy products are shown in the photographs included as Exhibits 2, 3, and 4.

17. Medi-Temp’s trade dress for its hot/cold therapy products is not functional.

18. The blue color and the blue color combined with the black straps of Medi-Temp’s hot/cold therapy products provide the public with a means of identifying genuine Medi-Temp hot/cold therapy products.

19. Thera-Med products are usually of mixed color(s):

- a. Thera-Med’s Cold Therapy Products (for cold application only) are light blue PVC vinyl with no outer protective sleeve; and
- b. Thera-Med’s Hot Therapy Products (for hot application only) are red PVC vinyl with no outer protective sleeve.

20. Prior to July 20, 2004 Medi-Temp’s hot/cold therapy products were the only hot/cold therapy products on the market using a blue or blue and black trade dress.

21. Medi-Temp has spent and continues to spend significant funds and other resources on advertising or otherwise promoting the sale of its “blue” hot/cold therapy

1 products.

2 22. As a result of marketing and wide distribution of Medi-Temp's hot/cold
3 therapy products, "blue" or "blue and black" hot/cold therapy products have become
4 generally known and uniquely identified in the public's mind as being associated with
5 Medi-Temp. Medi-Temp's hot/cold therapy products are favorably known to the trade
6 and to the public as being of a high quality and uniquely suited for treating injuries
7 requiring hot and/or cold therapy.

8 23. Medi-Temp has built up and currently possesses valuable goodwill
9 connected with its hot/cold therapy products. Defendants' patent-infringing copies of
10 Medi-Temp's hot/cold therapy products have an appearance confusingly similar to the
11 appearance of Medi-Temp's "blue" hot/cold therapy products. Consequently, consumers
12 who encounter problems with Defendants' hot/cold therapy products may associate those
13 problems with Medi-Temp, thereby damaging Medi-Temp's reputation and the goodwill
14 it has fostered through its high quality products.

15 **CVS' Infringing Activities**

16 24. CVS, through its multiple store locations in Arizona (and in most other
17 states), has sold and is continuing to sell hot/cold therapy products obtained from sources
18 other than Medi-Temp, which (a) infringe Medi-Temp's '254 Patent, (b) have induced
19 infringement of the '254 Patent, (c) infringe Medi-Temp's blue, or blue and black trade
20 dress for hot/cold therapy products, and (d) violate Medi-Temp's common law rights and
21 constitute unfair competition.

22 25. Upon information and belief, CVS has engaged in or caused, and continues
23 to engage in or cause the manufacture, advertising, sale of, and offer for sale of hot/cold
24 therapy products which were and are look-alikes of Medi-Temp's blue hot/cold therapy
25 products employing a nearly identical trade dress ("Counterfeit Products").

26 26. CVS' Counterfeit Products are inferior products such that consumers
27 exposed to CVS' Counterfeit Products are likely to have a negative impression and
28 disregard future purchase of any like or similar blue hot/cold therapy products, including

1 Medi-Temp's superior hot/cold therapy products.

2 27. Examples of such Counterfeit Products sold by CVS are shown in
3 photographs included as Exhibits 5 and 6.

4 28. Upon information and belief, from the time that CVS began its infringing
5 activities, CVS has had knowledge and awareness of Medi-Temp's '254 Patent, and the
6 appearance of Medi-Temp's blue hot/cold therapy products.

7 29. Upon information and belief, CVS has willfully and maliciously infringed
8 Medi-Temp's '254 Patent rights by making, causing to be made, using, selling or offering
9 for sale hot/cold therapy products covered by one or more of the claims of the '254 Patent,
10 and intentionally copying hot/cold therapy products using Medi-Temp's blue trade dress.

11 30. On or about April 1, 2004, Medi-Temp met with Steve Ortleb of CVS and
12 discussed, among other things, marketing plans for the CVS Private Label Hot/Cold
13 Therapy Program to be manufactured by Medi-Temp, pricing models for Medi-Temp
14 hot/cold therapy products, placement of CVS' logo, and proprietary documents relating to
15 Medi-Temp manufacturing processes in an attempt to enter into a private label business
16 relationship with CVS to manufacture for CVS hot/cold therapy products under a CVS
17 private label. In this meeting, Medi-Temp emphasized the superior features of its hot/cold
18 therapy products, pointing out that these features are covered by one or more claims in the
19 '254 Patent.

20 31. On or about May 3, 2004, Medi-Temp met with Paul Fitter of CVS and
21 discussed, among other things, marketing plans for the CVS Private Label Hot/Cold
22 Therapy Program to be manufactured by Medi-Temp, pricing models for Medi-Temp
23 hot/cold therapy products, placement of CVS' logo, and proprietary documents relating to
24 Medi-Temp manufacturing processes in an attempt to enter into a business relationship
25 with CVS to manufacture for CVS hot/cold therapy products under a CVS private label.
26 In this meeting, Medi-Temp emphasized the superior features of its hot/cold therapy
27 products, pointing out that these features are covered by one or more claims in the '254
28 Patent. Medi-Temp and Mr. Fitter had a subsequent meeting occurring between May 3,

1 2004 and July 20, 2004, to further discuss the CVS Private Label Hot/Cold Therapy
2 Program.

3 32. On or about July 20, 2004, and at the request of CVS, Medi-Temp met with
4 Steve Ortleb, Paul Fitter, and Maurice McCord of CVS and had continued discussions
5 about marketing plans for the CVS Private Label Hot/Cold Therapy Program to be
6 manufactured by Medi-Temp, placement of CVS' logo, and proprietary documents
7 relating to Medi-Temp manufacturing processes in a continued effort to enter into a
8 business relationship with CVS to manufacture for CVS hot/cold therapy products under a
9 CVS private label. In this meeting, Medi-Temp again emphasized the superior features of
10 its hot/cold therapy products, pointing out that these features are covered by one or more
11 claims in the '254 Patent.

12 33. Because the meetings with Mr. Ortleb, Mr. Fitter, and Mr. McCord included
13 discussions containing information that CVS knew or had reason to know involved Medi-
14 Temp confidential and/or proprietary information, a duty of confidentiality was imposed
15 on CVS, Mr. Ortleb, Mr. Fitter, and Mr. McCord.

16 34. Prior to the July 20, 2004 meeting, CVS communicated to Medi-Temp that
17 it was considering using Medi-Temp's original equipment manufacturer (OEM) hot/cold
18 therapy products for its private label. CVS requested that Medi-Temp provide multiple
19 samples of and detailed manufacturing information relating to Medi-Temp's OEM
20 hot/cold therapy products. Prior to this request, CVS had never expressed an interest in
21 using any Medi-Temp OEM product for its private label. Instead, CVS' normal business
22 dealing with Medi-Temp included an interest in modified versions of Medi-Temp's
23 products which were specially designed for Private Label applications, and released for
24 sale by Medi-Temp shortly before the July 20, 2004 meeting.

25 35. During the July 20, 2004 meeting, Medi-Temp provided CVS via the above-
26 named individuals with multiple samples of Medi-Temp's OEM hot/cold therapy products
27 and detailed manufacturing information relating to same. The samples Medi-Temp
28 provided to CVS and the above-named individuals included the "CVS® Pharmacy" label

1 printed on the blue sleeves, and insert cards for the clamshell packaging with the CVS
2 logo and design. Medi-Temp explained, in detail, the composition and construction of its
3 OEM hot/cold therapy products, and CVS and the above-named individuals retained the
4 samples and manufacturing information Medi-Temp provided them. Photographs
5 included as Exhibits 7 and 8 are representative of the samples Medi-Temp provided to
6 CVS and the above-named individuals.

7 36. On or about September 28, 2004, Medi-Temp received notice from CVS
8 that CVS was retaining its incumbent supplier, Thera-Med, to manufacture and supply
9 CVS with private label hot/cold therapy products.

10 37. Upon information and belief, CVS provided the Medi-Temp samples and
11 confidential manufacturing information to Thera-Med.

12 38. Upon information and belief, CVS requested that Thera-Med copy the
13 Medi-Temp samples using Medi-Temp's confidential manufacturing information.

14 39. Upon information and belief, CVS and Thera-Med entered into an
15 agreement whereby Thera-Med would manufacture and supply CVS with private label
16 hot/cold therapy products copied from the Medi-Temp samples.

17 40. Upon information and belief, at least as early as September 18, 2005, CVS
18 received from Thera-Med, and had for sale hot/cold therapy products copied from Medi-
19 Temp and covered by the '254 Patent.

20 41. Neither CVS nor Thera-Med has a right or license to use, make, sell, or
21 offer for sale hot/cold therapy products covered by the '254 Patent.

22 42. Upon information and belief, at least as early as September 18, 2005, CVS
23 received from Thera-Med, and had for sale hot/cold therapy products copied from Medi-
24 Temp's design and included Medi-Temp's blue trade dress.

25 43. Neither CVS nor Thera-Med has a right or license to use, make, sell, or
26 offer for sale hot/cold therapy products having Medi-Temp's blue trade dress.

27 44. CVS' sales of its counterfeit hot/cold therapy products have caused and will
28 continue to cause consumers to be confused as to the source or origin of the counterfeit

1 hot/cold therapy products, and have led and will continue to lead consumers to believe
2 that the counterfeit hot/cold therapy products are affiliated with Medi-Temp.

3 45. CVS' copying, advertising, and sale of the counterfeit hot/cold therapy
4 products has caused, and will continue to cause, Medi-Temp damage and irreparable
5 injury.

6 **Rite-Aid's Infringing Activities**

7 46. Rite-Aid, through its multiple store locations in Arizona (and in most other
8 states), has sold and is continuing to sell hot/cold therapy products obtained from sources
9 other than Medi-Temp, which (a) infringe Medi-Temp's '254 Patent and/or have induced
10 infringement of the '254 Patent, (b) infringe Medi-Temp's blue, or blue and black trade
11 dress for hot/cold therapy products, and (c) violate Medi-Temp's common law rights and
12 constitute unfair competition.

13 47. Upon information and belief, Defendant Rite-Aid has engaged in or caused,
14 and continues to engage in or cause the manufacture, advertising, sale of, and offer for
15 sale of Counterfeit Products.

16 48. Rite-Aid's counterfeit products are inferior products such that consumers
17 exposed to Rite-Aid's counterfeit products are likely to have a negative impression and
18 disregard future purchase of any like or similar blue hot/cold therapy products, including
19 Medi-Temp's superior hot/cold therapy products.

20 49. Examples of such counterfeit products sold by Rite-Aid are shown in
21 photographs included as Exhibits 9, 10, and 11.

22 50. Upon information and belief, from the time that Rite-Aid began its
23 infringing activities, Rite-Aid has had knowledge and awareness of Medi-Temp's '254
24 Patent, and the appearance of Medi-Temp's blue hot/cold therapy products.

25 51. Upon information and belief, Rite-Aid has willfully and maliciously
26 infringed Medi-Temp's '254 Patent rights by making, causing to be made, using, selling
27 or offering for sale hot/cold therapy products covered by one or more of the claims of the
28 '254 Patent, and intentionally copying hot/cold therapy products using Medi-Temp's blue

1 trade dress.

2 52. On or about May 4, 2004, Medi-Temp met with Bill Bergin of Rite-Aid and
3 Jamey Kindrick of Daymon Worldwide, Inc. ("Daymon Worldwide"), a Delaware
4 corporation with its principle place of business in Stamford, Connecticut, at an Efficient
5 Collaborative Retail Marketing (ECRM) convention in San Antonio, Texas. Rite-Aid and
6 Daymon Worldwide requested samples of five (5) different product/SKU samples of
7 Medi-Temp hot/cold therapy products and asked for product suggestions to be included in
8 the upcoming planogram review scheduled for January 2005, which samples and
9 suggestions were provided by Medi-Temp.

10 53. On or about August 13, 2004, Rite-Aid communicated to Medi-Temp that it
11 was considering using Medi-Temp's OEM hot/cold therapy products for its private label.
12 At the specific request of Jennifer Roush and Paul Margeson of Rite-Aid, and Mr.
13 Kindrick a full set of samples of both OEM products and specially designed private label
14 products incorporating the "RITE-AID" logo printed on the blue sleeves, and insert cards
15 for the clamshell packaging with the Rite-Aid logo and design, accompanied by a full
16 proposal including detailed, proprietary manufacturing information relating to Medi-
17 Temp's hot/cold therapy products, was sent to each individual. Photographs included as
18 Exhibits 12, 13, and 14 are representative of the samples Medi-Temp provided to Rite-Aid
19 and the above-named individuals on August 13, 2004.

20 54. Prior to this request, Rite-Aid had never expressed an interest in using any
21 Medi-Temp OEM product for its private label. Instead, Rite-Aid's normal business
22 dealing with Medi-Temp included an interest in modified versions of Medi-Temp's
23 products.

24 55. On or about September 30, 2004, Medi-Temp met with Jennifer Roush and
25 Jamey Kindrick and discussed, among other things, marketing plans for the Rite-Aid
26 Private Label Hot/Cold Therapy Program to be manufactured by Medi-Temp, pricing
27 models for Medi-Temp hot/cold therapy products, placement of Rite-Aid's logo, and
28 proprietary documents relating to Medi-Temp manufacturing processes in an attempt to

1 enter into a private label business relationship with Rite-Aid to manufacture for Rite-Aid
2 hot/cold therapy products under a Rite-Aid private label. In this meeting, Medi-Temp
3 emphasized the superior features of its hot/cold therapy products, pointing out that these
4 features are covered by one or more claims in the '254 Patent and explained, in detail, the
5 composition and construction of its hot/cold therapy products. Ms. Roush and Mr.
6 Kindrick retained the samples and manufacturing information Medi-Temp provided them
7 on August 13, 2004 and at this meeting.

8 56. On or about September 30, 2004, Medi-Temp met with Paul Margeson of
9 Rite-Aid and discussed, among other things, marketing plans for the Rite-Aid Private
10 Label Hot/Cold Therapy Program to be manufactured by Medi-Temp, pricing models for
11 Medi-Temp hot/cold therapy products, placement of Rite-Aid's logo, and proprietary
12 documents relating to Medi-Temp manufacturing processes in an attempt to enter into a
13 business relationship with Rite-Aid to manufacture for Rite-Aid hot/cold therapy products
14 under a Rite-Aid private label. In this meeting, Medi-Temp emphasized the superior
15 features of its hot/cold therapy products, pointing out that these features are covered by
16 one or more claims in the '254 Patent and explained, in detail, the composition and
17 construction of its hot/cold therapy products. Mr. Margeson retained the samples and
18 manufacturing information Medi-Temp provided him on August 13, 2004 and at this
19 meeting.

20 57. Because the meetings with Ms. Roush, Mr. Kindrick, and Mr. Margeson
21 included discussions containing information that Rite-Aid and Daymon Worldwide knew
22 or had reason to know contained Medi-Temp's confidential and/or proprietary
23 information, a duty of confidentiality was imposed on Rite-Aid, Daymon Worldwide, Ms.
24 Roush, Mr. Kindrick, and Mr. Margeson.

25 58. On or about October 22, 2004, Mr. Margeson, Ms. Roush, and Mr. Kindrick
26 requested additional samples of Medi-Temp's hot/cold therapy products, specifically
27 requesting samples of Medi-Temp's "Large Universal Pad." Medi-Temp sent samples of
28 the Large Universal Pad including a sample of both an OEM Large Universal Pad and a

1 Private Label Large Universal Pad having the “RITE-AID” logo printed on it. Exhibit 2 is
2 representative of the OEM sample and Exhibit 12 is representative of the Private Label
3 sample Medi-Temp provided to Rite-Aid. Exhibit 9 shows Rite-Aid’s copied private label
4 Large Universal Pad.

5 59. On or about November 15, 2004, Medi-Temp received a telephone call from
6 Mr. Margeson and Mr. Kindrick notifying Medi-Temp that Rite-Aid was going to use
7 another entity to manufacture and supply Rite-Aid with private label hot/cold therapy
8 products.

9 60. Upon information and belief, Rite-Aid provided the Medi-Temp samples
10 and confidential manufacturing information to Thera-Med.

11 61. Upon information and belief, Rite-Aid requested that Thera-Med copy the
12 Medi-Temp samples using Medi-Temp’s confidential manufacturing information.

13 62. Upon information and belief, Rite-Aid and Thera-Med entered into an
14 agreement whereby Thera-Med would manufacture and supply Rite-Aid with private label
15 hot/cold therapy products copied from the Medi-Temp samples.

16 63. Upon information and belief, at least as early as September 20, 2005, Rite-
17 Aid received from Thera-Med, and had for sale hot/cold therapy products copied from
18 Medi-Temp covered by the ‘254 Patent.

19 64. Neither Rite-Aid nor Thera-Med has a right or license to use, make, sell, or
20 offer for sale hot/cold therapy products covered by the ‘254 Patent.

21 65. Upon information and belief, at least as early as September 20, 2005, Rite-
22 Aid received from Thera-Med, and had for sale hot/cold therapy products copied from
23 Medi-Temp’s design and incorporating Medi-Temp’s blue trade dress.

24 66. Neither Rite-Aid nor Thera-Med has a right or license to use, make, sell, or
25 offer for sale hot/cold therapy products having Medi-Temp’s blue trade dress.

26 67. Rite-Aid’s sales of its counterfeit hot/cold therapy products have caused and
27 will continue to cause consumers to be confused as to the source or origin of the
28 counterfeit hot/cold therapy products, and have led and will continue to lead consumers to

1 believe that the counterfeit hot/cold therapy products are affiliated with Medi-Temp.

2 68. Rite-Aid's copying, advertising, and sale of the counterfeit hot/cold therapy
3 products has caused, and will continue to cause, Medi-Temp damage and irreparable
4 injury.

5 **Thera-Med's Infringing Activities**

6 69. Thera-Med is manufacturing and selling, to its retail customers located in
7 Arizona, hot/cold therapy products which (a) infringe Medi-Temp's '254 Patent, (b)
8 induce its retail customers to infringe the '254 Patent, (c) infringe Medi-Temp's blue, or
9 blue and black trade dress for hot/cold therapy products, and (d) violate Medi-Temp's
10 common law rights and constitute unfair competition.

11 70. Thera-Med's retail customers that have locations in Arizona include, but are
12 not limited to, CVS and Rite-Aid.

13 71. Upon information and belief, Defendant Thera-Med has engaged in or
14 caused, and continues to engage in or cause the manufacture, advertising, sale of, and
15 offer for sale Counterfeit Products.

16 72. Thera-Med's Counterfeit Products are inferior products such that consumers
17 exposed to Thera-Med's Counterfeit Products are likely to have a negative impression and
18 disregard future purchase of any like or similar blue hot/cold therapy products, including
19 Medi-Temp's superior hot/cold therapy products.

20 73. Examples of such Counterfeit Products sold by Thera-Med are shown in
21 Exhibits 5, 6, 9, 10, and 11.

22 74. Upon information and belief, from the time that Thera-Med began its
23 infringing activities Thera-Med has had knowledge and awareness of Medi-Temp's '254
24 Patent, and the appearance of Medi-Temp's blue hot/cold therapy products.

25 75. Upon information and belief, Thera-Med has willfully and maliciously
26 infringed Medi-Temp's '254 Patent rights by making, causing to be made, using, selling
27 or offering for sale hot/cold therapy products covered by one or more of the claims of the
28 '254 Patent, and intentionally copying hot/cold therapy products using Medi-Temp's blue

1 trade dress.

2 76. Upon information and belief, after July 20, 2004, Thera-Med received from
3 CVS the samples and confidential manufacturing information Medi-Temp provided to
4 CVS. Exhibits 7 and 8 are representative of the samples Medi-Temp provided to CVS,
5 which samples Thera-Med then received from CVS.

6 77. Upon information and belief, Thera-Med and CVS entered into an
7 agreement in which Thera-Med would manufacture and supply CVS with private label
8 hot/cold therapy products copied from the Medi-Temp samples and confidential
9 manufacturing information.

10 78. Upon information and belief, at least as early as September 18, 2005, Thera-
11 Med supplied CVS with hot/cold therapy products copied from Medi-Temp that Thera-
12 Med knew or had reason to know were covered by the '254 Patent, and knew or had
13 reason to know that CVS had for sale such hot/cold therapy products.

14 79. Neither Thera-Med nor CVS have or had a right or license to use, make,
15 sell, or offer for sale hot/cold therapy products covered by the '254 Patent.

16 80. Upon information and belief, at least as early as September 18, 2005, Ther-
17 Med supplied CVS with hot/cold therapy products copied from Medi-Temp that Thera-
18 Med knew or had reason to know included Medi-Temp's blue trade dress.

19 81. Neither Thera-Med nor CVS has or had a right or license to use, make, sell,
20 or offer for sale hot/cold therapy products having Medi-Temp's blue trade dress.

21 82. Upon information and belief, after September 30, 2004, Thera-Med received
22 from Rite-Aid the samples and confidential manufacturing information Medi-Temp
23 provided to Rite-Aid. Exhibits 12, 13, and 14 are representative of the samples Medi-
24 Temp provided to Rite-Aid, which samples Thera-Med then received from Rite-Aid.

25 83. Upon information and belief, Thera-Med and Rite-Aid entered into an
26 agreement in which Thera-Med would manufacture and supply Rite-Aid with private label
27 hot/cold therapy products copied from the Medi-Temp samples and confidential
28 manufacturing information.

1 84. Upon information and belief, at least as early as September 20, 2005, Thera-
2 Med supplied Rite-Aid with hot/cold therapy products copied from Medi-Temp that
3 Thera-Med knew or had reason to know were covered by the '254 Patent, and knew or
4 had reason to know that Rite-Aid had such hot/cold therapy products for sale.

5 85. Neither Thera-Med nor Rite-Aid have or had a right or license to use, make,
6 sell, or offer for sale hot/cold therapy products covered by the '254 Patent.

7 86. Upon information and belief, at least as early as September 20, 2005, Ther-
8 Med supplied Rite-Aid with hot/cold therapy products copied from Medi-Temp that
9 Thera-Med knew or had reason to know included Medi-Temp's blue trade dress.

10 87. Neither Thera-Med nor Rite-Aid have or had a right or license to use, make,
11 sell, or offer for sale hot/cold therapy products having Medi-Temp's blue trade dress.

12 88. Upon information and belief, Thera-Med has presented and solicited sales of
13 hot/cold therapy products copied from Medi-Temp to other prospective buyers; such
14 hot/cold therapy products infringe the '254 Patent and Medi-Temp's blue or blue and
15 black trade dress.

16 89. Upon information and belief, Thera-Med intends to present and solicit sales
17 of hot/cold therapy products copied from Medi-Temp to further prospective buyers; such
18 hot/cold therapy products infringe the '254 Patent and Medi-Temp's blue or blue and
19 black trade dress.

20 90. Thera-Med's sales of its counterfeit hot/cold therapy products have caused
21 and will continue to cause consumers to be confused as to the source or origin of the
22 counterfeit hot/cold therapy products, and have led and will continue to lead consumers to
23 believe that the counterfeit hot/cold therapy products are affiliated with Medi-Temp.

24 91. Thera-Med's copying, advertising, and sale of the counterfeit hot/cold
25 therapy products has caused, and will continue to cause, Medi-Temp damage and
26 irreparable injury.
27
28

COUNT I
(Patent Infringement)
[35 U.S.C. § 271(a)]

92. Medi-Temp hereby incorporates by reference all allegations contained in its paragraphs 1–91 as though fully set forth herein.

93. Defendants have been and, upon information and belief, are presently directly engaging in the infringement of the ‘254 Patent by selling and/or offering for sale infringing hot/cold therapy products without a license or the consent of Medi-Temp. Such hot/cold therapy products include, either literally or equivalently, each and every element of one or more of the claims of the ‘254 Patent. Such actions of Defendants violate the federal statutory scheme protecting patents.

94. Upon information and belief, Defendants’ actions have been and are with knowledge of the ‘254 Patent, and thus, have been and are in intentional, reckless, wanton and willful disregard of those rights.

95. As a direct and proximate consequence of Defendants’ actions, Medi-Temp has been damaged in an amount at this time not fully ascertainable but in an amount greater than \$75,000 to be proven at trial. Medi-Temp will continue to suffer irreparable injury to its good will, its rights, and its business unless and until Defendants are preliminarily and permanently enjoined from continuing their wrongful acts.

COUNT II
(Inducement of Infringement of Patent and Contributory Infringement)
[35 U.S.C. § 271(b) and (c)]

96. Medi-Temp hereby incorporates by reference all allegations contained in its paragraphs 1–95 as though fully set forth herein.

97. Defendants have been and, upon information and belief, are presently engaging in inducing infringement and contributorily infringing the ‘254 Patent by causing others to make, use or sell counterfeit hot/cold therapy products or non-staple components thereof which infringe upon each and every element of one or more of the claims of the ‘254 Patent.

98. Upon information and belief, Defendants’ actions have been and are with

1 knowledge of the '254 Patent and of Medi-Temp's other intellectual property rights in the
 2 Medi-Temp hot/cold therapy products, and thus, have been and are in intentional,
 3 reckless, wanton and willful disregard of those rights. Such actions constitute a violation
 4 of the federal statutory scheme protecting patents.

5 99. As a direct and proximate consequence of Defendants' actions, Medi-Temp
 6 has been damaged in an amount at this time not fully ascertainable but in an amount
 7 greater than \$75,000 to be proven at trial. Medi-Temp will continue to suffer irreparable
 8 injury to its good will, its rights and its business unless and until Defendants are
 9 preliminarily and permanently enjoined from continuing their wrongful acts.

10 **COUNT III**
 11 **(Trade Dress Infringement)**
 12 **[15 U.S.C. § 1125(a)]**

13 100. Medi-Temp hereby incorporates by reference all allegations contained in its
 14 paragraphs 1–99 as though fully set forth herein.

15 101. The trade dress of Medi-Temp's hot/cold therapy products is nonfunctional.

16 102. The trade dress of Medi-Temp's hot/cold therapy products is inherently
 17 distinctive.

18 103. The trade dress of Medi-Temp's hot/cold therapy products has acquired
 19 secondary meaning as indicating Medi-Temp as the origin of all hot/cold therapy products
 20 bearing a blue or blue and black trade dress.

21 104. Defendants have intentionally, willfully, recklessly, and wantonly copied
 22 and, upon information and belief, continue to intentionally willfully, recklessly, and
 23 wantonly copy Medi-Temp's trade dress for its hot/cold therapy products to unlawfully
 24 exploit Medi-Temp's goodwill in the marketplace associated with the inherently
 25 distinctive blue trade dress.

26 105. Defendants' counterfeit products are likely to be confused with Medi-
 27 Temp's hot/cold therapy products bearing its blue trade dress by members of the
 28 consuming public.

106. Upon information and belief, members of the consuming public are actually

1 confused as to the source of Defendants' counterfeit products and/or believe that
 2 Defendants' counterfeit products are affiliated with or sponsored by the makers, owners,
 3 and sellers of the genuine blue hot/cold therapy products.

4 107. Defendants have engaged in this false designation of origin and false
 5 description and representation of their hot/cold therapy products in interstate commerce in
 6 an effort to willfully, maliciously, and intentionally unfairly compete with Medi-Temp,
 7 and such actions are a violation of 15 U.S.C. § 1125(a).

8 108. As a direct and proximate consequence of Defendants' actions, Medi-Temp
 9 has been damaged in an amount at this time not fully ascertainable but in an amount
 10 greater than \$75,000 to be proven at trial. Medi-Temp will continue to suffer irreparable
 11 injury to its good will, its rights and its business unless and until Defendants are
 12 preliminarily and permanently enjoined from continuing their wrongful acts.

13 **COUNT IV**
 14 **(Unfair Competition under Arizona Common Law)**

15 109. Medi-Temp hereby incorporates by reference all allegations contained in its
 16 paragraphs 1–108 as though fully set forth herein.

17 110. Defendants' actions described above are in violation of Medi-Temp's
 18 common law rights and constitute unfair competition.

19 111. Upon information and belief, Defendants have committed these acts of
 20 unfair competition fraudulently, maliciously, and in conscious disregard of Medi-Temp's
 21 rights, with the intent to injure Medi-Temp.

22 112. As a direct and proximate consequence of Defendants' actions, Medi-Temp
 23 has suffered irreparable injury to its common law rights and a substantial loss of good will
 24 and reputation and other damages in an amount which at this time is not fully
 25 ascertainable but in an amount greater than \$75,000 to be proven at trial. Such damage
 26 will continue and increase unless Defendants are preliminarily and permanently enjoined
 27 from their unlawful conduct.
 28

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Medi-Temp prays for judgment against Defendants CVS, Rite-Aid, and Thera-Med as follows:

PRELIMINARY INJUNCTIVE RELIEF

1. For this Court's Order directed to Defendants requiring them to show cause why they should not be enjoined from infringing on Medi-Temp's intellectual property rights.

2. For this Court's Order preliminarily enjoining Defendants from selling infringing hot/cold therapy products while this action is pending.

PERMANENT INJUNCTIVE RELIEF

Patent

3. For this Court's Order enjoining Defendants and their officers, agents, servants, employees, and subsidiaries from directly or indirectly making or causing to be made, selling or causing to be sold, offering for sale or causing to be offered for sale, or using or causing to be used any of the inventions covered by one or more claims of the '254 Patent or otherwise directly or indirectly infringing, contributorily infringing or inducing infringement of the '254 Patent.

4. For this Court's Order requiring Defendants, their officers, agents, servants and employees to deliver up to this Court for impoundment and destruction all hot/cold therapy products infringing upon, directly or otherwise, one or more claims of the '254 Patent.

Trade Dress

5. For a final judgment of permanent injunction, enjoining Defendants, their agents, servants, employees, successors-in-interest, subsidiaries and all persons acting under, in concert with, or for them from displaying, offering for sale, advertising for sale or selling any hot/cold therapy products bearing Medi-Temp's trade dress or confusingly similar trade dress.

6. For this Court's Order requiring Defendants to deliver up to this

1 Court for impoundment and destruction all hot/cold therapy products bearing any trade
2 dress similar to that used on genuine Medi-Temp hot/cold therapy products.

3 **Proof of Compliance**

4 7. For this Court's Order directing Defendants to file with this Court
5 and serve on Medi-Temp within twenty (20) days after service of an injunction, a report in
6 writing under oath, setting forth in detail the manner and form in which Defendants have
7 complied with each injunction to which Medi-Temp is entitled.

8 **DAMAGES**

9 8. Defendants pay damages Medi-Temp has sustained proximately
10 resulting from the patent infringement in an amount to be established at the time of trial.

11 9. Damages awarded to Medi-Temp for patent infringement be trebled
12 in view of the intentional copying of Medi-Temp's patented invention and willful, wanton
13 violation of Medi-Temp's patent rights by Defendants.

14 10. Defendants pay damages Medi-Temp has sustained proximately
15 resulting from the trade dress infringement in an amount to be established at the time of
16 trial.

17 11. Defendants pay damages Medi-Temp has sustained proximately
18 resulting from unfair competition in an amount to be established at the time of trial.

19 12. Defendants pay damages as measured by an accounting of all of
20 Defendants' profits derived from its infringement of Medi-Temp's property rights.

21 13. Defendants to pay to Medi-Temp reasonable attorneys' fees for
22 infringement and all other costs which may be incurred by Medi-Temp in this action, as
23 well as pre-judgment and post-judgment interest.

24 **OTHER**

25 14. That this Court grant to Medi-Temp such other and further relief as it
26 may deem just and equitable.

JURY DEMAND

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff
Medi-Temp hereby demands a trial by jury.

DATED this 20th day of January, 2006.

SNELL & WILMER L.L.P.

By /s/ Jason S. Vanacour (#022738) for
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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2006, I will serve the attached document, by U.S. Mail, on the following, who is not a registered participant of the CM/ECF System:

D. Scott Hemingway
Hemingway & Hansen LLC
8117 Preston Road, Suite 460W
Dallas, Texas 75225
Attorney for Defendant CVS PHARMACY, INC.

I further certify that on January 20, 2006, I served a courtesy copy of the aforementioned document and transmittal of a Notice of Electronic Filing by mail on the following:

The Honorable James A. Teilborg
United States District Court
Sandra Day O'Connor U.S. Courthouse, Suite 523
401 West Washington Street, SPC 51
Phoenix, AZ 85003-2154

/s/ Patricia M. McIntyre

1766694.2

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