

**IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION**

BSN MEDICAL, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO.:
	)	
AMERICAN MEDICAL PRODUCTS, LLC,	)	JURY TRIAL DEMANDED
SEAN McKEOWN and	)	
WILLIAM MICHALSKI,	)	
	)	
Defendants.	)	
	)	

**COMPLAINT**

Plaintiff BSN Medical, Inc., (“BSN”) by and through its undersigned attorneys, hereby avers and alleges the following in support of its complaint against American Medical Products, Inc., Sean McKeown and William Michalski (collectively “Defendants”):

**PARTIES**

1. BSN is a corporation organized under the laws of the State of Delaware and with a principal place of business at 5825 Carnegie Boulevard, Charlotte, NC 28209.
2. Upon information and belief, Defendant American Medical Products is a limited liability company organized under the laws of the State of New Jersey with a principal place of business at 151 B Industrial Way East, Eatontown, New Jersey 07724.
3. Upon information and belief, Defendant Sean McKeown is an individual acting as an officer and the registered agent of Defendant American Medical Products with a residence at 1 Roseld Avenue, Number 7, Deal, New Jersey 07723.

4. Upon information and belief, Defendant William Michalski is an individual acting as an officer of Defendant American Medical Products with a residence at 14 Hialeah Court, Tinton Falls, New Jersey 07724.

### **JURISDICTION & VENUE**

5. This is an action for Patent and Copyright infringement under the Patent Laws and Copyright Laws of the United States, United States Code, Title 35, § 1 *et seq.* and Title 17 U.S.C. § 101 *et seq.*, as well as for breach of contract, unfair competition and deceptive acts and trade practices arising under the laws of the State of North Carolina.
6. Jurisdiction is proper in this Court under the provisions of 28 U.S.C. § 1338(a) in that the claims of the Complaint arise under the Patent Laws and Copyright Laws of the United States. This Court also has jurisdiction over this action pursuant to 28 U.S.C. §1332, as it is a civil action between citizens of different states with an amount in controversy exceeding \$75,000, exclusive of interest and costs.
7. This Court has jurisdiction over BSN's claims of patent and copyright infringement, as well as BSN's claims for breach of contract, unfair competition and deceptive acts and practices under the laws of the State of North Carolina, pursuant to the principle of supplemental jurisdiction and 28 U.S.C. §1367(a), because the state law claims are so related to the federal claims that they form part of the same case or controversy and derive from a common nucleus of operative fact.
8. This Court has *in personam* jurisdiction over BSN in that BSN is a corporation conducting business in this state and in this district and is headquartered in Charlotte, North Carolina.

9. This Court has *in personam* jurisdiction over Defendants, as Defendants were engaged in patent and copyright infringement, as well as deceptive acts and trade practices and unfair competition directed at and/or which caused damage to persons and entities, including BSN, residing in, located in, or doing business in the United States, including the Western District of North Carolina. Individual Defendants were at one time employed by BSN.
10. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391 and 1400(a) in that Defendants transact business in this district, because a substantial part of the events giving rise to BSN's claims occurred, and a substantial portion of the affected interstate trade and commerce described below has been carried out, and the records and persons related thereto may be found, in the Western District of North Carolina.

### **STATEMENT OF FACTS**

11. BSN is a Delaware corporation with a principal place of business in Charlotte, North Carolina. BSN is one of the world's leading suppliers in the casting, bandaging, traditional wound care, orthopedic soft goods and braces, and compression stockings.
12. On July 20, 2005, Defendant William Michalski was hired by FLA Orthopedics ("FLA"), a company involved in, among other things, the design, manufacture, distribution and sales of spinal bracing products. FLA was later acquired by BSN, as discussed below.
13. BSN sells several spinal bracing products, including, without limitation, a spinal brace marketed and sold under the name CINCH-LOC.

14. FLA is the owner of U.S. Patent No. 5,267,948 (the “‘948 Patent”), for “BODY JACKET CLOSURE”. The ‘948 Patent was issued on December 7, 1993. A copy of the ‘948 Patent is attached as Exhibit 1.
15. FLA’s CINCH-LOC product incorporates the invention of the ‘948 Patent.
16. Defendant Michalski was hired by FLA on July 20, 2005, and entered into an Employment Agreement that set forth both the terms of his employment and certain restrictions regarding competition with FLA and the use of trade secrets or proprietary materials after the dissolution of the employer-employee relationship. Defendant Michalski’s Employment Agreement is attached as Exhibit 2.
17. Defendant Sean McKeown was hired by FLA on July 19, 2005. Upon his employment, Defendant McKeown entered into a Non-Disclosure and Non-Compete Agreement which specifically restricted competition with FLA after the dissolution of the employer-employee relationship and the use of any company materials. Defendant McKeown’s Non-Disclosure and Non-Compete Agreement is attached as Exhibit 3.
18. Both of the Defendants’ Agreements with FLA state that, for a period of two years following the termination of the employer-employee relationship, they will not “engage in any business which is the same or essentially the same as the business of the company...” *See* Exhibits 2 and 3.
19. The Agreements further state that confidential information remains the exclusive property of the company and shall be returned immediately upon termination. There is no time constraint on this provision in either Agreement, and a violation of this provision is specifically identified as theft of the company’s trade secrets. *Id.*

20. Both of the Agreements provide for (and the employees acknowledge) that injunctive relief is an adequate remedy for violations of the Agreements, and that the prevailing party in any action to enforce the Agreements will be entitled to be reimbursed for its costs and attorney's fees. *Id.*
21. Both of the above-referenced Agreements inure to FLA's successors and assigns and specifically provide for a transfer of rights and obligations in the event of a merger or sale of assets by FLA. *Id.*
22. On April 9, 2006, while still in the employ of FLA, Defendant Michalski registered the domain name [www.americanmedicalproducts.com](http://www.americanmedicalproducts.com). The registration information is attached as Exhibit 4.
23. In 2007 BSN acquired FLA and all of its assets, including the '948 patent and other intellectual property. BSN's press release announcing the acquisition is attached as Exhibit 5.
24. Defendants Michalski and McKeown's Agreements with FLA inured to BSN, effectively making Defendants Michalski and McKeown employees of BSN and subject to all the obligations and restrictions contained in their respective Agreements.
25. Defendants Michalski and McKeown's duties included the promotion and sale of FLA and BSN products, specifically including the CINCH-LOC spinal brace.
26. BSN created, and is the author of, sales brochures and promotional material for use in marketing and selling the CINCH-LOC spinal brace and other spinal bracing products. These materials include application instructions, for which BSN is also the author,

- detailing for the consumer the proper use of the spinal brace. Examples of the promotional materials and the application instructions are attached as Exhibit 6.
27. BSN applied for copyright registration for both its promotional brochures and its application instructions with the United States Copyright Office. Copies of BSN's copyright registrations are attached as Exhibit 7.
  28. Defendants Michalski and McKeown were provided samples of the CINCH-LOC promotional brochures and application/use instructions for use in promoting and selling the CINCH-LOC product.
  29. Upon information and belief, during the tenure of their employment with FLA – and later BSN – Defendants Michalski and McKeown were provided confidential information regarding, without limitation, FLA and BSN's customer lists, pricing, mailing lists, and other information of a nature that is not generally known to those outside the employ of FLA or BSN, and that has significant value to BSN because the information is not generally known.
  30. On August 22, 2008, Mr. Michalski submitted his resignation in an email to Gary Keytel of BSN.
  31. On September 10, 2008, an Agreement was reached between BSN and Mr. Michalski regarding his working for BSN through a transition for a period of time. Mr. Michalski was reminded at that time of the obligations to which he agreed upon his employment, and the fact that these provisions were still in place. The September 10, 2008 letter is attached as Exhibit 8.

32. On October 17, 2008, Defendant Michalski re-submitted his resignation from BSN via a letter addressed to Colin Cashin, attached as Exhibit 9.
33. Upon information and belief, Defendant McKeown submitted his resignation from BSN in October of 2008.
34. On October 31, 2008, a letter was drafted to Defendant McKeown, reminding him of his post-separation obligations, including the use of proprietary materials. This letter referenced his 2005 non-disclosure and non-compete agreement and his “recent resignation.” The October 31, 2008 letter is attached as Exhibit 10.
35. On October 8, 2009, Defendants Michalski and McKeown formally created American Medical Products as a limited liability company in the State of New Jersey and listed Defendants Michalski and McKeown as being involved in the formation and ownership of the company. The New Jersey business entity status report is attached as Exhibit 11.
36. Upon information and belief, at the time American Medical Products was formed as a limited liability company, the two-year period of non-competition set forth in the Defendants’ respective Agreements had not expired.
37. Upon information and belief, the promotional and instructional materials regarding BSN’s products, specifically including without limitation the CINCH-LOC spinal brace, as well as BSN’s proprietary information regarding customers, pricing, and product lines, were not returned to BSN upon Defendants Michalski and McKeown’s resignation from BSN.

38. On or about November 15, 2010, BSN discovered that Defendants were offering spinal bracing products called FREEDOM and COMPLIANCE, which are nearly identical to and copies of BSN's CINCH-LOC spinal brace and infringe upon BSN's '948 Patent. A website printout of Defendants' product offerings is attached as Exhibit 12.
39. Defendants' spinal bracing products are promoted using sales brochures and application instructions that are nearly identical to and copies of BSN's promotional materials and application instructions, in that the layouts are identical and much of the language found on Defendants' sales brochures and application instructions is copied verbatim from BSN's promotional materials and application instructions. Examples of Defendants' sales brochures and application instructions are attached as Exhibit 13. *See also* Exhibit 6.
40. On November 30, 2010, an AMP FREEDOM spinal brace was sold in the United States by a company called K-Med.
41. Defendants' FREEDOM and COMPLIANCE spinal braces, as well as the related sales brochures and application instructions are clearly unauthorized copies of BSN's products and promotional materials and infringe upon BSN's patent rights in its spinal bracing product and BSN's copyright in the promotional materials and instructions.
42. BSN never authorized Defendants to copy their patented products or promotional materials or to create derivatives thereof.
43. Defendants' activities are in violation of their respective Agreements.



44. Upon information and belief, Defendants are offering their infringing products and materials to BSN's customers and have damaged BSN in lost sales due to these unlawful activities.

## **COUNT ONE**

### ***Patent Infringement***

45. BSN incorporates herein by reference the averments of the preceding paragraphs as though fully set forth herein.
46. Defendants have made, caused to be made, offered for sale and used spinal braces in violation of BSN's rights in the '948 Patent.
47. As a direct result of Defendants' infringement of the '948 Patent, BSN has suffered irreparable injury and monetary damages. If Defendants' infringement is not permanently enjoined, BSN will continue to suffer irreparable injury and monetary damages.
48. Defendants' had full knowledge of BSN's rights in the '948 Patent and the spinal braces claimed in the '948 Patent, thus Defendants' infringement of the '948 Patent is intentional, willful, and wanton under 35 U.S.C. § 284, and makes this an exceptional case under 35 U.S.C. § 285.

## **COUNT TWO**

### ***Copyright Infringement***

49. BSN incorporates herein by reference the averments of the preceding paragraphs as though fully set forth herein.

50. The creation, marketing, advertising, publication, distribution and/or public display and dissemination of unauthorized and unlicensed copies or derivatives of BSN's promotional materials and instructions violates BSN's copyright in its promotional materials and instructions; specifically including, without limitation, those for BSN's CINCH-LOC spinal brace.
51. Defendants have a direct financial interest in the infringing actions alleged herein and had the ability to supervise or control such activity.
52. Defendants Michalski and McKeown have induced, caused or materially contributed to the infringement of BSN's copyrights.
53. As a direct and proximate result of Defendants' wrongful conduct, BSN has been and continues to be damaged.
54. Defendants' infringements of BSN's copyrights have been and continue to be committed willfully.

### **COUNT THREE**

#### ***Breach of Contract***

55. BSN incorporates herein by reference the averments of the preceding paragraphs as though fully set forth herein.
56. Defendants entered into Agreements with BSN regarding not only the duties expected of them as employees of BSN, but also containing specific restrictions as to use of BSN's trade secrets and proprietary material and those activities forbidden after the dissolution of the employer-employee relationship.

57. Defendants have willfully breached these Agreements by:

- (a) actively taking steps to create a competing company while still in the employ of BSN, including the registration of a website clearly intended for use in competition with BSN;
- (b) unlawfully misappropriating BSN's proprietary information, sales brochures and application instructions for the express purpose of making unauthorized copies or derivatives of BSN's spinal brace and the promotional material related thereto; and
- (c) marketing, advertising, distributing and selling Defendants' infringing products in direct violation of the non-compete provisions present in the employment and non-disclosure agreements signed by Defendants Michalski and McKeown.

58. As a result of these willful violations of Defendants' Agreements with BSN, BSN has been and continues to be damaged and is entitled to an injunction as well as its costs and expenses in pursuing this action as specifically set forth in the Agreements.

#### **COUNT FOUR**

##### ***Misappropriation of Trade Secrets***

59. BSN incorporates herein by reference the averments of the preceding paragraphs as though fully set forth herein.

60. Through the contracts with BSN, Defendants have obtained access to and knowledge of the technology, composition, materials and process for manufacture of BSN's spinal bracing products, including BSN's CINCH-LOC spinal brace. Defendants were also

given proprietary material belonging to BSN regarding lists of accounts, products, pricing and related information. This information is not generally known to BSN's competitors and constitutes "trade secrets" within the meaning of North Carolina's Trade Secret Protection Act. N.C. Gen. Stat. § 66-153 *et seq.*

61. BSN has exercised reasonable efforts to maintain secrecy of its trade secrets and has limited access to its trade secrets only to those employees and agents who need to utilize said trade secrets for the benefit of BSN and who implement reasonable measures to protect BSN's trade secrets.
62. Defendants have willfully misappropriated BSN's trade secrets for their own pecuniary gain and to the injury of BSN.

#### **COUNT FIVE**

##### ***Unfair Competition under N.C. Gen. Stat. § 17-1.1***

63. BSN incorporates herein by reference the averments of the preceding paragraphs as though fully set forth herein.
64. Defendants' unlawful acts in appropriating BSN's proprietary materials were intended to capitalize on BSN's know-how and successful designs for the express purpose of creating a competing company and producing unlawful copies or derivatives of BSN's products and related materials; all for Defendants' pecuniary gain.
65. BSN has expended substantial time, resources and effort to obtain and maintain an excellent reputation for itself and those products it distributes.

66. Defendants' took advantage of their employment with BSN by misappropriating BSN's patented products and related copyrighted materials, as well as those trade secrets belonging to BSN.
67. Defendants are unjustly enriched and are benefitting from property rights that rightly belong to BSN.
68. Defendants' acts are in, or affecting, commerce and constitute Unfair and Deceptive Trade Practices under Chapter 75-1.1 of the North Carolina General Statutes.
69. Defendants' actions were both malicious and intentional, and as such support an award of treble damages under N.C. Gen. Stat. §75-16, as well as an award of attorney's fees incurred by BSN in pursuing this action and all profits, gains, or advantages obtained by the Defendants as a result of their unlawful conduct.

#### **PRAYER FOR RELIEF**

BSN respectfully prays that this Court enters judgment in its favor and against the Defendants as follows:

A. Granting preliminary and permanent injunctive relief directing Defendants, their agents, associates, employees, and all persons acting on behalf of or in concert with Defendants to:

1. Cease soliciting any customer or potential customer in violation of BSN's rights as set forth in the Complaint until such time as Defendants have purged the effects of their violations of BSN's rights.

2. Permanently refrain from imitating, copying, or making any unauthorized use of the infringing spinal braces, promotional materials or instructions in any manner; and from publishing, distributing, selling, advertising, marketing or otherwise disposing of any copies or unlicensed derivatives of the BSN spinal braces or the related promotional materials and instructions.

3. Deliver up to be impounded during the pendency of this action under 17 U.S.C. § 503 all copies or derivatives of BSN's spinal braces (including without limitation Defendants' COMPLIANCE and FREEDOM spinal braces) in Defendants' possession or under Defendants' control and to deliver up all infringing copies of BSN's copyrighted promotional materials or instructions, or any derivatives thereof.

4. Permanently refrain from unfairly competing with BSN, including by way of using any of BSN's trade secrets;

5. Immediately return any and all documents and things containing trade secrets belonging to BSN, and a listing of all customers solicited by Defendants, together with an identification of all products sold, volume of sales and product pricing;

6. Immediately return any and all products and materials, including without limitation any of BSN's spinal braces and related promotional material and instructions;

B. Awarding BSN damages resulting from Defendant's infringement of the '948 Patent, and that such damages be trebled in accordance with provisions of 35 U.S.C. § 284, and that BSN be awarded its reasonable attorneys' fees in accordance with 35 U.S.C. § 285;

C. Awarding BSN such damages as the jury determines BSN has sustained in consequence of Defendants' infringing BSN's copyrights, and to account for all gains, profits, and advantages derived by Defendants through their infringement of BSN's copyrights under 17 U.S.C. § 504(b), or at BSN's election, statutory damages under 17 U.S.C. § 504(c) which permits a recovery of up to \$150,000 for Defendant's willful infringement of each copyrighted work;

D. Directing Defendants to pay BSN's costs of this action and their reasonable attorney's fees allowable by the Court under 17 U.S.C. § 505;

E. Awarding BSN treble damages pursuant to N.C. Gen. Stat. § 75-1.1 and § 17-16;

F. Awarding BSN such other relief as the Court deems just and proper; and

G. That all triable issues be heard by a jury.

This the 22<sup>nd</sup> day of February, 2011.

Respectfully submitted,

s/ W. Thad Adams, III

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