

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

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ANDOVER HEALTHCARE, INC., :  
 :  
Plaintiff, : CIVIL ACTION NO. 1:11-cv-10019  
 :  
v. :  
 :  
TEMPO MEDICAL PRODUCTS, LLC, : **Jury Trial Demanded**  
 :  
Defendant. :  
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**COMPLAINT**

***I. Introduction***

1. This action arises out of defendant Tempo Medical Products, LLC's ("Tempo's") false labeling and advertising of certain of its bandage products as "latex-free," in violation of federal and state false advertising and unfair competition laws, as well as Tempo's wrongful adoption and use of a trademark that is confusingly similar to that of the plaintiff, Andover Healthcare, Inc. ("Andover"), in violation of federal and state trademark and unfair competition laws.

2. Andover has been providing high quality products and service to the healthcare, animal health, and sports medicine industries—in the United States and around the world—for more than three decades. Andover's products include a line of latex-free self-adherent wrap bandages, which Andover has manufactured and sold for over twelve years, both to consumers and to institutions such as blood banks.

3. The availability of latex-free bandage products is crucial both for patients with latex allergies and for the significant percentage of American health care workers with latex allergies, for whom unintended exposure to latex could be life-threatening.

4. On information and belief, Tempo manufactures and sells a line of self-adherent wrap bandages which it advertises as “latex free.” On information and belief, Tempo’s products are sold in direct competition to Andover’s latex-free products, including via sales to blood banks.

5. Contrary to Tempo’s labeling and advertising, however, independent laboratory testing of a sample of Tempo’s “latex-free” product revealed that the sample actually contained latex. Tempo’s false labeling and advertising of its products as “latex free” not only poses a severe health threat, but also gives Tempo an unfair advantage in competing to meet consumer demand for latex-free products.

6. In addition, for more than five years Andover has used the trademark of a repeating design of the words “GIVE BLOOD” on bandages such as adhesive bandages and tape and compression and elastic bandages. Andover’s “GIVE BLOOD” trademark is registered on the Supplemental Register and is the subject of United States Trademark Registration No. 3,555,629, a copy of which is attached as Exhibit A. Andover’s “GIVE BLOOD” mark has acquired secondary meaning through Andover’s substantially exclusive and continuous use of the mark in commerce for more than five years. Andover sells its “GIVE BLOOD” products directly to institutions such as blood banks.

7. On information and belief, certain of Tempo’s products are also imprinted with a substantially similar repeated pattern of the words “Give Blood” and are sold in direct competition with Andover’s products.

8. Tempo's use of a repeating pattern of the words "Give Blood" on its bandage products is likely to cause consumer confusion, or to cause mistake or to deceive, because Andover and Tempo are involved in the same industry and are likely to deal with many of the same customers and consumers within blood banks and other medical institutions.

9. Moreover, Tempo's use of Andover's "GIVE BLOOD" mark, when Tempo also falsely labels products as "latex-free," threatens Andover's business reputation as a provider of quality medical products—which is a critical factor in this business.

## ***II. Parties***

10. The plaintiff, Andover, is a Delaware company, with a principal place of business in Salisbury, Massachusetts.

11. On information and belief, the defendant, Tempo, is a Delaware corporation with a principal place of business in Chapin, South Carolina, or Scottsdale, Arizona.

## ***III. Jurisdiction and Venue***

12. This Court has subject matter jurisdiction over Andover's federal law claims because they arise under the Lanham Act (15 U.S.C. § 1051 *et seq.*). This Court therefore has subject matter jurisdiction under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1338(b) (unfair competition), and 15 U.S.C. § 1121 (Lanham Act). This Court has subject matter jurisdiction over Andover's Massachusetts common law and Massachusetts law claims under the supplemental jurisdiction provisions of 28 U.S.C. § 1367 (a).

13. Venue is proper in this District pursuant to 28 U.S.C. § 1391.

14. This Court has personal jurisdiction over Tempo pursuant to Fed. R. Civ. P. 4(k) and Mass. Gen. Laws ch. 223A, § 3.

#### ***IV. Background Facts***

##### ***A. Andover's Business***

15. Andover was founded in 1976 and is a leading manufacturer of cohesive bandages and tapes for the healthcare, animal health, and sports medicine industries, distributing its innovative, high-quality products in the United States and throughout the world.

16. Andover has manufactured and sold self-adherent wrap bandage products for decades. Andover began selling latex-free versions of its bandages in 1998 and was the first company to manufacture printed latex-free bandages. It continues to sell its latex-free products under the registered tradename "CoFlex."

##### ***B. Latex Allergies***

17. Three million Americans suffer from latex allergies, according to the American Latex Allergy Association ("ALAA"), or approximately one percent of the general population. Allergic reactions to latex range from mild itching and sneezing to anaphylactic shock—a severe and often life-threatening condition.

18. Latex allergies are most often caused by repeated exposure to latex-containing products. Bandages—because they are most often used in direct contact with skin—are one of the most common causes of latex allergies, according to the Mayo Clinic.

19. For this reason, latex allergies affect a much higher percentage of American healthcare workers—as much as 17 percent, according to the ALAA.

20. There is no cure for latex allergies. The best mode of prevention is to avoid any contact with latex-containing products.

**C. Andover's Use of the "GIVE BLOOD" Mark**

21. Andover has been using the "GIVE BLOOD" mark in connection with its business since at least 2005.

22. Andover's "GIVE BLOOD" trademark is registered on the Supplemental Register and is the subject of United States Trademark Registration No. 3,555,629.

23. Andover's "GIVE BLOOD" trademark has acquired secondary meaning through Andover's exclusive and continuous use of its "GIVE BLOOD" mark in commerce for more than five years.

**D. Tempo's Unlawful Advertisement and Sale of Bandage Products as "Latex-Free"**

24. On information and belief, Tempo promotes itself as a manufacturer and wholesaler of disposable medical products.

25. On information and belief, Tempo and Andover market and sell their products within the same industry, to many of the same clients, including blood banks and medical institutions. Tempo also markets, sells and/or offers its products for sale through its website.

26. A sample of Tempo's product ("Tempo Sample"), advertised and labeled as "latex-free," was purchased through Tempo's website by an independent investigation firm and was received in Massachusetts.

27. On information and belief, the Tempo Sample contained latex. Therefore, the statement that the Tempo Sample is "latex-free" is false and misleading.

28. On information and belief, Tempo continues to advertise, sell and/or offer for sale its improperly labeled products.

29. Unless enjoined, Tempo's false advertising and unfair competitive practices will continue to cause Andover irreparable harm as well as monetary damages.

***E. Tempo's Unlawful Use of Andover's "Give Blood" Mark***

30. On information and belief, Tempo produces, has sold, and continues to sell in this Judicial District and elsewhere in the United States a bandage imprinted with the words "Give Blood" in a repeating pattern (the "Infringing Bandage").

31. Unless enjoined, Tempo's continuing use of the Andover's "GIVE BLOOD" mark will irreparably harm Andover by misleading and confusing consumers as to the origin, source and identity of the products and services offered by the two entities.

32. In addition, unless enjoined, Tempo's use of Andover's "GIVE BLOOD" mark will cause Andover to suffer immeasurable harm to its goodwill and reputation for quality.

**COUNT I**

***(Federal Trademark Infringement, 15 U.S.C. §1114(1))***

33. Andover incorporates the allegations contained in the preceding paragraphs as if fully set forth here.

34. Tempo's "Give Blood" products are being advertised, distributed and sold in United States commerce.

35. Tempo's use of Andover's "GIVE BLOOD" mark in connection with the sale, offering for sale, distribution, promotion and advertising of goods is likely to cause consumer confusion, or to cause mistake or to deceive, as to the source, sponsorship, or affiliation of Tempo's products or services.

36. Tempo's conduct, including as described above, constitutes trademark infringement in violation of 15 U.S.C. §1114(1).

37. Upon information and belief, Tempo's conduct is willful, knowing, and in bad faith.

38. As a result of Tempo's conduct, Andover has suffered, and will continue to suffer, actual damages and irreparable harm, for which it has no adequate remedy at law.

39. Andover is entitled to recover as damages Tempo's profits from its sale of its products imprinted with the "Give Blood" pattern.

## **COUNT II**

### ***(Federal Unfair Competition, 15 U.S.C. § 1125(a))***

40. Andover incorporates the allegations contained in the preceding paragraphs as if fully set forth here.

41. Tempo's aforesaid use of Andover's "GIVE BLOOD" mark constitutes the use of words, terms, names, symbols and devices and combinations thereof, false designations of origin and false and misleading representations of fact that are likely to cause confusion or to cause mistake or to deceive as to the affiliation, connection or association of Tempo with Andover, or as to the origin, sponsorship or approval of Tempo's products or other commercial activities by Andover.

42. Upon information and belief, Tempo had actual knowledge of Andover's ownership of the GIVE BLOOD trademark and Tempo committed the foregoing acts with full knowledge that it was infringing upon Andover's rights..

43. Tempo's conduct, including as described above, constitutes unfair competition in violation of 15 U.S.C. §1125(a).

44. As a result of Tempo's conduct, Andover has suffered, and will continue to suffer, actual damages and irreparable harm, for which it has no adequate remedy at law.

45. Andover is entitled to recover as damages Tempo's profits from sales of Tempo's "Give Blood" products.

**COUNT III**

***(Federal False Advertising, 15 U.S.C. § 1125(a))***

46. Andover incorporates the allegations contained in the preceding paragraphs as if fully set forth here.

47. Tempo's description and representation of its latex-containing products as "latex-free" constitutes a false designation of origin and is a false and misleading statement of fact in commercial advertising or promotion that misrepresents the nature, characteristics and qualities of this product.

48. Tempo's conduct, including as described above, constitutes false advertising in violation of 15 U.S.C. §1125(a).

49. Upon information and belief, Tempo's conduct is willful, knowing, and in bad faith.

50. The acts of Tempo have caused and are causing great and irreparable harm and damage to Andover, and unless permanently restrained and enjoined by this Court, such irreparable harm will continue.

51. Andover is entitled to recover as damages Tempo's profits from sales of Tempo's products that are falsely labeled and marketed as "latex-free."

**COUNT IV**

***(Massachusetts Common Law Trademark Infringement)***

52. Andover incorporates the allegations contained in the preceding paragraphs as if fully set forth here.

53. Tempo's conduct constitutes trademark infringement in violation of Massachusetts common law.



54. Tempo's conduct has caused and is continuing to cause great and irreparable harm to Andover and, unless preliminarily and permanently restrained and enjoined by this Court, such irreparable harm will continue.

**COUNT V**

***(Massachusetts Common Law Unfair Competition)***

55. Andover incorporates the allegations contained in the preceding paragraphs as if fully set forth here.

56. Tempo's conduct constitutes unfair competition in violation of Massachusetts common law.

57. Tempo's conduct has caused and is continuing to cause great and irreparable harm to Andover and, unless preliminarily and permanently restrained and enjoined by this Court, such irreparable harm will continue.

**COUNT VI**

***(Massachusetts Unfair Competition, Mass. Gen. Laws ch. 110H, §§ 13, 16)***

58. Andover incorporates the allegations contained in the preceding paragraphs as if fully set forth here.

59. Tempo's conduct, including as described above, constitutes unfair competition in violation of Mass. Gen. Laws ch. 110H, §§ 13 and 16.

60. As a result of Tempo's conduct, Andover has suffered, and will continue to suffer, actual damages and irreparable harm, for which it has no adequate remedy at law.

**COUNT VII**

***(Massachusetts Trademark Dilution, Mass. Gen. Laws ch. 110H, §§ 13)***

61. Andover incorporates the allegations contained in the preceding paragraphs as if fully set forth here.

62. Tempo's conduct, including as described above, is likely to injure the business reputation of Andover, impair the effectiveness of the Andover "GIVE BLOOD" mark, and dilute the distinctive quality of the Andover "GIVE BLOOD" mark and the reputation and goodwill symbolized by the mark, in violation of Mass. Gen. Laws ch. 110H, § 13.

63. As a result of Tempo's conduct, Andover has suffered, and will continue to suffer, actual damages and irreparable harm, for which it has no adequate remedy at law.

### **COUNT VIII**

#### ***(Massachusetts Unfair or Deceptive Acts or Practices, Mass. Gen. Laws ch. 93A)***

64. Andover incorporates the allegations contained in the preceding paragraphs as if fully set forth here.

65. Tempo is engaged in "trade" or "commerce" within the meaning of Mass. Gen. Laws ch. 93A.

66. Tempo's conduct, including as described above, constitutes unfair competition, unlawful, unfair, and deceptive business practices, and the making of false and misleading statements in connection with the offering of goods and services for sale in the Commonwealth of Massachusetts, in violation of Mass. Gen. Laws ch. 93A, §§ 2 and 11, and the regulations promulgated under them.

67. As a result of Tempo's conduct, Andover has suffered, and will continue to suffer, actual damages and irreparable harm, for which it has no adequate remedy at law.

**REQUEST FOR RELIEF**

WHEREFORE, Andover respectfully requests that this Court:

1. Preliminarily and permanently enjoin Tempo and its respective, successors, divisions, subsidiaries, or joint ventures thereof, together with any and all parent or affiliated companies or corporations, and all officers, directors, employees, agents, attorneys, representatives, those acting in privity or concern with them, or on their behalf, from:

(a) using the phrase “latex-free” or colorable imitation thereof, to advertise, promote or characterize any bandage product that has any measurable amount of latex;

(b) using on or in connection with the production, manufacture, advertisement, promotion, display (including on the Internet) or otherwise, displaying for sale, offering for sale, sale or distribution of any product or for any purpose whatsoever, the GIVE BLOOD mark, or any mark confusingly similar thereto;

(c) representing by any means whatsoever, directly or indirectly, or doing any other acts or things calculated or likely to cause confusion, mistake or to deceive purchasers into believing that Tempo’s products originate with or are the products of Andover of that there is any affiliation or connection between Andover and Tempo, and from otherwise competing unfairly with Andover;

2. Award to Andover its actual damages in an amount to be determined at trial;

3. Award to Andover all of its actual costs and reasonable attorneys’ fees in this action, as authorized by 15 U.S.C. § 1117; Mass. Gen. Laws ch. 93A, § 11; and Mass. Gen. Laws ch. 110H, § 14;

4. Award to Andover double or treble damages as appropriate under Mass. Gen. Laws ch. 93A, § 11; Mass. Gen. Laws ch. 110H, § 14; or other applicable law;

5. Enter judgment in favor of Andover on each of its claims; and
6. Grant to Andover such other relief as may be just and warranted.

**JURY DEMAND**

Andover demands a trial by jury on all issues so triable.

ANDOVER HEALTHCARE, INCORPORATED

By its attorneys,

/s/ Vinita Ferrera

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Dated: January 5, 2011

