

SHERIFF'S ENTRY OF SERVICE

Marietta, Georgia COBB COUNTY

Superior Court ☒ State Court ☐

Attorney's Address

Michael Rozmajzl
 130 Arnold Mill Park
 Woodstock, GA 30188
 770.310.0687

Civil Action No. 12-1-2081-28Date Filed 02-29-12

Name and Address of Party to be Served

Carter Burton
 5000 Plaza on the Lake
 Suite 305
 Austin, Texas 78746

Amend, Inc.

Plaintiff

vs.

Carter Burton

Garnishee

Defendant

PERSONAL ☐

I have this day served the defendant _____ personally with a copy of the within action and summons

NOTORIOUS ☐

I have this day served the defendant _____ by leaving a copy of the action and summons at his most notorious place of abode in this County.

Delivered same into hands of _____ described as follows age, about _____ years; weight, about _____ pounds; height, about _____ feet and _____ inches, domiciled at the residence of defendant.

CORPORATION ☐

Served the defendant _____ a corporation by leaving a copy of the within action and summons with _____ in charge of the office and place of doing business of said Corporation in this County.

TACK & MAIL ☐

I have this day served the above styled affidavit and summons on the defendant(s) by posting a copy of the same to the door of the premises designated in said affidavit, and on the same day of such posting by depositing a true copy of same in the United States Mail, First Class in an envelope properly addressed to the defendant(s) at the address shown in said summons, with adequate postage affixed thereon containing notice to the defendant(s) to answer said summons at the place stated in the summons.

NON EST ☐

Diligent search made and defendant not to be found in the jurisdiction of this Court.

This _____ day of _____, 20____

DELIVERED THIS 6th DAY OF March 2012
BRUCE ELLANT
 CONSTABLE, PCT. 5, TRAVIS COUNTY, TEXAS
 BY _____
 DEPUTY

SHERIFF DOCKET _____ PAGE _____

DEPUTY

Bruce Ellant

Constable Pct. 5, Travis County, Texas



WHITE: Clerk

CANARY: Plaintiff Attorney

PINK: Defendant

12-1-2081-28
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This _____ day of _____, 20____

SHERIFF DOCKET _____ PAGE _____

Bruce Elfant
Constable Pct. 5, Travis County, Texas



WHITE: Clerk CANARY: Plaintiff Attorney PINK: Defendant

IN THE SUPERIOR COURT OF COBB COUNTY
COBB JUDICIAL CIRCUIT
STATE OF GEORGIA

SECOND ORIGINAL

AMENDIA, INC.

Plaintiffs

vs.

OMNI SURGICAL, LLC, and
DAVID JANICE, and
CARTER BURTON

Defendants.

CIVIL ACTION

FILE NO. 12-1-2081-28

SUMMONS

You are hereby summoned and required to file with the Clerk of said court and serve upon the Plaintiff's attorney, whose name and address is:

Michael F. Rozmajzl
Blue. King & Rozmajzl Business Law Group, P.C.
130 Arnold Mill Park
Woodstock, GA 30075
770.310.0687

an answer to the complaint which is herewith served upon you within 30 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

This 29th day of February, 2012.

Jay Stephenson

Clerk of Superior Court

By:

Jay C. Stephenson

COBB COUNTY, GA
FILED IN OFFICE
2012 FEB 29 PM 3:15
Jag C. Stephenson
COBB SUPERIOR COURT CLERK

February 29, 2012

Constable Bruce Elfant,

This letter constitutes a request to serve the enclosed summons and complaints on the named individuals and corporation. Attached to each of the three enclosed summons and complaint is a partially completed Sheriff's Entry of Service. Please return to my attention your executed copy of service entry using the pre-addressed stamped envelope.

Also enclosed is a check in the amount of \$210 payable to Constable Bruce Elfant.

Should you have any questions or comments, please do not hesitate to contact me at 770.310.0687 or by email at mrozmajzl@bluebusinesslaw.com

Thank you in advance.

Regards,

A handwritten signature in black ink, appearing to be 'MR', is written over a horizontal line.

Michael F. Rozmajzl

RECEIVED

2012 MAR -1 PM 2:59

CLERK OF DISTRICT COURT
DALLAS COUNTY, TEXAS

IN THE SUPERIOR COURT OF COBB COUNTY
COBB JUDICIAL CIRCUIT
STATE OF GEORGIA

AMENDIA, INC.

Plaintiffs

vs.

OMNI SURGICAL, LLC, and
DAVID JANICE, and
CARTER BURTON

Defendants.

CIVIL ACTION
FILE NO. 12-1-2081-28

SECOND ORIGINAL

COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF

COMES NOW, Plaintiff, Amendia Inc. ("**Amendia**") a Georgia corporation which makes and files this COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF against Defendants, OMNI SURGICAL, LLC, formerly known as OMNI SURGICAL, L.P. and doing business as "Spine 360" and "Spine 360, LLC" (collectively referred to as "**Omni**"), and DAVID JANICE ("**Janice**"), and CARTER BURTON ("**Burton**") and shows the Court the following:

I. PARTIES AND JURISDICTION AND VENUE

1. Amendia is a Georgia corporation with its registered office in Cobb County, Georgia.
2. Defendant Omni is a Texas limited liability company with its principal place of business in 5000 Plaza on the Lake, Suite 305, Austin, TX 78746, Texas. Upon information and belief, Omni Surgical, LLC is the successor in interest to Omni Surgical, L.P., each of which

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JAC. S. JACOBSON
COBB SUPERIOR COURT CLERK

have done business under the name “Spine 360” and “Spine 360, LLC”. Based on the information and belief that the foregoing named Defendants are a single entity, such Defendants are collectively referred to herein as Defendant Omni.

3. Upon information and belief, Defendant Janice is a resident of Austin, Texas and is the CEO and manager of Defendant Omni, and is also the beneficial owner of all of Defendant Omni’s issued equity interests through his companies, MOMO, Ltd. and Omni Headquarters, LLC.

4. Upon information and belief, Defendant Burton is a resident of Austin, Texas and is the President of Defendant Omni.

5. This Court has personal jurisdiction over each of Defendants Omni, Janice, and Burton because they have traveled to Cobb County, conducted business and transacted business within this State, committed tortious acts or omissions within this State; and/or by their actions, have committed tortious injury in this State where they regularly do or solicit business, or engage in other persistent courses of conduct, or derive substantial revenue from goods used, consumed, or produced in this State. The Court has jurisdiction over these Defendants pursuant to O.C.G.A. 9-10-91 (1), (2), (3).

6. Each of Defendants Omni, Janice and Burton consented to personal jurisdiction and venue in the State of Georgia as provided further herein.

II. BACKGROUND

7. Defendants Omni and Janice entered into that certain Confidential Letter of Intent (the “**LOI**”) dated on or about December 2009 which outlined Amendia’s proposed acquisition of all of Defendant Omni’s assets (the “**Acquisition**”). Defendant Omni was referred to in the

LOI as “Spine 360, LLC”. Defendant Janice signed the LOI on behalf of Spine 360, LLC and was referred to as “the current owner of 100% of the interests and assets of [Spine 360, LLC].”

8. The LOI contained both binding and nonbinding terms and outlined the structure of the Acquisition, including purchase price, ancillary agreements and conditions to closing. The Acquisition was contingent upon certain conditions precedent including, among others, satisfactory completion of a due diligence, investigation, and acquisition audit (collectively, the “**Due Diligence Review**”) to be conducted by Amendia and its representatives. The Due Diligence Review continued from approximately December 2009 through approximately August 2010.

9. The LOI and the terms contained therein were governed by that certain Mutual NonDisclosure Agreement (the “**NDA**”) dated December 8, 2009 by and between Amendia and “Spine 360”, the trade name for Defendant Omni. The NDA was signed by Defendant Janice in his capacity as “owner” of Spine 360. The NDA addressed jurisdiction and venue as follows: “This Agreement shall be governed by the laws of the State of Georgia, and both parties consent to the personal jurisdiction and waive any objections to venue of the state and federal courts thereof.”

10. The binding obligations in the LOI included, among others, the following: (i) Defendant Omni’s duty to provide to Amendia and its management, personnel, legal counsel, accountants, and technical and financial advisors (collectively, “**Representatives**”), full access and opportunity to inspect, investigate and audit the books, records, contracts and documents of Defendant Omni for the purposes of identifying issues pertaining to Defendant Omni’s business, assets, and valuation; (ii) Defendant Omni’s duty to provide to Amendia and its Representatives

access and opportunity to inspect, investigate and audit the books, records, contracts, and other documents; and (iii) mutual consent to Georgia laws, venue and jurisdiction.

11. The LOI required that Defendants disclose all actual and contingent liabilities to Amendia.

12. During the Due Diligence Review, Amendia secured a capital commitment from a financing syndicate to fund the Acquisition through debt and equity offerings. The financing syndicate (the “**Financing Syndicate**”) was comprised of an investment advisor firm, commercial bank, and private equity firms. The financing syndicate conditioned its investment in the Acquisition on, among others, completion of a Due Diligence Review to its satisfaction.

13. The original members of the Financing Syndicate included GE Healthcare Financing Services, Inc. which was represented by Defendant Burton. Defendant Burton entered into that certain Confidentiality Agreement dated January 12, 2010 protecting confidential information of Amendia. Defendant Burton provided investment advisory services to Amendia and had direct access to material confidential records of Amendia in his capacity as a financial advisor to Amendia with regards to the Acquisition. In his capacity as a financial advisor, Defendant Burton held a duty of loyalty and care to Amendia.

14. Amendia incurred expenses exceeding \$900,000 to conduct and administer the Due Diligence Review and secure financing. Amendia paid cash deposits to Defendant in two increments totaling \$75,000 (the “**Cash Deposits**”) as an inducement for Defendants to participate in the Due Diligence Review and to give Amendia first right of refusal to acquire the assets of Defendant Omni. Amendia reimbursed Defendant Omni for, or paid third parties on Omni’s behalf, the cost of, among others, an independent audit, financial statement compilation, quality of earnings report, and establishing general corporate governance.

III. MISREPRESENTATION OF FACTS

15. Defendant Omni's assets were comprised primarily of patented, patent pending and unpatented technology on the design and use surgical instruments in spine surgery.

Defendant's core asset was its Talon Spinal Fixation System (the "**Talon System**") which is mainly comprised of a tulip and pedicle screw to immobilize and stabilize spine segments.

16. Based on information and belief, during the Due Diligence Review period, Defendants Omni and Janice received a legal letter (the "**Infringement Notice**") from its competitor, Phygen, LLC, giving notice that (i) the Talon System infringed U.S. Patent 7,678,139 owned by Phygen, LLC, and (ii) Phygen had drafted a complaint seeking, among others, economic damages and injunctive relief. The allegations in the Infringement Notice constituted material pending and contingent liabilities and litigation matters.

17. Defendant's Omni and Janice did not disclose the Infringement Notice to Amendia or its Representatives for a period of approximately six weeks after receipt. Upon information and belief, the Infringement Notice was not disclosed by Defendants Omni and Janice to Amendia and its Representatives because the infringement substantially impaired the value of assets of Defendant Omni.

18. For the six week concealment period, Amendia continued to incur significant costs to conduct the Due Diligence Review by entering into the most expensive phase of the Due Diligence Review. During this concealment period, Amendia incurred costs for Defendant Omni's outside consultants and professional service providers, retention of financing, and payment Cash Deposit to Defendant Omni.

19. In approximately August 2010, Amendia's Representatives identified the concealed Infringement Notice and disclosed the Infringement Notice to its Financing Syndicate. Following disclosure of the Infringement Notice, the Financing Syndicate withdrew its capital commitment to fund the Acquisition. Accordingly, Amendia terminated its Due Diligence and forfeited the Cash Deposits.

IV. POST-TERMINATION OF DUE DILIGENCE; PROMISSORY ESTOPPEL

20. Starting approximately November 2011, Defendants Omni and Janice alleged that Amendia's MIS Savannah_T pedicle screw and tulip (the "**Savannah System**"), a product recently introduced by Amendia in the spine market, might contain design features similar to Defendant Omni's Talon System.

21. On December 7, 2011, Amendia as represented by Tim Lusby, President of Operations, and Jeff Smith, CEO, held a teleconference (the "**December 2011 Teleconference**") with Defendant Omni as represented by Defendant Janice and Omni's corporate officer, Tim Hildebrand, to discuss (i) the proposed revisions to the Savannah System to eliminate "similarities" and (ii) Amendia's proposed engagement of Derrek Holland whose business, Fenway Surgical, LLC, was a former Consultant to Defendant Omni.

22. During the December 2011 Teleconference, Defendant Janice did not disclose that Derrek Holland or Fenway Surgical, LLC may be subject to noncompetition restrictions and in fact consented to Amendia's proposed engagement of Derrek Holland. Amendia relied on this averment and failure to object, and Amendia proceeded with the engagement of Derrek Holland as a Consultant through his company, How Do Holdings, LLC.

23. During the December 2011 Teleconference, Defendant Janice confirmed that if Amendia slightly revised its Savannah System design, then there would be no risk of infringement or similarity to Defendant Omni's Talon System. Amendia agreed to provide proposed Savannah System design changes to Defendant Omni for approval.

24. On December 7, 2011 and December 14, 2011, Amendia submitted to Defendant Omni's corporate officer, Tim Hildebrand, CAD drawings depicting Amendia's proposed Savannah System revisions for approval. Amendia requested that Defendants Omni and Janice approve the design changes to eliminate their design similarity concerns.

25. On December 27, 2011, Mr. Hildebrand and Defendant Janice reviewed and approved the proposed Savannah System design changes. Amendia relied on this approval and proceeded to final engineering and production under the Savannah System design changes.

26. Notwithstanding Defendant Janice's approval of the proposed revisions to the Savannah System design and despite consenting to Amendia's engagement of Derrek Holland's company during the December 2011 Teleconference, on February 25, 2012, Defendant Omni delivered a cease and desist letter to Amendia, alleging among others, (i) developing a knock-off of the Talon System; and (ii) tortious interference with Defendant Omni's expired contract with Derrek Holland on behalf of Fenway Surgical, LLC.

27. Based on information and belief, Defendant Omni has verbally stated to Amendia's prospective customers and current distributor that Amendia has committed wrongful acts, is the subject of potential litigation, and developed patent infringing products.

COUNT ONE: NEGLIGENT MISREPRESENTATION

28. Amendia restates and re-alleges Paragraphs 1 through 27 of this Complaint as though fully set forth herein.

29. Defendants Omni and Janice negligently and/or recklessly misrepresented and concealed from Amendia and its Representatives the Infringement Notice which created a false, illusory, and deceptive condition and value of Defendant Omni and its assets.

30. These misrepresentations were negligently or recklessly made to Amendia and its Representatives through concealment and nondisclosure. As a direct and proximate result of these misrepresentations, omissions, and concealments, Amendia continued its costly due diligence review of Defendants Omni and Janice, and Amendia has been injured in the amount to be determined at trial.

31. Defendants Omni and Janice knew at all times that Amendia and its agents relied upon the misrepresentation and concealment while continuing the due diligence. Defendant Omni's and Janice's concealment and nondisclosure were intended to influence Amendia's valuation of Defendant Omni and its decision to continue funding the due diligence.

32. The Infringement Notice was a material factor in the Financing Syndicate's decision to terminate financing of the Acquisition and Amendia's decision to terminate the due diligence and discontinue the prospective acquisition of Defendant Omni. Had Defendants Omni and Janice properly disclosed the Infringement Notice, Amendia would have terminated the due diligence at an earlier date, thereby avoiding significant costs associated with the continued due diligence.

COUNT TWO: UNJUST ENRICHMENT

33. Amendia restates and realleges Paragraphs 1 through 32 of this Complaint as though fully set forth herein.

34. As a result of the substantial sums paid by Amendia to Defendant Omni as a reimbursement of expenses incurred, or to third parties engaged by Defendant Omni for payment of services performed, pursuant to Due Diligence Review and the Financing Syndicate review, Defendants Omni and Janice have been unjustly enriched at the expense of Amendia.

35. Specifically, Defendant Omni retained the Cash Deposit and received valuable services including an audit, financial statement compilation, quality of earnings report, patent claims construction and improvement, and general corporate governance and regulatory compliance matters, unjustly enriching Defendant at an amount to be proven at trial.

36. Defendants Omni and Janice, in his capacity as owner of Defendant Omni, should be required to disgorge this unjust enrichment.

COUNT THREE – PROMISSORY ESTOPPEL

37. Amendia hereby re-alleges and incorporates by reference the allegations of paragraphs 1 through 36 of this Complaint.

38. Defendants Omni and Janice gave certain averments, promises, and consents (collectively, “**Promises**”) to Amendia to proceed with the redesign of the Savannah System and to proceed with the engagement of its Consultant.

39. Defendants Omni and Janice had reason to believe that Amendia would rely on these Promises.

40. Amendia relied on the Promises and Amendia incurred substantial expenditures in the redesign and branding of the Savannah System and the engagement of its distributor, Fenway Surgical, LLC.

41. Injustice can only be prevented by enforcing the Defendant's Promises. Defendant Omni and Janice should be estopped from pursuing its allegations of misappropriation of trade secrets and tortious interference with contract and all related claims alleged by Defendant Omni, and Amendia should be permitted to proceed with its manufacturing and sale of the Savannah System in its amended form and to continue its engagement of Derrek Holland without limitation or threat of interference by Defendants Omni or Janice.

42. Defendant Omni's and Janice's breach of their Promises proximately caused the damages previously described, said damages were foreseeable and Defendant Omin's and Defendant Janice's conduct causing the damages was intended by malice, willfulness, insult, and abuse, thus entitling the Amendia to recover punitive as well as actual damages.

COUNT FOUR – GEORGIA STATUTORY AND COMMON LAW
UNFAIR COMPETITION

43. Amendia hereby re-alleges and incorporates by reference the allegations of paragraphs 1 through 42 of this Complaint.

44. Defendant Omni and Defendant Janice are attempting to encroach on the business of Amendia by making misstatements of fact to Amendia's prospective customers and distributors thereby deceiving and misleading purchasers of Amendia's products, in violation of O.C.G.A. § 23-2-55. Defendant Omni also continues to make unfounded threats of litigation which are contrary to its previous acts and consents to Amendia.

45. Defendant Omni's and Defendant Janice's conduct as described above constitutes common law unfair competition.

46. Amendia has suffered damages as a result of Defendants' unfair competition.

47. Amendia is entitled to actual and punitive damages, in an amount to be determined at trial.

COUNT FIVE: SLANDER AND SLANDER PER SE

48. Amendia hereby re-alleges and incorporates by reference the allegations of paragraphs 1 through 47 of this Complaint.

49. Defendant Omni and Defendant Janice have made false, disparaging, and defamatory statements about Amendia to third parties, including without limitation to prospective customers and distributors.

50. Defendant Omni and Defendant Janice statements were not privileged communications within the meaning of O.C.G.A. Section 51-5-7.

51. These statements were made orally directly to third parties.

52. Defendant Omni's and Defendant Janice's statements were made with malice because Defendants knew their statements were false or made the statements with reckless disregard for their truth.

53. These defamatory statements has damaged Amendia causing general and special damages including without limitation the damage to Amendia's good name and reputation.

54. Defendants Omni and Janice are liable to Amendia for orchestrating or authoring these defamatory statements.

COUNT SIX: BREACH OF FIDUCIARY DUTIES

55. Amendia hereby re-alleges and incorporates by reference the allegations of paragraphs 1 through 54 of this Complaint.

56. Defendant Burton owed to Amendia a duty of loyalty and care to provide prudent financial and investment advice for purposes of assisting Amendia in obtaining financing, under fair terms, to fund the Acquisition.

57. Based on information and belief, Defendant Burton, during the course of his representation of Amendia, participated in self-dealing to negotiate a senior officer position with Defendant Omni, and in fact, obtained a senior officer position with Omni during the course of the Due Diligence Review.

58. As a result of Defendant Burton's failure to comply with its duty of loyalty and care to Amendia, Amendia was unable to maintain a capital commitment from the Finance Syndicate for purposes of funding the Acquisition.

59. Defendant Burton's acts have damaged Amendia causing general and special damages including without limitation lost business opportunity. Amendia has been damaged by the Defendants' actions in an amount to be determined by the evidence at trial.

COUNT SEVEN: PUNITIVE DAMAGES

60. Amendia hereby re-alleges and incorporates by reference the allegations of paragraphs 1 through 59 of this Complaint.

61. Each of Defendants Omni, Janice, and Burton actions have shown willful misconduct, malice, fraud, oppression and the entire want of care that would raise the

presumption of conscious indifference to the consequences so as to justify an award of punitive damages in favor of Amendia.

62. Each of Defendants Omni, Janice, and Burton have acted with the specific intent to cause harm to Amendia and are subject to punitive damages.

COUNT EIGHT – ATTORNEYS FEES - O.C.G.A. § 13-6-11

63. Amendia hereby re-alleges and incorporates by reference the allegations of paragraphs 1 through 63 of this Complaint.

64. Defendants' actions described herein have been taken in bad faith, and Defendants have caused Amendia unnecessary trouble and expense, such that Amendia is entitled to recover its expenses of litigation and reasonable attorney's fees pursuant to O.C.G.A. § 13-6-11.

65. Amendia has been damaged by the Defendants' actions in an amount to be determined by the evidence at trial.

JURY TRIAL DEMANDED

66. Amendia hereby demands trial by jury on all issues proper for a jury trial.

WHEREFORE, Amendia prays for the following:

A.) That Summons issue and Defendants be served with process in accordance with law;

B.) That Amendia recover compensatory damages against Defendants in an amount to be determined by the enlightened conscious of the jury;

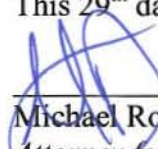
C.) That Defendants be enjoined and restrained from conduct designed to destroy Amendia;

D.) That Amendia be awarded punitive damages in an amount determined by the enlightened conscious of the jury;


E.) That Amendia recover its expenses of litigation and attorneys fees from Defendants; and

F.) That Amendia has and receives such other and further relief as is just and proper.

This 29th day of February, 2012.



Michael Rozmajzl
Attorney for the Plaintiff
Georgia Bar No. 572920



R. Randy Edwards
Georgia Bar No. 241525

Attorney for Plaintiff

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