

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION, AKRON

Pain Management Technologies, Inc.,)	
1340 Home Ave., Bldg. A)	Case No.
Akron, Ohio 44310,)	
)	Judge
Plaintiff,)	
)	Magistrate
v.)	
)	
Aspen Medical Products, Inc.,)	<u>COMPLAINT FOR</u>
6481 Oak Canyon)	<u>DECLARATORY JUDGMENT OF</u>
Irvine, California 92618,)	<u>NONINFRINGEMENT AND</u>
)	<u>AND INVALIDITY OF PATENT</u>
Defendant.)	
)	(Jury Demand Endorsed Hereon)
)	

NOW COMES the Plaintiff, *Pain Management Technologies, Inc.*, and for its Complaint against the Defendant hereby alleges and avers the following:

THE PARTIES

1. The Plaintiff, Pain Management Technologies, Inc., is a corporation organized under the laws of Ohio, and has its principal place of business in Akron, Ohio, which is in Summit County.
2. The Defendant, Aspen Medical Products, Inc., is a California corporation with its principal place of business located in Irvine, California.
3. The Defendant purports to be the assignee and owner of United States Design Patent No. D636,494 (hereinafter referred to as "the '494 patent").

JURISDICTION AND VENUE

4. There is an actual justiciable case or controversy pursuant to 28 U.S.C. § 2201 regarding the validity and infringement of the '494 patent. A judicial declaration that the claims of the '494 patent are invalid and that the Plaintiff has not infringed any valid claim of the '494 patent is necessary and appropriate at this time so that the Plaintiff may ascertain its rights and duties with respect to the '494 patent.
5. This Court has subject matter jurisdiction over this Complaint under 28 U.S.C. § 2201, 2202, and 1338 as a declaratory judgment action arising under the patent laws, Title 35 of the United States Code.
6. In addition or in alternative to this Court's federal question jurisdiction, this Court also has subject matter jurisdiction pursuant to diversity of citizenship principles as this case involves parties from different states and the amount in controversy exceeds \$75,000.
7. This Court has personal jurisdiction over the Defendant by virtue of the Defendant's conduct within the State of Ohio, within this judicial district. The Defendant has issued a cease and desist letter to the Plaintiff at its offices in Akron, Ohio, within this judicial district, which invokes personal jurisdiction in the Northern District of Ohio.
8. Venue is proper in the Northern District of Ohio pursuant to 28 U.S.C. § 1391 and 1400.

FACTUAL ALLEGATIONS

9. The Defendant sent the Plaintiff a cease and desist letter dated October 10, 2012. (See a true and accurate copy of the cease and desist letter attached hereto as "Exhibit 1.")

1 10. In their letter, the Defendant alleges that the Plaintiff has infringed the '494 patent. (A copy
2 of the '494 patent was included within the cease and desist letter, attached within "Exhibit
3 1.")

4 11. The Defendant alleges that the Plaintiff's "Stringback belt" product infringes upon the '494
5 patent.

6 12. In actuality, the Plaintiff's product does not infringe the '494 patent. (See a thorough design
7 patent noninfringement chart analysis attached hereto as "Exhibit 2," which compares the
8 allegedly infringing product to the '494 patent. The attached noninfringement chart is for
9 illustrative purposes only, and the Plaintiff reserves its rights to alter, amend, or modify its
10 claims positions pursuant to the local patent rules.)

11 13. The Plaintiff has had its product reviewed by patent counsel and at times relevant received an
12 advice of counsel opinion of noninfringement. Thus, if Plaintiff's product were found to be
13 infringing, any infringement was not willful.

14 14. Further, Plaintiff's sales of its allegedly infringing product have been insignificant.

15 15. Given that the Defendant's cease and desist letter has alleged infringement and threatened
16 litigation, the Plaintiff files this action to ascertain its rights with respect to noninfringement
17 and invalidity of the '494 patent.

18 **CLAIM NO. 1**

19 *(Declaratory Judgment of Noninfringement)*

20 16. The Plaintiff hereby incorporates by reference each statement, whether written above or
21 below, as if each is fully re-written herein.

1 17. This claim arises under the Declaratory Judgment Act, 28 USC § 2201 *et seq.*, and the patent
2 laws of the United States, 35 USC § 1 *et seq.* and seeks a declaratory judgment that Plaintiff
3 has not and does not infringe any valid and enforceable claims of the '494 patent.

4 18. The Defendant purports to be the assignee and owner of the '494 patent. (Ex. 1.)

5 19. The Defendant has issued a cease and desist letter alleging infringement of the claims of the
6 '494 patent.

7 20. The Plaintiff does not make, use, offer to sell or sell, within the United States, or import into
8 the United States, any product that infringes any valid and enforceable claim of the '494
9 patent, either directly, indirectly, contributorily, or otherwise, and has not induced others to
10 infringe any valid and enforceable claim of the '494 patent. (Ex. 2.)

11 21. A judicial declaration is necessary under the circumstances to resolve this controversy.

12 22. The Plaintiff requests a declaratory judgment that it does not make, use, offer to sell or sell,
13 within the United States, or import into the United States, any product that infringes any
14 valid and enforceable claim of the '494 patent, either directly, indirectly, contributorily, or
15 otherwise, and has not induced others to infringe any valid and enforceable claim of the '494
16 patent.

17 **CLAIM NO. 2**

18 (*Declaratory Judgment of Invalidity*)

19 23. The Plaintiff hereby incorporates by reference each statement, whether written above or
20 below, as if each is fully re-written herein.

21 24. This claim arises under the Declaratory Judgment Act, 28 USC § 2201 *et seq.*, and the patent
22 laws of the United States, 35 USC § 1 *et seq.* and seeks a declaratory judgment that the '494
23 patent is invalid and/or unenforceable.
24
25
26

1 25. The Defendant purports to be the assignee and owner of the '494 patent. (Ex. 1.)

2 26. The Defendant has issued a cease and desist letter alleging infringement of the claims of the
3 '494 patent.

4 27. The claims of the '494 patent are and have been invalid and void on the grounds that the
5 purported invention, attempted to be patented therein, fails to meet the conditions of
6 patentability specified in Title 35 of the United States Code, including, but not limited to, the
7 conditions specified in 35 USC §§ 101, 102, 103, 112, and/or 305 of the Code.
8

9 28. A judicial declaration is necessary under the circumstances to resolve this controversy. The
10 Plaintiff is entitled to a declaratory judgment that each of the claims of the '494 patent are
11 invalid.

12 **PRAYER FOR RELIEF / REQUEST FOR REMEDIES**

13 WHEREFORE, the Plaintiff prays that this Court to enter an Order in favor of the
14 Plaintiff and against the Defendant, including, but not limited to:
15

- 16 A) A declaratory judgment that none of the Plaintiff's products infringe or have infringed, either
17 directly or indirectly, or contributorily, any valid claim of the '494 patent;
18 B) A declaratory judgment that the claims of the '494 patent are invalid;
19 C) A declaration that this case is exceptional under 35 USC § 285 and award the Plaintiff its
20 attorney's fees, costs, and expenses incurred in this action; and,
21 D) Any further relief in law or equity that this honorable Court deems just and appropriate.
22

23 **JURY DEMAND**

24 WHEREFORE, the Plaintiff requests a trial by jury on all issues so triable by the
25 maximum number of jurors permitted by law.
26

Most Respectfully Submitted,

/s/ David A. Welling

DAVID A. WELLING (0075934)

C. VINCENT CHOKEN (0070530)

Choken Welling LLP

3020 W. Market Street

Akron, Ohio 44333

Tel. (330) 865 – 4949

Fax (330) 865 – 3777

davidw@choken-welling.com

vincec@choken-welling.com

Counsel for the Plaintiff