

**UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA**

LD TECHNOLOGY LLC,

Plaintiff,

v.

IMPETO MEDICAL SAS aka IMPETO
MEDICAL COMPANY, and IMPETO
MEDICAL, INC.,

Defendant.

Case No. _____

**COMPLAINT FOR
DECLARATORY RELIEF and
UNFAIR COMPETITION**

Plaintiff, LD Technology LLC ("LD Tech."), by and through its undersigned counsel, hereby brings this action for Declaratory Judgment of Non-Infringement and Unfair Competition against Defendant, Impeto Medical SAS aka Impeto Medical Company and Impeto Medical, Inc. (collectively, "Impeto"), and states as follows:

NATURE OF THE ACTION

1. This action seeks the following relief:
 - a. A declaratory judgment and ancillary relief under 28 U.S.C. §§ 2201 and 2202 resolving an existing case and controversy. To wit, that none of LD Tech.'s products or services infringe any of the Defendant, Impeto's patents, including U.S. Patent Nos. 8,655,443 ("the '443 Patent") and 8,918,170 ("the '170 Patent") (collectively, the "Patents-in-Suit");
 - b. A declaratory judgment that LD Tech.'s use of the SUDOPATH mark does not infringe, and is not likely to cause confusion with, Impeto's SUDOSCAN trademark.
 - c. Damages relating to Defendant's unfair competition, including monetary relief; and

- d. any attorneys' fees and costs that may be recoverable.

THE PARTIES

2. Plaintiff, LD Tech., is a corporation organized and existing under the laws of Florida with a principal place of business at 100 N. Biscayne Blvd., Suite 502, Miami, Florida 33132.

3. On information and belief, Defendant, Impeto Medical SAS, is a corporation organized and existing under the laws of France with a principal place of business at 17 Rue Campagne Premiere, 75014 Paris, France.

4. Defendant Impeto Medical, Inc. is a corporation organized and existing under the laws of Delaware, with a principal place of business at 8910, University Center Lane, Suite 615, San Diego, CA 92122. On information and belief, Impeto Medical, Inc. is a wholly owned subsidiary of Impeto Medical SAS.

JURISDICTION AND VENUE

5. This action is brought pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §2201, et seq. Defendant sent LD Tech. infringement notification letters alleging that each respectively infringed the Patents-in-Suit by making, using, selling or offering for sale, LD Tech.'s products, giving rise to an actual case or controversy under 28 U.S.C. §§ 2201 and 2202.

6. This action arises under the patent laws of the United States, 35 U.S.C. § 1, et seq. and the Lanham Act, 15 USC§ 1117.

7. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1338, 2201 and 2202.

8. This Court has personal jurisdiction over Impeto because, on information and belief, Impeto resides in this District, conducts business in this District, maintains an interactive

website www.impeto-medical.com that is directed to, and is accessible from, this District, and because Impeto has purposefully availed itself of the courts in this District, including filing an action against LD Tech.'s president and owner, Albert Maarek – Impeto Medical SAS a/k/a/ Impeto Medical Company v. Maarek, Case No. 14022189CA13, pending before the 11th Judicial Circuit County Court for Miami-Dade County, Florida.

9. Venue in this District is proper under 28 U.S.C. § 1391 because Plaintiff resides in this District and at least because on information and belief, Defendant Impeto resides in this District.

10. LD Tech. is entitled to declaratory relief because LD Tech. and its customers have not infringed any trademark belonging to Defendants, or any valid, enforceable claim of the Patents-in-Suit by making, using, selling or offering for sale, LD Tech.'s Products, and because LD Tech. wishes to continue selling and commercializing its products and processes free from allegations of infringement by Impeto.

BACKGROUND FACTS

11. LD Tech. is a leading provider of sudomotor function monitoring systems based on the galvanic skin response (collectively, the "LD Tech. Products"), including the SudoPath System and device.

12. Sudomotor function monitoring systems monitor relates to the stimulation of the sweat glands in human skin. Galvanic skin response, also called skin conductance, relates to the measuring of the human skin's responses to electrical stimulation, which is dependent on the amount of sweat-induced moisture on the skin. Thus the LD Tech. Products, including the SudoPath System and device, measure sudomotor function by applying electrical stimulation to human skin and measuring its response.

13. These measurements of human sudomotor function are primarily used for identifying or detecting decreases or deficiencies in sudomotor function, which can be used by a physician, in view of a patient's history and clinical context, to make medical judgment regarding diagnoses or treatment.

14. LD Tech. was founded by Dr. Albert Maarek, who did pioneering work in reading and evaluating sudomotor function via the galvanic skin response in the early 2000s. On November 12, 2002, Dr. Maarek filed a patent application entitled "Electrosomatogram," that published as WO 2004/043247 ("the '247 Application"). A copy of the '247 Application and a certified translation thereof are attached hereto as Exhibits A and B, respectively. The '247 Application discloses and claims a setting forth a novel method for monitoring sudomotor function via the galvanic skin response.

15. Dr. Maarek formed Medi L.D. S.A.R.L., a family owned company, to market and sell embodiments of the '247 Application, including the DDFAO product. The DDFAO product used the same hardware as Plaintiff's current SudoPath System.

16. Subsequently, on or about November 12, 2003 Medi LD hired Nicolas Bocquet (to assist in marketing and distributing the DDFAO product). On or about September 13, 2014 Medi LD hired Philippe Brunswick ("Brunswick") to analyze and refine the algorithms used by the DDFAO device. Mr. Brunswick also executed a non-disclosure agreement with Medi LD.

17. After working with Dr. Maarek and obtaining access to his and his company's trade secret information, Bocquet and Brunswick severed their relationship with Dr. Maarek and went into competition with him.

18. Specifically, on or about June 22, 2005, Bocquet, Brunswick and Brunswick's sister, Annick Tournefier ("Tournefier") – formed Impeto Medical to develop a competing

product based on the work and know-how they developed through their relationship with Medi LD and Maarek, including the EZ Scan and SudoScan products. On November 29, 2005 Tournefier filed a patent application titled "System and Method for Electrophysiological Analysis," which on information and belief, she later ceded to Brunswick and Bocquet, acknowledging them as inventors.

19. Thereafter, Dr. Maarek sued Bocquet and Brunswick for misappropriation of trade secrets and confidential information. This is was done in the French courts. In the litigation that ensued in the French courts, the High Court of Paris held that Maarek had failed to establish the use or theft of confidential information by Brunswick and Bocquet. The French court also found Maarek liable to Impeto for €15,000 for having unsuccessfully brought a breach of contract and misappropriation action against Impeto ("the French Judgment").

20. In 2014, Impeto attempted to domesticate the French Judgment against Mr. Maarek by filing suit in Miami-Dade County.

21. Additionally, on information and belief, Impeto, after raising millions of Euros from investors, has not been successful in its efforts to market and sell its own SudoScan products, and blames Plaintiff for its own inept management.

22. On February 18, 2014, the USPTO issued the '443 Patent, titled "Electrophysiological Analysis System."

23. On December 23, 2014, the USPTO issued the '170 Patent, titled "Electrophysiological Analysis System."

24. Accordingly, on December 23, Impeto sent LD Tech. a letter notifying LD Tech. that it's "manufacture, use, sale offer for sale and/or importation into the United States of the

Sudopath <sic> device infringes [the Patents-in-Suit].” *See* December 23, 2014 Impeto Letter to LD Tech. attached hereto as Exhibit C.

25. In its December 23, 2014 Letter, Impeto claims that it is the owner of the Patents-in-Suit, demands that LD Tech. “immediately cease and desist” from selling the SudoPath device and further contends that Impeto will “seek every possible remedy available under the law ... [including] lost profits damages together with interest and costs as well as attorneys fees ... [and] treble damages.” Ex. C, at 1.

26. However, the claims of the Patents-in-Suit recite limitations that are not present in the LD Tech. Products. More specifically, no reasonable juror will be able to find that the LD Tech. Products, including the SudoPath System and device, directly or indirectly infringe any claims of the Patent-in-Suit because such products are not capable of meeting at least one limitation recited in each and every claim of the Patents-in-Suit. Moreover the hardware that makes up the SudoPath device has not substantively changed since at least 2004.

27. Accordingly, on information and belief, LD Tech believes that Impeto is asserting the Asserted Patents against LD Tech. in bad faith in order to gain a competitive advantage against LD Tech. to increase Impeto’s failing sales of the SudoScan product and to pressure LD Tech. into paying the €15,000 awarded by the French court on wholly unrelated claims.

28. In its December 23, 2014 Letter, Impeto also alleges that it is the owner of U.S. Trademark Registration No. 4,181,325, for the mark “SUDOSCAN”, and accuses LD Tech. of infringing same, apparently through LD Tech.’s use of the SUDOPATH mark. Ex. C. at 2.

29. Impeto further demands that LD Tech. “immediately cease and desist any and all uses of the ‘SUDOPATH’ ... mark[,]” and threatens to “take more aggressive action to protect Impeto’s rights” if its demands are not met. Ex. C.

30. Impeto's mark SUDOSCAN is descriptive. It is a combination of the prefix "SUDO", which is descriptive in view of the fact that these products are designed to measure sudomotor function, and the affix "SCAN" which is descriptive of the electrical measurements that are taken by the Impeto's products. Accordingly, SUDOSCAN is a relatively weak descriptive mark.

31. In contrast, while LD Tech.'s SUDOPATH mark also uses the descriptive prefix "SUDO", its suffix "PATH" is not descriptive, and is at least suggestive, if not arbitrary or fanciful. SUDOPATH forms a different commercial impression than SUDOSCAN, is vastly different in the important portion – the affix – of LD Tech.'s mark.

32. Accordingly, LD Tech.'s use of the SUDOPATH mark does not infringe on any rights Impeto may have in the SUDOSCAN mark, because there is no likelihood of confusion between the two.

33. Any condition precedent necessary to bring the instant action has been performed, waived or excused.

COUNT I

(DECLARATORY JUDGMENT OF NON-INFRINGEMENT OF PATENTS)

34. LD Tech. repeats and re-alleges Paragraphs 1-33 of this Complaint as if fully set forth herein.

35. LD Tech. does not directly infringe any valid and enforceable claim of the Patents-in-Suit under 35 U.S.C. § 271(a), either alone or with any other entity, at least because the LD Tech. Products lack at least one limitation recited in each and every claim in the Patents-in-Suit.

36. LD Tech. does not induce others, including its customers, to infringe any valid and enforceable claim of the Patents-in-Suit under 35 U.S.C. § 271(b), either alone or with any other entity, at least because the LD Tech. Products lack at least one limitation recited in each and every claim in the Patents-in-Suit.

37. LD Tech. does not contributorily infringe any valid and enforceable claim of the Patents-in-Suit under 35 U.S.C. § 271(c), either alone or with any other entity, including its customers, at least because the LD Tech. Products lack at least one limitation recited in each and every claim in the Patents-in-Suit, and because the LD Tech. Products have non-infringing uses.

38. An actual, live and justiciable controversy exists between LD Tech. and Impeto as to whether any of the products in LD Tech.' Products infringe the Patents-in-Suit.

39. Accordingly, LD Tech. is entitled to a declaratory judgment of non-infringement of the claims of the Patents-in-Suit and to all just and proper relief.

COUNT II

(DECLARATION OF NON-INTERFERENCE WITH PATENT RIGHTS)

40. LD Tech. repeats and re-alleges Paragraphs 1-33 of this Complaint as if fully set forth herein.

41. An actual, live and justiciable controversy exists concerning LD Tech.'s freedom to operate free of infringement claims by Impeto.

42. As a result LD Tech. seeks, and is entitled to, a judgment that LD Tech. and its customers are not infringing any valid and enforceable claim of any patents owned or controlled by Impeto, individually or collectively.

COUNT III

(DECLARATORY JUDGMENT OF NON-INFRINGEMENT OF TRADEMARK)

43. LD Tech. repeats and re-alleges Paragraphs 1-33 of this Complaint as if fully set forth herein.

44. LD Tech.'s use of the SUDOPATH mark on its sudomotor function measuring products does not create a likelihood of confusion amongst consumers as to the origin of the goods sold, and is not confusingly similar to Impeto's SUDOSCAN mark.

45. Impeto's SUDOSCAN mark is a weak, descriptive mark derived from the prefix "SUDO," which is descriptive of the sudomotor function measured by the products, and "SCAN," which is descriptive of the electrical measurement performed by such products.

46. In contrast, LD Tech's SUDOPATH mark comprises an affix is at least suggest, if not arbitrary or fanciful, and forms a different commercial impression.

47. Moreover, both of these products are FDA approved medical devices with a very limited, and educated consumer base that will recognize that the products originate from different manufacturers and distributors.

48. Accordingly, Impeto has not been damaged by LD Tech.'s use of the SUDOPATH mark, the SUDOPATH mark is not confusingly similar to Impeto's SUDOSCAN mark, and there is no likelihood of confusion amongst consumers as to the origin of LD Tech.'s goods sold.

COUNT IV

(UNFAIR COMPETITION)

49. LD Tech. repeats and re-alleges Paragraphs 1-33 of this Complaint as if fully set forth herein.

50. Defendant, Impeto, developed its SudoScan product by copying the technology that its founders, including Brunswick and Bocquet learned from Dr. Maarek.

51. Impeto now unlawfully seeks to prevent Dr. Maarek's own company, LD Tech. from using a device that was publicly used and sold since long before Impeto filed the Patents-in-Suit.

52. Moreover, on information and belief, Impeto's claims of infringement against the LD Tech. Products, including the SudoPath System and device, are made in bad faith because no reasonable juror will be able to find that such products infringe any claims of the Patent-in-Suit. More specifically, there is at least one limitation recited in each and every claim of the Patents-in-Suit that no reasonable juror will be able to find in the LD Tech. Products.

53. On information and belief, Impeto is asserting the Patents-in-Suit against LD Tech. in order to gain an unfair advantage in commercializing Impeto's own competing SudoScan product and to obtain extrajudicial enforcement of the French Judgment.

54. Impeto's actions constitute unfair competition.

55. LD Tech. has been damaged as a result of Impeto's unfair competition.

56. Accordingly LD Tech. should be awarded damages for Impeto's unfair competition, and Impeto's unfair competition should be enjoined by the Court.

PRAYER FOR RELIEF

WHEREFORE, LD Tech. prays for the following relief:

A. That judgment be entered in favor of LD Tech. and against Impeto on each count of the Complaint;

B. That judgment be entered declaring that neither LD Tech., nor any accused product in the LD Tech. Products, nor the its customers' of any of the LD Tech. Products, have infringed any claims in the Patents-in-Suit;

C. That judgment be entered declaring that Impeto is prohibited from alleging infringement of any claims of the Patents-in-Suit against LD Tech.;

D. That judgment be entered declaring that Impeto is precluded from obtaining injunctive relief, money damages, costs, and/or attorneys' fees against LD Tech. for the alleged infringement of the claims of the Patents-in-Suit;

E. That judgment be entered permanently enjoining Impeto, their officers, agents, servants, employees and attorneys, and all others acting for, on behalf of, or in active concert or participation with any of them, from stating, implying or suggesting that LD Tech., or any of the LD Tech. Products infringe the claims of the Patents-in-Suit;

F. That the Court declare that LD Tech. is free to operate without a cloud of infringement claims by Impeto;

G. That judgment be entered declaring that this case is exceptional in favor of LD Tech. under 35 U.S.C. § 285 and that LD Tech. be awarded its reasonable attorneys' fees and expenses;

H. That the Court find that LD Tech.'s SUDOPATH mark is not confusingly similar to Impeto's SUDOPATH mark.

I. That judgment be entered declaring that LD Tech.'s use of its SUDOPATH mark does not infringe Impeto's trademark rights, and is not likely to cause confusion among consumers as to the origin of LD Tech.'s goods.;

J. That the Court grant LD Tech. injunctive relief enjoining Impeto from continuing to engage in unfair competition;

K. That the Court grant LD Tech. all appropriate additional monetary relief against Impeto for its unfair competition;

L. That LD Tech. be awarded its costs in this action; and

M. That LD Tech. be awarded such other and further relief as the Court may deem just and proper.

Respectfully submitted,

Dated: January 13, 2015

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