

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

TRANSCEND MEDICAL, INC.,)
)
 Plaintiff,)
) C.A. No.
 v.)
) Demand for Jury Trial
 GLAUKOS CORPORATION,)
)
 Defendant.)

**COMPLAINT FOR DECLARATORY JUDGMENT
OF PATENT NON-INFRINGEMENT AND INVALIDITY**

Plaintiff Transcend Medical, Inc. (“Transcend”), for its complaint for declaratory judgment relief against Defendant Glaukos Corporation (“Glaukos”), alleges as follows:

THE PARTIES

1. Plaintiff Transcend is a Delaware corporation, with its principal place of business in Menlo Park, California.
2. On information and belief, Defendant Glaukos is a Delaware corporation, having its principal place of business in Laguna Hills, California.

JURISDICTION AND VENUE

3. This is an action for declaratory judgment of non-infringement and/or invalidity of the system and apparatus claims of U.S. Patent Nos. 7,850,637 (“the ‘637 patent”), 7,857,782 (“the ‘782 patent”), and 8,075,511 (“the ‘511 patent”) (collectively, the “patents-in-suit”) arising under the United States patent laws, 35 U.S.C. §§ 101 *et seq.* Copies of the patents-in-suit are attached as Exhibits A, B, and C, respectively.
4. On information and belief, Glaukos is the owner of the patents-in-suit.

5. The Court has subject-matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338(a).

6. The Court has personal jurisdiction over Glaukos because Glaukos is incorporated in this judicial district.

7. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b)-(c) and 1400(b).

EXISTENCE OF AN ACTUAL CONTROVERSY

8. There is an actual controversy between Transcend and Glaukos relating to the system and apparatus claims of the patents-in-suit within the jurisdiction of this Court under 28 U.S.C. §§ 2201 and 2202.

9. Transcend is a privately held, start-up innovator in the development of medical technology for the treatment of glaucoma and has developed its CyPass Micro-Stent technology for use in Micro-Invasive Glaucoma Surgery (“MIGS”). The CyPass technology is presently not approved by the United States Food and Drug Administration (“FDA”) and is thus not commercially available in the United States. Instead, the CyPass technology is currently available for use in the United States only through Transcend’s FDA-sanctioned clinical trial (known as the COMPASS Clinical Study). The purpose of the COMPASS Clinical Study is to collect data for submission to the FDA to support an application by Transcend for approval to commercialize its technology in the United States; data collection under the COMPASS Clinical Study is still years away from completion.

10. Until recently, the CyPass technology was also available for use in Europe only through one or more clinical trials or registries. However, beginning in late 2012, Transcend’s CyPass technology became commercially available on a limited basis in Germany. Transcend makes all of the CyPass Micro-Stent, the CyPass Applier (for implanting the Micro-Stent

devices), and other associated technology in the United States and exports those products for sale and use in Germany.

11. On various occasions before March 2013, Transcend heard through conversations with various individuals that Glaukos had repeatedly claimed that its patent position is dominant in the MIGS space, that Transcend practices Glaukos' patent rights and that Transcend lacks the freedom to commercialize its CyPass technology because of Glaukos' patent rights.

12. In an effort to resolve the cloud of uncertainty created by Glaukos' claims, Mr. Brian Walsh, President and Chief Executive Officer of Transcend, sent a letter to Mr. Thomas Burns, President and Chief Executive Officer of Glaukos, on March 19, 2013. Mr. Walsh noted the narrow scope of Glaukos' patent disclosures and the fact that Glaukos' patents distance themselves from Transcend's implantation approaches and techniques. Mr. Walsh further asked Mr. Burns either to acknowledge that Transcend has the freedom to launch its CyPass technology or, if Glaukos truly believed that Transcend practices Glaukos' patent rights, to explain the basis for such beliefs.

13. On April 30, 2013, Mr. Burns forcefully responded to Mr. Walsh's letter. In the response letter, Mr. Burns disagreed with Mr. Walsh's characterization of Glaukos' patents as distancing themselves from the implantation approaches and techniques that Transcend is commercializing. Mr. Burns pointed out that Transcend's own patent portfolio "give[s] [Transcend] no right to practice whatever may be disclosed or claimed" in its patents. Mr. Burns further stated that Glaukos "will not and do[es] not" clarify that Transcend has the right to launch its CyPass technology. Rather, Mr. Burns stated Glaukos' position that "if Transcend were to commercialize its CyPass technology as currently described on its website, we believe that it would infringe at least several of Glaukos' patents," including the patents-in-suit.

14. Transcend's CyPass devices have not infringed, and do not infringe, either directly or indirectly, any valid system or apparatus claim of the patents-in-suit, either literally or under the doctrine of equivalents. A substantial controversy exists between the parties concerning the system and apparatus claims, which is of sufficient immediacy and reality to warrant declaratory relief. Because of the early stage of Transcend's regulatory process in the U.S., however, no actual controversy presently exists on any of Glaukos' method claims and Transcend therefore does not seek to challenge any of Glaukos' method claims with this action.

FIRST CAUSE OF ACTION
(DECLARATORY JUDGMENT OF NON-INFRINGEMENT)

15. Transcend restates and realleges the allegations set forth in paragraphs 1 through 14 above and incorporates them by reference.

16. Transcend does not directly infringe, contribute to the infringement of, or actively induce the infringement of, at least any valid and enforceable system or apparatus claim of the patents-in-suit.

17. An actual, justiciable controversy exists between the parties concerning infringement of the system and apparatus claims of the patents-in-suit.

18. Transcend is entitled to a judicial declaration that it does not directly or indirectly infringe the system and apparatus claims of the patents-in-suit.

SECOND CAUSE OF ACTION
(DECLARATORY JUDGMENT OF INVALIDITY)

19. Transcend restates and realleges the allegations set forth in paragraphs 1 through 18 above and incorporates them by reference.

20. The system and apparatus claims of the patents-in-suit are invalid for failure to meet one or more of the conditions for patentability set forth in 35 U.S.C. §§ 102, 103 and 112.

21. An actual, justiciable case or controversy exists between the parties concerning the validity of the system and apparatus claims of the patents-in-suit.

22. Transcend is entitled to a judicial declaration that the system and apparatus claims of the patents-in-suit are invalid.

PRAYER FOR RELIEF

WHEREFORE, Transcend prays for the following:

1. A judgment and declaration that Transcend has not infringed and does not infringe, either directly or indirectly, any system or apparatus claim of the patents-in-suit;

2. A judgment and declaration that the system and apparatus claims of the patents-in-suit are invalid and therefore without any force or effect;

3. A permanent injunction against Glaukos and its affiliates, subsidiaries, assigns, employees, agents or anyone acting in privity or concert with Glaukos from charging infringement or instituting any legal action for infringement of the system and apparatus claims of the patents-in-suit against Transcend or anyone acting in privity with Transcend, including the divisions, successors, assigns, agents, suppliers, manufacturers, contractors and customers of Transcend;

4. A judgment and declaration that this action is an exceptional case and awarding Transcend reasonable attorneys' fees pursuant to 35 U.S.C. § 284; and

5. A judgment for such other and further relief in law or in equity as this Court deems just or proper.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP



Maryellen Noreika (#3208)
Regina S.E. Murphy (#5648)
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899
(302) 658-9200
mnoreika@mnat.com
rmurphy@mnat.com

OF COUNSEL:

Matthew B. Lehr (#2370)
David J. Lisson
Shiwoong Kim
DAVIS POLK & WARDWELL LLP
1600 El Camino Real
Menlo Park, CA 94025
(650) 752-2000

Attorneys for Plaintiff Transcend Medical, Inc.

May 10, 2013
7199251