

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

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CYTOPHIL, INC.  
2485 Corporate Circle  
East Troy, WI 53120,

Plaintiff,

v.

MERZ NORTH AMERICA, INC.  
6501 Six Forks Road  
Raleigh, NC 27615

and

Case No. \_\_\_\_\_

BIOFORM MEDICAL, INC. n/k/a  
MERZ AESTHETICS, INC.  
1875 South Grant Street, Suite 110  
San Mateo, CA 94402

and

MERZ PHARMA GmbH & Co. KGaA  
Eckenheimer Landstrasse 100, D-60318  
Frankfurt am Main Germany,

Defendants.

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**COMPLAINT**

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Plaintiff Cytophil, Inc. ("Cytophil"), for its complaint against Merz North America, Inc. ("Merz North America"); BioForm Medical, Inc. n/k/a Merz Aesthetics, Inc. ("BioForm"), and Merz Pharma GmbH & Co. KGaA ("Merz Pharma"), (collectively, "Defendants"), alleges as follows:

## **NATURE OF THE CASE**

1. This is an action for false patent marking under 35 U.S.C. § 292, and for unfair competition and false advertising under the Lanham Act, 15 U.S.C. §1125(a).
2. Cytophil seeks injunctive and monetary relief against Defendants.

## **THE PARTIES**

3. Cytophil is a corporation organized under the laws of the State of Delaware, with a principal place of business at 2485 Corporate Circle Suite 2, East Troy, Wisconsin, 53120.

4. Upon information and belief, BioForm n/k/a Merz Aesthetics, Inc. was a corporation organized and existing under the laws of Delaware, having its principal place of business at 1875 South Grant Street, Suite 110, San Mateo, CA 94402. Upon information and belief, BioForm was acquired by Merz North America on or about January, 2010. At the time of the acquisition, the flagship product of BioForm was Radiesse.

5. Upon information and belief, Merz North America is a corporation formed under the laws of State of North Carolina, with a principal place of business located at 6501 Six Forks Road, Raleigh, North Carolina 27615 and a manufacturing and distribution facility located in Sturtevant, Wisconsin, within this judicial district.

6. Upon information and belief, Merz Pharma is a German company, with a principal place of business at Eckenheimer Landstrasse 100, D-60318, Frankfurt am Main, Germany.

## **JURISDICTION AND VENUE**

7. This Court has original subject matter jurisdiction of this action under 28 U.S.C. §1331 because it arises under the laws of the United States, §1338(a) because it arises under an Act of Congress related to patents, and §1338(b) because it asserts a claim of unfair competition that is joined with a substantial and related claim under the patent laws.

8. This Court has personal jurisdiction over Defendants under several provisions of Wisconsin's long-arm statute, Wis. Stat. § 801.05. Personal jurisdiction is proper under § 801.05(1)(d) because Defendants are engaged in substantial and not isolated activities within this state; under § 801.05(3) because this action claims injury to Cytophil and its property within and without this state arising out of acts within this state by Defendants; and under §§ 801.05(4)(a) and (b) because this action claims injury to Cytophil and its property within this state arising out of acts outside this state by Defendants, and at the time of the injury, solicitation or service activities were carried on within this state by or on behalf of Defendants and products, materials, or things processed, serviced, or manufactured by Defendants were used or consumed within this state in the ordinary course of trade.

9. Venue is proper in this District under 28 U.S.C. §§1391 (b) and (c) because all Defendants reside in Wisconsin, the State in which this judicial district is located. Each Defendant resides in Wisconsin for venue purposes because each is subject to the Court's personal jurisdiction with respect to this action.

## **FACTUAL BACKGROUND**

10. Merz North America claims to be the owner, by assignment, of all

right, title, and interest in and to United States Patent No. 6,537,574 ("the '574 patent"), entitled, "Soft Tissue Augmentation Material." The named inventor on the '574 patent is Mr. William G. Hubbard.

11. William G. Hubbard is the founder and CEO of Cytophil.

12. The '574 patent was issued by the United States Patent Office on March 25, 2003.

13. The '574 patent contains 25 claims. All 25 are method claims. All 25 claims in the '574 patent claim, among other things, a method for soft tissue augmentation comprising the introduction at a desired site in a mammal of a material that comprises a matrix of rounded, substantially spherical and biocompatible finely divided ceramic particles.

14. Defendants manufacture a number of medical device and pharmaceutical devices, including Prolaryn Gel (a representative example of packaging for which is attached to this complaint as Exhibit 1), Prolaryn Plus™, a vocal implant that Defendants formerly referred to as Radiesse® Voice (representative examples of packaging for which are attached to this complaint as Exhibits 2 and 4, respectively), and Radiesse®, a volumizing dermal filler for augmentation of the face and hands (a representative example of packaging for which is attached to this complaint as Exhibit 3).

15. In connection with the Prolaryn Gel product, Defendants have used in interstate commerce certain words, combinations of words and terms and symbols, patent numbers, and descriptions and representations of fact, ("the Prolaryn Gel statements"), including in commercial advertising or promotion.

16. In connection with the Prolaryn Plus™ product, Defendants have used in

interstate commerce certain words, combinations of words and terms and symbols, patent numbers, and descriptions and representations of fact, ("the Prolaryn Plus™ statements"), including in commercial advertising or promotion.

17. In connection with the Radiesse® product, Defendants have used in interstate commerce certain words, combinations of words and terms and symbols, patent numbers, and descriptions and representations of fact, ("the Radiesse® statements"), including in commercial advertising or promotion.

18. In connection with the Radiesse® Voice product, Defendants have used in interstate commerce certain words, combinations of words and terms and symbols, patent numbers, and descriptions and representations of fact, ("the Radiesse® Voice statements"), including in commercial advertising or promotion.

19. Defendants have marked promotional material for Prolaryn Gel, including but not limited to packaging, with the number of United States Patent No. 6,537,574.

20. Defendants have marked promotional material for Prolaryn Plus™, including but not limited to packaging, with the number of United States Patent No. 6,537,574.

21. Defendants have marked promotional material for Radiesse®, including but not limited to packaging, with the number of United States Patent No. 6,537,574.

22. Defendants have marked promotional material for Radiesse® Voice, including but not limited to packaging, with the number of United States Patent No. 6,537,574.

23. In all cases where Defendants have marked products with the number of United States Patent No. 6,537,574, Defendants have intended to communicate to

the public that the product so marked practices the invention of the '574 patent.

24. In all cases where Defendants have marked products with the number of United States Patent No. 6,537,574, Defendants have intended to communicate to the public that the product so marked is protected by the '574 patent.

25. In all cases where Defendants have marked products with the number of United States Patent No. 6,537,574, Defendants have intended to communicate to the public that the product so marked cannot lawfully be duplicated and sold or offered for sale by a competitor without Defendants' consent or authorization.

26. Plaintiff Cytophil is the manufacturer of Renu® Voice products.

27. Cytophil's Renu® Voice products compete with Defendants' products.

28. Defendants believe Cytophil markets, offers to sell, and sells its Renu® Voice products to physicians and medical practice groups to whom Defendants market, offer to sell, and sell their Prolaryn and Radiesse products.

**FIRST CAUSE OF ACTION: FALSE PATENT MARKING IN VIOLATION  
OF 35 U.S.C. §292**

29. Cytophil repeats, realleges, and incorporates by reference each and every paragraph above as if set forth fully herein.

30. Defendants' Prolaryn Gel product does not practice the invention of the '574 patent. For example, Prolaryn Gel does not contain ceramic particles at all.

31. By marking upon, affixing to, and using in advertising the word "patent" and the number of the '574 patent in connection with Prolaryn Gel, importing that Prolaryn Gel practices the invention of the '574 patent, Defendants have marked an "unpatented article" under 35 U.S.C. §292.

32. Defendants' Prolaryn Plus™ product does not practice the invention of the '574 patent. For example, Prolaryn Plus™ does not contain a matrix of rounded, substantially spherical, biocompatible, substantially non-resorbable, finely divided ceramic particles.

33. By marking upon, affixing to, and using in advertising the word "patent" and the number of the '574 patent in connection with Prolaryn Plus™, importing that Prolaryn Plus™ practices the invention of the '574 patent, Defendants have marked an "unpatented article" under 35 U.S.C. §292.

34. Defendants' Radiesse® product does not practice the invention of the '574 patent. For example, Radiesse® does not contain a matrix of rounded, substantially spherical, biocompatible, substantially non-resorbable, finely divided ceramic particles.

35. By marking upon, affixing to, and using in advertising the word "patent" and the number of the '574 patent in connection with Radiesse®, importing that Radiesse® practices the invention of the '574 patent, Defendants have marked an "unpatented article" under 35 U.S.C. §292.

36. Defendants' Radiesse® Voice product does not practice the invention of the '574 patent. For example, Radiesse® Voice does not contain a matrix of rounded, substantially spherical, biocompatible, substantially non-resorbable, finely divided ceramic particles

37. By marking upon, affixing to, and using in advertising the word "patent" and the number of the '574 patent in connection with Radiesse® Voice, importing that Radiesse® Voice practices the invention of the '574 patent, Defendants have marked an "unpatented article" under 35 U.S.C. §292.

38. In all cases where Defendants now mark products with the number of United States Patent No. 6,537,574, Defendants know that the products so marked do not practice the invention of the '574 patent.

39. During a past period, the scope and extent of which will be determined at trial, Defendants marked products with the number of United States Patent No. 6,537,574 with knowledge that the products so marked do not practice the invention of the '574 patent.

40. In all cases where Defendants have falsely marked products with the number of the '574 patent, Defendants have done so with intent to deceive the public, illegitimately extend the scope of patent rights, and decrease lawful competition.

41. As a direct result of Defendants' false patent marking, Cytophil has suffered competitive injury.

42. As a direct result of Defendants' false patent marking, Cytophil has suffered damages in an amount to be determined at trial.

### **SECOND CAUSE OF ACTION: UNFAIR COMPETITION**

43. Cytophil repeats, realleges, and incorporates by reference each and every paragraph above as if set forth fully herein.

44. The Prolaryn Gel Statements, include false, deceptive statements and representations of fact, made in bad faith in interstate commerce, that are likely to deceive the relevant consuming public as to the origin or nature of the Prolaryn Gel products.

45. The Prolaryn Plus™ Statements, include false, deceptive statements and



representations of fact, made in bad faith in interstate commerce, that are likely to deceive the relevant consuming public as to the origin or nature of the Prolaryn Plus™ products.

46. The Radiesse® Statements, include false, deceptive statements and representations of fact, made in bad faith in interstate commerce, that are likely to deceive the relevant consuming public as to the origin or nature of the Radiesse® products.

47. The Radiesse® Voice Statements, include false, deceptive statements and representations of fact, made in bad faith in interstate commerce, that are likely to deceive the relevant consuming public as to the origin or nature of the Radiesse® Voice products.

48. Defendants' false, deceptive statements described above violate 15 U.S.C. §1125(a) because they are likely to cause confusion, cause mistake, and deceive as to the origin and approval of Defendants' goods, and because they have been used in commercial advertising and promotion and misrepresent the nature, characteristics, and qualities of Defendants' goods.

49. All of Defendants' false, deceptive statements described above were made willfully, with full knowledge that they were in fact false and deceptive, and with intent to deceive the public, increase Defendants' gain, and quell or eliminate lawful competition.

50. As a direct result of Defendants' false, deceptive statements described above, Cytophil has suffered damages in an amount to be proven at trial.

### **JURY DEMAND**

51. Cytophil hereby demands a trial by jury on all issues so triable.

### **PRAYER FOR RELIEF**

WHEREFORE, Cytophil respectfully asks this Court for entry of a judgment against Defendants and in favor of Cytophil:

- a. Finding that Defendants have intentionally and falsely marked products with the number of a United States patent, for the purpose of deceiving the public, in violation of 35 U.S.C. §292;
- b. Finding that Defendants have made false and deceptive statements, in interstate commerce, regarding the nature of their Prolaryn and Radiesse products, in violation of the Lanham Act, 15 U.S.C. §1125(a);
- c. Awarding damages to Cytophil in an amount adequate to compensate Cytophil for the competitive injury caused by Defendants' false patent marking, pursuant to 35 U.S.C. §292;
- d. Awarding a further monetary remedy to Cytophil, pursuant to 15 U.S.C. §1117(a), that includes disgorgement of Defendants' ill-gotten profits, an amount adequate to compensate Cytophil for damages caused by Defendants' unfair competition in violation of 15 U.S.C. §1125(a), and Cytophil's costs of this action;
- e. Permanently enjoining Defendants from falsely marking its products and making deceptive, false statements about its products or the products of

Cytophil;

- f. Ordering Defendants, pursuant to 15 U.S.C. §1118, to deliver up for destruction all labels, signs, prints, packages, wrappers, receptacles, and advertisements in possession of Defendants bearing the false patent markings or other misrepresentations related to any suggestion that their products practice the invention of the '574 patent;
- g. Ordering Defendants to issue corrective advertising sufficient to notify the relevant public that Prolaryn Gel, Prolaryn™, Radiesse®, and Radiesse® Voice do not practice the invention of, and are not protected by, the '574 patent;
- h. Declaring this case exceptional, under 35 U.S.C. §285 and 15 U.S.C. §1117(a), and awarding Cytophil to recover its attorney fees; and
- i. Granting Cytophil such other and further relief as it may deem just and equitable.

Dated this 4th day of February, 2016.

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