

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

MACRO NICHE SOFTWARE,	§
INC.,	§
R/MED, INC. and	§
MICHAEL J. RUTHEMEYER	§
	§
Plaintiffs,	§
	§
VS	§
	§
4 IMAGING SOLUTIONS, L.L.C.,	§
PROTECH LEADED EYEWEAR,	§
INC.	§
MARK STRUTHERS,	§
DEBBIE STARR, and	§
IMAGING SOLUTIONS OF	§
AUSTRALIA	§
	§
Defendants.	§

Case No. 4:12-cv-02293

Jury Trial

**DEFENDANT IMAGING SOLUTIONS OF AUSTRALIA’S ANSWER TO
SECOND AMENDED COMPLAINT AND COUNTERCLAIMS**

Defendant Imaging Solutions of Australia (“ISA”) files this answer to Plaintiffs Macro Niche Software, Inc., R/MED, Inc. and Michael J. Ruthemeyer (“Macro Niche”) Second Amended Complaint and Counterclaims, using the same paragraph numbering. ISA denies any allegations made in the Complaint, whether express or implied, that are not specifically addressed below.

As to “PARTIES”

1. ISA is without sufficient knowledge or information to admit or deny the allegations in paragraph 1.

2. ISA is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 2.

3. ISA is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 3.

4. No response is required to paragraph 4 of the Complaint.

5. No response is required to paragraph 5 of the Complaint.

6. No response is required to paragraph 6 of the Complaint.

7. No response is required to paragraph 7 of the Complaint.

8. No response is required to paragraph 8 of the Complaint.

As to “JURISDICTION AND VENUE”

9. ISA admits that Plaintiffs allege violations of the Copyright Act of 1976 and that this Court has jurisdiction over such a claim. ISA further admits that Plaintiffs allege that its claims exceed the matter in controversy specified in 28 U.S.C. §1331, but denies that there is any factual or legal basis for such claims. ISA denies the remaining allegations in paragraph 9.

10. Denied.

As to “FACTUAL STATEMENT”

11. ISA is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 11.

12. ISA is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 12.

13. ISA is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 13. ISA specifically denies allegations that any of Plaintiffs' intellectual property was used to design or build Radtrack.

14. ISA is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 14.

15. ISA is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 15.

16. ISA is without sufficient knowledge or information to admit or deny the allegations contained in paragraph 16.

17. ISA admits that a meeting between Ruthemeyer and Glenn Honey was held in Chicago during an industry convention. ISA further admits that ISA is a distributor for ProTech. ISA denies the remaining allegations in paragraph 17.

18. ISA admits that ISA did not sign any agreement with Plaintiffs. ISA is without sufficient knowledge or information to admit or deny the remaining allegations contained in paragraph 18.

19. Denied.

20. Denied.

21. Denied.

22. ISA admits that RadTrack was introduced at the RSNA in November 2011. ISA further admits that RadTrack is described on ISA's website as having "high levels of functionality in reporting (templates or design your own report) and managing apparel," "unique identification codes (RadIDs)," and "complete life-cycle tracking from purchase to end-of-life disposal." ISA denies the remaining allegations in paragraph 22.

As to "CAUSES OF ACTION: Copyright Infringement-17 U.S.C. §501"

23. ISA realleges and incorporates by reference its responses to paragraphs 1 through 22.

24. On information and belief, ISA admits that Plaintiffs purport to hold copyright registration certificates from the United States Copyright Office shown in Exhibit A. ISA specifically denies the remaining allegations in paragraph 24.

25. Denied.

26. Denied.

27. Denied.

As to "CAUSES OF ACTION: Fraud"

28. ISA realleges and incorporates by reference its responses to paragraphs 1 through 27.

29. The averments in paragraph 29 are not directed to ISA and therefore no response is required on the part of ISA. To the extent that a response is required, the averments are denied.

30. The averments in paragraph 30 are not directed to ISA and therefore no response is required on the part of ISA. To the extent that a response is required, the averments are denied.

31. The averments in paragraph 31 are not directed to ISA and therefore no response is required on the part of ISA. To the extent that a response is required, the averments are denied.

As to “CAUSES OF ACTION: Breach of Contract”

32. ISA realleges and incorporates by reference its responses to paragraphs 1 through 31.

33. The averments in paragraph 33 are not directed to ISA and therefore no response is required on the part of ISA. To the extent that a response is required, the averments are denied.

34. The averments in paragraph 34 are not directed to ISA and therefore no response is required on the part of ISA. To the extent that a response is required, the averments are denied.

As to “CAUSES OF ACTION: Breach of Fiduciary Duty”

35. ISA realleges and incorporates by reference its responses to paragraphs 1 through 34.

36. The averments in paragraph 36 are not directed to ISA and therefore no response is required on the part of ISA. To the extent that a response is required, the averments are denied.

37. The averments in paragraph 37 are not directed to ISA and therefore no response is required on the part of ISA. To the extent that a response is required, the averments are denied.

38. The averments in paragraph 38 are not directed to ISA and therefore no response is required on the part of ISA. To the extent that a response is required, the averments are denied.

As to “CAUSES OF ACTION: Civil Conspiracy”

39. ISA realleges and incorporates by reference its responses to paragraphs 1 through 38.

40. Denied.

41. Denied.

42. Denied.

As to “APPLICATION FOR INJUNCTIVE RELIEF”

43. ISA admits that Plaintiffs seek injunctive relief, but denies that Plaintiffs are entitled to such relief.

As to “ATTORNEY’S FEES”

44. ISA denies that Plaintiffs are entitled to the requested relief.

ISA'S AFFIRMATIVE DEFENSES

Further answering the Complaint, Defendant ISA asserts the following affirmative defenses without assuming any burden that it would not otherwise have. ISA reserves the right to amend its Answer with additional defenses as additional information is obtained.

1. Plaintiffs' claims fail, in whole or in part, to state a claim upon which relief can be granted. Among other reasons, including those set forth in ISA's answers above, and without limiting its proof at trial based on additional information acquired through further investigation or discovery, ISA has not copied any of Plaintiffs' software asserted in Plaintiffs' Complaint. Moreover, the Copyright Act expressly excludes ideas, processes, procedures, systems, methods of operation, concepts, and similar matters from copyright protection. Likewise, material dictated by external factors such as industry standards and taken from the public domain are excluded from copyright protection. Plaintiff is attempting impermissibly to leverage its alleged copyrights to restrict the use of uncopyrightable subject matter. This is precluded as a matter of law, and Plaintiffs' claims fail to state viable claims for relief. By this means, Plaintiffs are improperly seeking to use its alleged copyrights in an anti-competitive attempt to control the market for lead apron tracking software of the kind at issue in this case.

2. For the reasons set forth in the preceding paragraph, and without limiting its proof at trial based on additional information acquired through further investigation or discovery, Plaintiffs' copyright claims are barred, in whole or in part, by the doctrine of copyright misuse. By its conduct, Plaintiff is seeking to use its alleged copyrights to secure an exclusive right and monopoly position over uncopyrightable ideas, processes, systems, methods, and concepts that are beyond the legitimate scope of copyright protection, contrary to law and public policy. By using its alleged copyrights in this manner, Plaintiff has committed and continues to commit copyright misuse, which renders its alleged copyrights unenforceable.

3. Plaintiffs' copyright claims are barred by, in whole or in part, by its unclean hands. In addition to the reasons set forth above, and without limiting its proof at trial based on additional information acquired through further investigation or discovery, Plaintiff is seeking to use vague and unsubstantiated claims regarding alleged copyright infringement and civil conspiracy to extend unlawfully its position and control of the market for lead apron tracking. In pursuit of that effort, Plaintiff has actively sought to interfere with Defendant ISA's right to use its general knowledge, skill and experience in the radiation protective products industry to independently develop and market a competing lead apron tracking product.

4. Plaintiffs' copyright claims are barred by the doctrine of independent creation.

5. Plaintiffs' copyright claims are barred, in whole or in part, by acquiescence, consent and/or implied license given by the copyright owner. Among other reasons, including those set forth in ISA's answers above, and without limiting its proof at trial based on additional information acquired through further investigation or discovery, ISA has not used any of Plaintiffs' copyrighted images without Plaintiffs' consent.

6. Plaintiffs' copyright claims are barred, in whole or in part, by waiver and/or estoppel.

7. Plaintiffs' copyright claims fails, in whole or in part, to state a claim for alleged copyright infringement that occurs within the United States.

8. Plaintiffs failed to mitigate damages, if any.

9. Plaintiffs failed to provide copyright notice.

10. Plaintiffs failed to provide notice of copyright infringement prior to filing the case at hand.

11. ISA was justified and legally privileged to undertake the specific course of conduct that ISA actually undertook.

12. Plaintiffs have an adequate remedy at law.

COUNTERCLAIMS

Imaging Solutions of Australia (“ISA”) asserts the following counterclaims against Michael J. Ruthemeyer (“Ruthemeyer”) and Macro Niche Software, Inc. (“Macro Niche”).

I. PARTIES, JURISDICTION AND VENUE

1. ISA is an Australian Proprietary Company incorporated under the laws of the State of New South Wales and having a principal place of business in Australia.

2. This Court has diversity jurisdiction pursuant to 28 U.S.C. §1332(a) because the amount in controversy exceeds \$75,000 and neither Macro Niche nor Ruthemeyer are citizens of the same state as ISA. On information and belief, as Plaintiffs assert in their Complaint, Macro Niche is a corporation duly formed and operating under the laws of the State of Texas with a principal place of business in Harris County, Texas. Ruthemeyer purports to be the Chief Executive Officer and shareholder of Macro Niche, and is a resident of Harris County, Texas.

3. Venue in the Southern District of Texas is proper pursuant to 28 U.S.C. §1391.

II. FACTUAL BACKGROUND

4. ISA is a specialist supplier of high-quality medical imaging and general healthcare products with market-leading brands to Australasian and North

American markets. Michael Ruthemeyer, through Macro Niche, sells ApronCheck software in the U.S. which purports to track the maintenance of lead aprons.

5. ISA first learned of ApronCheck through a customer and inquired about opportunities to become the exclusive distributor of ApronCheck in Australia and New Zealand. Through co-defendant Protech Leaded Eyewear, Inc. (“Protech”), ISA learned that exclusive distributorship rights to ApronCheck were available in New Zealand, and an exclusive distributorship for ApronCheck in Australia already existed.

6. On or about December 1, 2010, representatives of ISA and Protech met with Ruthemeyer and Macro Niche during an industry convention to further discuss an exclusive distributorship for ApronCheck in Australia and New Zealand. At the meeting, Ruthemeyer and Macro Niche represented to ISA that Ruthemeyer believed that ApronCheck sales performance by his then current Australian distributor was unsatisfactory and did not justify a renewal of their exclusive distributorship agreement with Ruthemeyer’s company Macro Niche.

7. In recognition of his Australia distributor’s poor sales performance, Ruthemeyer represented to ISA and Protech that the logical path forward was to allow his then current exclusive distributorship agreement in Australia to expire, after which Macro Niche would enter into a new exclusive distributorship agreement with ISA, through Protech, for distribution of ApronCheck in both

Australia and New Zealand. Ruthemeyer expressly represented his intention to do so within a short period and agreed to an initial purchase by ISA of approximately ten to twenty ApronCheck licenses. Ruthemeyer authorized all preparatory work to begin for direct sales and marketing activities in Australia and New Zealand on the basis that exclusive New Zealand market access be provided immediately and exclusive Australian market access would follow within six to eight weeks upon expiration of Macro Niche's then current Australia exclusive distributorship agreement.

8. Following his representations to enter into the above plan and actions, Ruthemeyer introduced the ApronCheck system at the meeting to demonstrate that ApronCheck would address the compliance issues surrounding protective apron and apparel tracking facing many health organizations in Australia and New Zealand.

9. ISA did not request and Ruthemeyer never divulged any software material, source code or other marketing material during the meeting or at any time thereafter.

10. Relying on the above representations, ISA extended a formal invitation to Ruthemeyer to attend ISA's annual supplier partner dinner. In his capacity as a newly appointed supplier partner of ISA, Ruthemeyer attended the

dinner where he was introduced to and interacted with fifty to sixty other ISA supplier partner representatives.

11. In the following weeks, and acting on Ruthemeyer's representations, ISA developed and supplied to Ruthemeyer a draft press release announcing Imaging Solutions as an ApronCheck distributor in Australia and New Zealand and undertook development of co-branded sales literature for commercializing and preparing to market ApronCheck.

12. Ruthemeyer reviewed these materials and specifically directed revisions, and upon incorporation of his revisions, approved the materials for release and distribution by ISA. Up to this point, Ruthemeyer still had not suggested he could not or would not provide exclusivity to ISA in Australia and New Zealand.

13. Contrary to his continued representations, Ruthemeyer later refused to offer an exclusive distributorship to ISA, and ISA was ultimately informed that Ruthemeyer had reneged on earlier representations in relation to ApronCheck. This was learned by ISA after expending significant financial and business resources in preparation to market and distribute ApronCheck in Australia and New Zealand on an exclusive basis per Ruthemeyer's representations beginning at the December 2010 meeting and continuing thereafter.

14. As a result, ISA was prompted to immediately internally design, develop and implement a lead apron tracking system product as a replacement product to meet existing customer requests and save face with ISA customers, which required expenditure of significant financial and business resources on an accelerated timeline.

III. CLAIMS FOR RELIEF

A. First Cause of Action—Negligent Misrepresentation By Ruthemeyer and Macro Niche

15. ISA realleges and incorporates by reference the foregoing paragraphs of these Counterclaims.

16. Ruthemeyer and Macro Niche are liable for at least negligent misrepresentation. Ruthemeyer made material representations to ISA by supplying false and misleading information regarding the status of an exclusive distributorship agreement with his then then current Australian distributor and/or regarding his agreement to award a new exclusive distributorship agreement for ApronCheck in Australia and New Zealand to ISA. These representations were made in the course of Ruthemeyer's Macro Niche business in which he had a pecuniary interest. Ruthemeyer and Macro Niche supplied false information for the guidance of ISA in its business, on which ISA justifiably relied. Ruthemeyer and Macro Niche at least failed to exercise reasonable care or competence in

communicating this information. As a direct and proximate result of these negligent misrepresentations, ISA has suffered damages.

17. ISA seeks to recover its actual damages, consequential damages, incidental damages, exemplary damages and costs incurred from Ruthemeyer's actions.

B. Second Cause of Action—Fraudulent Misrepresentation By Ruthemeyer and Macro Niche

18. ISA realleges and incorporates by reference the foregoing paragraphs of these Counterclaims.

19. In addition, or in the alternative, Ruthemeyer and Macro Niche are liable to ISA for common law fraud and/or fraudulent misrepresentation. Ruthemeyer and Macro Niche falsely represented to ISA the status of an exclusive distributorship agreement between Ruthemeyer's company Macro Niche and his then then current Australian distributor. Ruthemeyer and Macro Niche further falsely represented to ISA his intention to allow the exclusive distributorship agreement with the Australian distributor to automatically expire and to then enter into a new exclusive distributorship agreement to ISA as Australian and New Zealand distributor of ApronCheck.

20. At the time these misrepresentations were made, Ruthemeyer and Macro Niche knew they were false or made them without regard to their truth or

falsity. Further, these misrepresentations were made with the intention that ISA act upon them.

21. In making these misrepresentations, Ruthemeyer and Macro Niche calculated that he would meet ISA supplier partner representatives and access to ISA's extensive distribution networks in Australia and New Zealand, while also gaining free marketing and sales literature developed by ISA without ISA discovering Ruthemeyer's and Macro Niche's fraud, thereby resulting in Ruthemeyer's and Macro Niche's ill-gotten gains.

22. In reasonable reliance on the false and misleading representations, ISA was induced to act upon these misrepresentations and expended significant financial and business resources to develop sales literature and other marketing materials in cooperation with Ruthemeyer for anticipated distribution of ApronCheck in Australia and New Zealand that it otherwise never would have expended. The misrepresentations, and ISA's reliance on them, were the direct and proximate causes of damages to ISA.

23. ISA seeks to recover its actual damages, consequential damages, incidental damages, exemplary damages and costs incurred from the foregoing actions.

WHEREFORE, Imaging Solutions of Australia prays that Macro Niche take nothing by way of its Complaint, that Macro Niche's claims be dismissed with

prejudice, that ISA be awarded its costs, expenses and attorneys' fees in defending the matter, and such other and further relief as the Court deems just and proper.

IV. JURY DEMAND

ISA requests a trial by jury on all issues triable to a jury.

DATED: 7/10/2013

Respectfully submitted,

ANDREWS KURTH LLP

/s/Gregory L. Porter

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ATTORNEYS FOR DEFENDANT
IMAGING SOLUTIONS OF
AUSTRALIA

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of this filing to all attorneys of record who are filing users of the Court's Electronic Filing System.

/s/ Gregory L. Porter