

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 Demanded

**DEFENDANT PROTECH LEADED EYEWEAR,
INC.'S ORIGINAL ANSWER TO PLAINTIFFS' SECOND AMENDED
ORIGINAL COMPLAINT AND SECOND AMENDED COUNTERCLAIMS**

Defendant, ProTech Leded Eyewear, Inc. (herein, "ProTech"), answers the Second Amended Original Complaint and Application for Injunctive Relief (herein, the "Complaint") of Plaintiffs, Macro Niche Software, Inc., R/Med. Inc., and Michael J. Ruthemeyer (herein, the "Plaintiffs"), and files its counterclaims as follows:

ANSWERS TO PLAINTIFFS' ALLEGATIONS

The following responses correspond numerically to the paragraphs in the Complaint:

1. After reasonable inquiry, ProTech is without knowledge or information sufficient to admit or deny the truth of the allegations set forth in paragraph 1 of the Complaint, and they are therefore denied.

2. After reasonable inquiry, ProTech is without knowledge or information sufficient to admit or deny the truth of the allegations set forth in paragraph 2 of the Complaint, and they are therefore denied.

3. After reasonable inquiry, ProTech is without knowledge or information sufficient to admit or deny the truth of the allegations set forth in paragraph 3 of the Complaint, and they are therefore denied.

4. ProTech admits the allegations set forth in paragraph 4 of the Complaint.

5. ProTech admits the allegations set forth in paragraph 5 of the Complaint.

6. ProTech admits the allegations set forth in paragraph 6 of the Complaint.

7. ProTech admits the allegations set forth in paragraph 7 of the Complaint.

8. ProTech admits the allegations set forth in paragraph 8 of the Complaint.

9. ProTech admits that the Court has subject matter jurisdiction and venue is proper in Harris County, but denies the remainder of the allegations as set forth in paragraph 9 of the Complaint.

10. ProTech denies the allegations set forth in paragraph 10 of the Complaint.

11. ProTech admits the allegations in the second sentence in paragraph 11 of the Complaint, but denies the remainder of the allegations set forth in paragraph 11 of the Complaint.

12. After reasonable inquiry, ProTech is without knowledge or information sufficient to admit or deny the truth of the allegations set forth in paragraph 12 of the Complaint, and they are therefore denied.

13. After reasonable inquiry, ProTech is without knowledge or information sufficient to admit or deny the truth of the allegations set forth in the first sentence of paragraph 13 of the

Complaint, and they are therefore denied, and ProTech denies the remainder of the allegations set forth in paragraph 13 of the Complaint.

14. To the extent “their” or “they” include ProTech, ProTech denies the allegations in paragraph 14 of the Complaint, otherwise, after reasonable inquiry, ProTech is without knowledge or information sufficient to admit or deny the truth of the allegations set forth in paragraph 14 of the Complaint, and they are therefore denied.

15. After reasonable inquiry, ProTech is without knowledge or information sufficient to admit or deny the truth of the allegations set forth in the first three sentences of paragraph 15 of the Complaint, and they are therefore denied, and ProTech denies the remainder of the allegations set forth in paragraph 15 of the Complaint.

16. ProTech denies the allegations set forth in paragraph 16 of the Complaint.

17. ProTech denies the allegations set forth in the first three sentences of paragraph 17 of the Complaint, and after reasonable inquiry, is without knowledge or information sufficient to admit or deny the truth of the allegations set forth in the fourth sentence of paragraph 17 of the Complaint, and denies the allegations set forth in the remainder of paragraph 17 of the Complaint.

18. ProTech denies the allegations set forth in paragraph 18 of the Complaint.

19. ProTech denies the allegations set forth in the first three sentences and the first one-half of the fourth sentence of paragraph 19 of the Complaint, and after reasonable inquiry, is without knowledge or information sufficient to admit or deny the truth of the allegations set forth in the remainder of the allegations in paragraph 19 of the Complaint, and therefore denies them.

20. After reasonable inquiry, ProTech is without knowledge or information sufficient to admit or deny the truth of the allegations set forth in paragraph 20 of the Complaint, and they are therefore denied.

21. ProTech denies the allegations set forth in the first sentence of paragraph 21 of the Complaint, denies the allegations set forth in the last sentence of paragraph 21 of the Complaint, and after reasonable inquiry, is without knowledge or information sufficient to admit or deny the truth of the remainder of the allegations set forth in paragraph 21 of the Complaint, and they are therefore denied.

22. To the extent “their” or “they” include ProTech, ProTech denies the allegations in paragraph 22 of the Complaint. ProTech denies the allegations in the last two sentences of paragraph 22 of the Complaint. After reasonable inquiry, ProTech is without knowledge or information sufficient to admit or deny the truth of the remainder of the allegations set forth in paragraph 22 of the Complaint, and they are therefore denied.

23. ProTech incorporates its answers to the allegations set forth in paragraphs 1-22 above.

24. ProTech denies the allegations set forth in paragraph 24 of the Complaint.

25. ProTech denies the allegations set forth in paragraph 25 of the Complaint.

26. ProTech denies the allegations set forth in paragraph 26 of the Complaint.

27. ProTech denies the allegations set forth in paragraph 27 of the Complaint.

28. ProTech incorporates its answers to the allegations set forth in paragraphs 1-27 above.

29. ProTech denies the allegations set forth in paragraph 29 of the Complaint.

30. ProTech denies the allegations set forth in paragraph 30 of the Complaint.

31. ProTech denies the allegations set forth in paragraph 31 of the Complaint.

32. ProTech incorporates its answers to the allegations set forth in paragraphs 1-31 above.

33. ProTech denies the allegations set forth in paragraph 33 of the Complaint.

34. ProTech denies the allegations set forth in paragraph 34 of the Complaint.

35. ProTech incorporates its answers to the allegations set forth in paragraphs 1-34 above.

36. ProTech denies the allegations set forth in paragraph 36 of the Complaint.

37. ProTech denies the allegations set forth in paragraph 37 of the Complaint.

38. ProTech denies the allegations set forth in paragraph 38 of the Complaint.

39. ProTech incorporates its answers to the allegations set forth in paragraphs 1-38 above.

40. ProTech denies the allegations set forth in paragraph 40 of the Complaint.

41. ProTech denies the allegations set forth in paragraph 41 of the Complaint.

42. ProTech denies the allegations set forth in paragraph 42 of the Complaint.

43. ProTech denies the allegations set forth in paragraph 43 of the Complaint.

44. ProTech denies the Plaintiffs are entitled to any relief requested in paragraph 44 of the Complaint.

45. ProTech denies the Plaintiffs are entitled to any relief requested on page 14 and 15 of the Complaint.

SPECIAL DENIALS

41. ProTech specifically denies the allegation in paragraph 24 of Plaintiffs' Complaint that the EXE 1.01 and 1.20 software programs, "each of the works at issue," and

Apron Check contain material that is original to Plaintiffs, and further ProTech denies it has wrongfully copied or used any protected material(s) of Plaintiffs.

42. ProTech denies the allegation in paragraph 24 of Plaintiffs' Complaint that the material is copyrightable under the laws of the United States.

43. ProTech denies the allegation in paragraphs 24 through 27 of Plaintiffs' Complaint that ProTech infringed any of Plaintiffs' copyright(s). ProTech denies wrongfully copying Plaintiffs' EXE 1.01 or 1.02 software programs, or any of the works at issue in this case, and then publishing and using them for its own financial gain.

44. ProTech denies that Plaintiffs' have the capacity to sue on the Agreement for Sales of ApronCheck Software in Australia as none of the Plaintiffs are parties to the contract. (See Exhibit A attached hereto and incorporated by reference).

AFFIRMATIVE DEFENSES

45. Plaintiff fraudulently induced ProTech to enter into the Boxed Manufacturer License Agreement (See Exhibit B attached hereto and incorporated by reference).

46. There was a failure of consideration for both the Agreement for Sales of ApronCheck Software in Australia (See Exhibit A attached hereto), and the Boxed Manufacturer License Agreement (See Exhibit B attached hereto). Plaintiffs promised to provide ProTech the license to offer the Apron Check software program as an inducement to enter into the Boxed Apron Manufacturing agreement, but failed to do so. Plaintiffs also failed to provide the Apron Check software for the Agreement for Sales of ApronCheck Software in Australia (See Exhibit A attached hereto).

47. Plaintiffs' EXE 1.01 and 1.20 software programs, or other works at issue, constitute un-copyrightable subject matter as they are not unique works, but only common programs or materials.

48. Plaintiffs' EXE 1.01 and 1.20 software programs, or other works at issue, lack originality.

49. Plaintiffs have unclean hands in promising to license ProTech to sell or market the Apron Check software, and failing to do so.

50. Plaintiffs have failed to state a claim upon which relief can be granted.

51. Any award of punitive damages would be grossly excessive and would not comply with due process under the United States or Texas Constitutions. Alternatively, any punitive damages award would be subject to the statutory cap in Texas Civil Practices and Remedies Code, Chapter 41.

52. Plaintiffs have failed to mitigate their damages.

53. Plaintiffs' damages, if any, were caused in whole or in part by Plaintiffs' own negligence or conduct.

54. Plaintiffs' failed to perform all conditions precedent by among other things, failing to give notice.

55. Plaintiffs' actions have frustrated the purpose of Sales of ApronCheck Software in Australia (See Exhibit A attached hereto and incorporated by reference), and the Boxed Manufacturer License Agreement (See Exhibit B attached hereto and incorporated by reference), or made the performance of each impracticable.

PRAYER

PREMISES CONSIDERED, ProTech respectfully requests from this Court the following relief:

- A. Judgment that Plaintiffs take nothing by their claims against ProTech, and dismiss Plaintiffs' claims against ProTech with prejudice;
- B. Judgment against Plaintiffs for attorney's fees and costs;
- C. Enter a judgment that ProTech is a prevailing party, assess costs against Plaintiffs, and award ProTech all other relief the Court deems appropriate.

PROTECH'S SECONDED AMENDED COUNTERCLAIM

1. ProTech Leaded Eyewear, Inc. (herein, "ProTech"), files its counterclaim against Macro Niche Software, Inc., R/Med. Inc., and Michael J. Ruthemeyer (herein, "Macro Niche" "R/Med" "Ruthemeyer" or collectively the "Counter-Defendants") as follows:

PARTIES

- 2. ProTech Leaded Eyewear, Inc. is a corporation located in Florida.
- 3. Macro Niche Software, Inc. is a corporation located in Harris County, Texas.
- 4. R/Med. Inc. is a corporation located in Harris County, Texas.
- 5. Michael J. Ruthemeyer is an individual residing in Harris County, Texas.

JURISDICTION AND VENUE

6. The court has jurisdiction over the lawsuit under 28 U.S.C. §1332(a)(1) because ProTech and the Counter-Defendants are citizens of different states and the amount in controversy exceeds \$75,000, excluding interest and costs. Venue is proper in this Court under 28 U.S.C. §1391 because the acts complained of occurred substantially in Harris County.

FACTS

7. ProTech manufactures and sells aprons and other protective devices for use by personnel who work in and near x-ray areas. Counter-Defendants promised to license ProTech to sell its (ProTech's) protective aprons with a device to record the history of the particular apron, and the software program to save and retrieve the data for reports and inspections (herein the "Services"). Counter-Defendants agreed to license ProTech and its distributors to offer the Services in the U.S.A., and agreed to license ProTech's distributor for protective aprons, Imaging Solutions of Australia (herein "ISA"), to provide the Services in Australia and other areas where ISA operated. ProTech relied upon the promises of Counter-Defendants and entered into the Boxed Manufacturer License Agreement as a preliminary step to becoming authorized to offer the entire package of Services as previously stated (See Exhibit B attached hereto and incorporated by reference). However, these promises of Counter-Defendants were untrue when made or made recklessly because after months of negotiating, Counter-Defendants suddenly decided not to allow ISA to offer the ApronCheck software as previously agreed. Rather than allow ISA to offer ApronCheck direct, Counter-Defendants decided to only allow ISA to offer the services through a competitor, Peak Medical. This was unacceptable. Counter-Defendants seek to unlawfully restrain ProTech from competing worldwide. ProTech relied upon these misrepresentations of Counter-Defendants to its detriment because ProTech gave up the opportunity to use other tracking services, and was damaged by Counter-Defendants' misrepresentations.

8. ProTech continued to try to get the rights from Counter-Defendants to offer the Services in the U.S.A., but Counter-Defendants refused. At all relevant times, the relationship between ProTech and Counter-Defendants was as independent contractors. ProTech does not

own or have rights to use or sell any tracking system for aprons or other protective devices for use by personnel who work in and near x-ray areas. Furthermore, ProTech was never provided access to the source code for Counter-Defendants' tracking system. ProTech's damages include lost past and future lost profits.

CAUSES OF ACTION

DECLARATORY JUDGMENT

9. ProTech repeats and re-alleges all preceding paragraphs as if set forth fully herein, and pleads in the alternative if necessary.

10. ProTech brings this claim for a declaratory judgment under both Federal Rule of Civil Procedure 57 and 28 U.S.C. §§2201, 2202.

11. ProTech requests the Court to declare the Sales of ApronCheck Software in Australia (See Exhibit A attached hereto and incorporated by reference), and the Boxed Manufacturer License Agreement (See Exhibit B attached hereto and incorporated by reference) invalid for the reasons stated herein. Further, ProTech requests the Court to declare that none of the Counter-Defendants are the proper party to make a claim for breach of the Sales of ApronCheck Software in Australia agreement, as none of them are parties to this agreement. (See Exhibit A attached hereto and incorporated by reference).

BREACH OF GOOD FAITH AND FAIR DEALING

12. ProTech repeats and re-alleges all preceding paragraphs as if set forth fully herein, and pleads in the alternative if necessary.

13. As stated above, the purpose of the contracts, Exhibit A and Exhibit B was for ProTech to become authorized to offer the entire package of Services offered by Plaintiffs. The written agreements were simply preliminary steps for ProTech to get the rights to offer the full range of tracking the aprons and other protective devices (See Exhibit B attached hereto and incorporated

by reference). These agreements alone, are actually harmful to ProTech from a competitive standpoint. ProTech expected to offer the full range of Services, but Counter-Defendants induced ProTech to enter into the agreements attached as Exhibit A and Exhibit B, and then refused to allow ProTech the right to offer the full range of services. This was in breach of Counter-Defendants promises to do so. In summary, ProTech was promised a good business opportunity, but Counter-Defendants breached their agreements. ProTech has been damaged by the acts of Counter-Defendants for which it seeks recovery for actual, punitive, and consequential damages and attorneys fees.

FRAUD AND FRAUD IN THE INDUCEMENT

14. ProTech repeats and re-alleges all preceding paragraphs as if set forth fully herein, and pleads in the alternative if necessary.

15. As stated above, Counter-Defendants made representations of material fact to ProTech and/or failed to disclose material facts when obligated to do so as described above.

16. Counter-Defendants made such representations and/or nondisclosures of fact to ProTech when it had actual knowledge of the facts as being other than as stated or omitted, or made such statements or omissions recklessly, without regard for their truth in order to induce ProTech to act.

17. ProTech reasonably relied on the statements and/or non-disclosed material facts of Counter-Defendants. Counter-Defendants' conduct was deceitful and fraudulent and was a substantial factor in causing ProTech ProTech's damages described above.

18. Counter-Defendants represented to ProTech that they would authorize and provide materials to ProTech to offer the full range of Services, but refused. Counter-Defendants made these representations to ProTech intending ProTech to rely upon such representations, and

ProTech did rely on such representations to its detriment. ProTech has been damaged due to its reliance on the material misrepresentations of Counter-Defendants. ProTech seeks actual, consequential, and punitive damages as a result of Counter-Defendant's fraud and fraud in the inducement, or in the alternative, seeks rescission of the Boxed Manufacturer License Agreement (See Exhibit B attached hereto and incorporated by reference).

VIOLATION OF THE TEXAS DECEPTIVE TRADE PRACTICES ACT

19. ProTech repeats and re-alleges all preceding paragraphs as if set forth fully herein, and pleads in the alternative if necessary.

20. Counter-Defendants represented to ProTech that they would authorize ProTech to offer the full range of Services, but refused to do so. Counter-Defendants made these representations to ProTech knowingly and intending ProTech to rely upon such representations, and ProTech did rely on such representations to its detriment. ProTech has been damaged due to its reliance on the material misrepresentations of Counter-Defendants.

Such acts of Counter-Defendants resulted in at least the following DTPA violations:

- violation of 17.46(5) by knowingly representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or qualities which they do not have;
- violation of 17.46(12) by knowingly representing that its agreement involved rights, remedies, or obligations which it did not have or involve, or which are prohibited by law;
- violation of 17.46(23) by knowingly failing to disclose information concerning goods or services which was known at the time of the transaction, when such failure was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed; and
- violation of 17.50(2) by knowingly breaching a warranty.
- other knowingly false representations made by Counter-Defendants and relied upon by ProTech

21. ProTech has been damaged due to its reliance on the misrepresentations of Counter-Defendants. ProTech seeks both actual, consequential, and multiple damages, and attorneys fees as a result of Counter-Defendants' knowing violation of the Texas Deceptive Trade Practices Act.

NEGLIGENT MISREPRESENTATION

22. ProTech repeats and re-alleges all preceding paragraphs as if set forth fully herein, and pleads in the alternative if necessary.

23. Counter-Defendants represented to ProTech that material facts relating to a business transaction were true and/or failed to disclose material facts to ProTech.

24. Counter-Defendants' representations were not true and/or the material facts were unknown to ProTech.

25. Counter-Defendants had no reasonable grounds for believing the representations to be true when made, or the representations were made recklessly, without regard to their truth, or falsity, or failed to notify ProTech within a reasonable time that facts had changed, and reasonably knew that the facts were material.

26. Counter-Defendants intended ProTech to rely on these representations and/or undisclosed facts.

27. ProTech reasonably relied on Counter-Defendants' misrepresentations and/or relied that the undisclosed facts did not exist.

28. Counter-Defendants' conduct was a substantial factor in causing ProTech's damages for which it seeks to recover actual, consequential, and punitive damages.

DEMAND FOR JURY

29. ProTech demands trial by jury.

PRAYER

WHEREFORE, ProTech prays that Counter-Defendants be cited to appear and answer and that ProTech have judgment against Counter-Defendants for the following:

- a. Actual, consequential, enhanced, and punitive damages;
- b. An order declaring that the Boxed Manufacturer License Agreement (See Exhibit B attached hereto and incorporated by reference) is invalid, and that none of the Counter-Defendants are the proper party to make a claim for breach of the Sales of ApronCheck Software in Australia agreement (See Exhibit A attached hereto and incorporated by reference), and dismiss this claim with prejudice.
- c. Reasonable attorney's fees;
- d. Prejudgment and post judgment interest as allowed by law;
- e. Costs of suit; and
- f. All other relief, at law and in equity, to which it may be entitled.

DATED: December 17, 2012

Respectfully submitted,

MATTHEWS LAWSON, PLLC

/s/ Guy E. Matthews by Permission Lee Joseph

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**ATTORNEYS FOR DEFENDANT AND
COUNTER-PLAINTIFF PROTECH
LEADED EYEWEAR, INC.**

CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that the foregoing Amended Answer of ProTech Leded Eyewear, Inc.'s to Plaintiffs' First Amended Original Complaint and First Amended Counterclaim has been filed on this 17th day of December, 2012, pursuant to the electronic filing requirements of the United States District Court for the Southern District of Texas, which provide for service on counsel of record in accordance with the electronic filing protocols in place.

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SIGNED: December 17, 2012

/s/ Guy E. Matthews by Permission Lee Joseph
Guy E. Matthews