

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

MACRO NICHE SOFTWARE, INC.,	§	
R/MED, INC. and	§	
MICHAEL J. RUTHEMEYER	§	
	§	
VS.	§	
	§	C.A. NO. 4:12-cv-2293
4 IMAGING SOLUTIONS, L.L.C.,	§	
PROTECH LEADED EYEWEAR, INC.,	§	
And IMAGING SOLUTIONS OF	§	
AUSTRALIA	§	JURY DEMANDED

**PLAINTIFFS' SECOND AMENDED ORIGINAL COMPLAINT AND
APPLICATION FOR INJUNCTIVE RELIEF**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, **MACRO NICHE SOFTWARE, INC., R/MED, INC.** and **MICHAEL J. RUTHEMEYER**, Plaintiffs and file this Second Amended Original Complaint complaining of Defendants **4 IMAGING SOLUTIONS, L.L.C., PROTECH LEADED EYEWEAR, INC., MARK STRUTHERS, DEBBIE STARR,** and **IMAGING SOLUTIONS OF AUSTRALIA** for cause of action and shows the following:

PARTIES

1. Plaintiff **MACRO NICHE SOFTWARE, INC.** (“Macro Niche”) is a corporation duly formed and operating under the laws of the State of Texas and who has the exclusive worldwide rights to distribute the software “ApronCheck”. Its principle place of business is in Harris County, Texas.

2. Plaintiff **MICHAEL J. RUTHEMEYER** (“Ruthemeyer”) is the Chief Executive Officer and shareholder of Macro Niche, the entity who has the exclusive worldwide rights to distribute the software “ApronCheck”, and is a resident of Harris County, Texas.

3. Plaintiff **R/MED, INC.** (“R/MED”) is a corporation duly formed and operating under the laws of the State of Texas and who is the copyright owner of the “ApronCheck” software. It has its principle place of business in Harris County, Texas.

4. Defendant **4 IMAGING SOLUTIONS, L.L.C.** (“4 Imaging”) has answered and appeared herein.

5. Defendant **PROTECH LEADED EYEWEAR, INC.** (“ProTech”) has answered and appeared and has filed a Rule 12(b)(6) Motion which is pending before this Court.

6. Defendant **MARK STRUTHERS** (“Struthers”) has answered and appeared herein.

7. Defendant **DEBBIE STARR** (“Starr”) has filed a Rule 12(b)(6) Motion which is pending before this Court.

8. Defendant **IMAGING SOLUTIONS OF AUSTRALIA** (“ISA”) has filed a Rule 12(b)(6) Motion which is pending before this Court.

JURISDICTION AND VENUE

9. Jurisdiction of this action is vested in this Court under 28 U.S.C. § 1331 as the Plaintiffs allege violation of the Copyright Act of 1976, 17 U.S.C. § 101 et seq. This court has jurisdiction pursuant to 28 U.S.C. § 1338(a). Additionally, venue lies in this Court under 28 U.S.C. § 1391 as the causes of action alleged herein are based upon actions and activities that substantially took place at all relevant times in Harris County, Texas and the underlying agreements between the parties all placed venue in Harris County, Texas. By reason thereof, the jurisdiction and venue of this action is proper in any federal district court in the Southern District of Texas. Furthermore, the matter in controversy exceeds, exclusive of interest and costs, the sum specified by 28 U.S.C. § 1331 and accordingly, jurisdiction is proper before this court.

10. This is a civil liability case brought to collect a legal debt of money damages due and owing to Plaintiff by reasons of the injuries to and damages of Plaintiff by reason of improper and wrongful conduct on the part of the Defendants.

FACTUAL STATEMENT

11. Plaintiffs Macro Niche, R/Med and Ruthemeyer designed and own the copyright to the software “ApronCheck” and associated documents, training material, images and trade secrets. Please see Exhibit “A”. This software allows the lead aprons used to protect people from the radiation of x-rays for example, to be adequately tracked for a history of their use and inspection. This software is a revolutionary design in the medical field and keeps an organized record of which aprons have been inspected and repaired. This software provides the owner with good policies and procedures and produces reports of the entire life history of every apron to insure the safety for the people using it and to meet regulatory compliance. The associated documents, training material, and images are used in Plaintiffs’ websites and other publications regarding the product.

12. In October 2007, Macro Niche and 4 Imaging, through Struthers, entered into an agreement with one another whereby 4 Imaging would sell Macro Niche’s ApronCheck in the United States only to sell the software. Starr works with Struthers at Defendant 4 Imaging and did work together with him throughout the entire relevant time period. Additionally, Struthers also installed and agreed to the copyright /licensing agreement contained in the software. This agreement was based on a 22 year relationship between Plaintiffs and Struthers and eventually formed the basis for the agreements with other parties regarding ApronCheck. Struthers and Starr were both always very aware of the written agreement between ProTech and its dealers and Plaintiffs. The licensing agreement covers nondisclosure and also requires the user to certify they

are not a competitor or work with a competitor. Another integral part of the agreement was that 4 Imaging would not sell competitor products of ApronCheck during the time of their agreement and for three years after its termination. During the course of their relationship, negotiations ensued regarding selling outside of the United States and more specifically, Australia. However, Plaintiffs verified the original agreement that Struthers would not have the right to sell outside of the United States despite his attempts to circumvent the current exclusive agreement already in place in Australia with another company.

13. 4 Imaging terminated the agreement with Macro Niche in September of 2011 shortly after the AHRA national convention after being given a list of leads from the AHRA convention for “business reasons.” What Macro Niche did not know was that for a significant period of time during this relationship, 4 Imaging, through Struthers and Starr, was learning and stealing the copyright concepts, business innovations, trade secrets, information about the current product and new products in development ideas and features of ApronCheck and designing/build based on that information their own product with ProTech and Imaging Solutions of Australia that they would use to compete, called RadTrack.

14. More importantly, during the time of their agreement, while 4 Imaging, Struthers and Starr were promoting ApronCheck to the public and others, they were also secretly finding and realizing who the customers would be for this market and keeping them on the back burner for when they released RadTrack. Instead of selling and promoting ApronCheck pursuant to their agreement with Plaintiff, 4 Imaging was finding and soliciting customers for their own future product.

15. This was accomplished by 4 Imaging, Struthers and Starr through the annual AHRA Convention. Macro Niche paid for Struther’s air fare and hotel stay to attend the

conference and work in the booth for ApronCheck to network, promote and sell the ApronCheck software only. During this convention, Macro Niche released half of the booth that it had acquired through its position as a bronze sponsor of the AHRA to ProTech to use for what Plaintiff thought would be an effort to work as a team and promote both ProTech's boxed aprons, a method of lead apron construction that was created by Macro Niche and licensed to ProTech, and Macro Niche's ApronCheck together. However, unbeknownst to Macro Niche, 4 Imaging used this opportunity to meet ProTech and collect leads for their future product instead of using those leads to sell ApronCheck.

16. At this convention, it is believed that 4 Imaging, through Struthers, met its future customers: Defendant ProTech, Clear Image Devices LLC and Reina Imaging. 4 Imaging eventually retained and became business partners with these corporations. Among these corporations, and using the classic "bait and switch" approach, 4 Imaging continued to use Plaintiff's copyrighted pictures and images to advertise and attract potential customers for RadTrack that would likely have been customers of ApronCheck. At all relevant times, not only was Struthers personally aware of what was going on but so was Starr as both were personally involved in this tortious scheme. ProTech also had an agreement with Macro Niche that it would not compete with ApronCheck and that it would not have a competitive product or an interest in a competitive product.

17. ProTech had signed agreements with Plaintiffs whereby ProTech agreed that it would sell the product in New Zealand but not in Australia as there was already a contractual relationship between ProTech and another company regarding Australia. At this time Protech informed Plaintiffs that they had a dealer in New Zealand, Glenn Honey ("Honey"), who also happens to be ISA's owner and representative a fact unknown to Plaintiffs at this time. One of

the issues that ProTech and Plaintiffs needed to discuss was local support in New Zealand because of the time zone issue. Plaintiffs wanted to insure that ProTech's dealer in New Zealand had a good understanding of the software. Consequently, ProTech arranged a meeting between Ruthemeyer and Honey in November 2010 in Chicago during an industry convention.

18. After meeting Honey at the Chicago meeting, Ruthemeyer asked ProTech for a copy of its written agreement with Honey as a dealer of ProTech only to be told that ProTech had no written agreement with Honey. At this time and as was their usual practice, Plaintiffs informed ProTech that they needed a written agreement either between ProTech and Honey or between ApronCheck and Honey in order to protect Plaintiffs' product and its copyright. Based on information and belief, Honey refused to sign any agreement with anyone including Plaintiffs.

19. Plaintiffs' agreements with ProTech allowed ProTech to have its dealer(s) sell ApronCheck in New Zealand only. This was the basis of the parties' verbal agreement that in turn would allow Honey to be ProTech's dealer for New Zealand. The verbal agreement was that Honey could sell ApronCheck direct in New Zealand only through ProTech who had a signed agreement with Plaintiffs for the distribution rights in New Zealand but not Australia as Plaintiffs already had a dealer, Peak Medical, in place for all of Australia. Plaintiffs' agreement through ProTech with Peak Medical was signed in February 2008 and Plaintiffs had no grounds or reasons on which to break the contract and give it to Honey. It was understood by both Honey and Protech that they could not sell ApronCheck direct in Australia but could purchase ApronCheck from Peak Medical and resell it to Honey's customers in Australia.

20. However, instead of honoring the terms of ProTech's agreement with Peak Medical and the fact that there was no agreement between Plaintiffs and Honey, Honey wanted to change the terms of the written agreements that were already in place with Peak Medical and

ProTech after meeting with Ruthemeyer in November 2010. Moreover, that was the basis for his not signing an agreement with Plaintiffs or ProTech and the genesis of his actions to buy the products through Struthers in a blatant attempt to subvert the Australian contract with Peak Medical that he was fully aware of. When he was informed by Plaintiffs that they would not break the standing agreement with Peak Medical, Honey threatened to sue Plaintiffs. Yet, Honey and his company, ISA, continued to advertise Plaintiffs' product both in his catalog and on his website.

21. Notwithstanding the existing agreements between ProTech and Plaintiffs, ProTech used or provided access to Plaintiffs' web based training material, reports, and manufacturers to ISA. However, even after all agreements and negotiations had ceased, ISA continued to use Plaintiffs' images and product on its website and in its printed material to create a market for their own launching of RadTrack. This continued course of conduct of advertising the ApronCheck product by Defendants continues to this date.

22. RadTrack was initially presented at the RSNS, a worldwide x-ray convention, in November 2011 just months after Struthers presented his termination notice to Plaintiffs and was subsequently released in the early months of 2012. Coincidentally, it offered many similar features and identical designs as ApronCheck. It is still described on their website as "Highly functional in terms of tracking and reporting on personal radiation protection apparel" and having "unique identification codes (RadIDs)" and "complete life-cycle tracking from purchase to end-of-life disposal." The "RadID" was constantly used throughout Plaintiffs' training materials with the specifically being used in ApronCheck's advertising on the Imaging Solutions of Australia's web site in which it was later learned they practiced their bait and switch. Defendants used the same key term and function within their software. All of Defendants'

actions have caused Plaintiff irreparably harm for which Plaintiffs now have no choice but to file this suit to protect and preserve their rights.

CAUSES OF ACTION

Copyright Infringement – 17 U.S.C. §501

23. Plaintiffs incorporate herein by reference the factual statements set forth in paragraphs 1 through 22 above.

24. For each of the works at issue in this matter, Plaintiffs hold a copyright registration certificate from the United States Copyright Office. Please see Exhibit “A”. Defendant 4 Imaging Solutions provided access of registered copies of ApronCheck and access to Plaintiffs’ copyright concepts, business innovations, trade secrets web-based online training material, demo software, printed reports, and access to registered EXE 1.01 and 1.20 software to Defendants ISA and Protech. These Defendants then took these copyrighted materials, copied/reproduced them and used them for their own financial gain all the while knowing that these materials were not theirs to use because of Plaintiffs’ copyrights. Defendant ISA also displayed Plaintiff’s copyrighted imaging and work on their website to advertise the ApronCheck product and develop its market to promote its own product to the point of using the exact same pictures of Plaintiff Ruthemeyer’s wife on its website. All of these Defendants took these actions without the permission, authorization, or consent of Plaintiffs and continue to this day. The works were not fact based, and instead were used to attract business for Defendants’ own product. Defendants’ effort to use the Plaintiffs’ material for their own personal gain was intentional and willful. Defendants learned copyright concepts, business innovations, trade secrets and copied many of the features of ApronCheck to install them on their own competing software, RadTrack. In undertaking this course of conduct, Defendants have violated Plaintiffs’

exclusive rights of reproduction and distribution. Defendants' actions constitute infringement of Plaintiffs' copyrights and exclusive rights under copyright.

25. Defendants knew the infringed works belonged to Plaintiffs and that they did not have permission to exploit Plaintiffs' works. Defendants further knew their acts constituted copyright infringement. Defendants' conduct was willful within the meaning of the Copyright Act. As a result of their wrongful conduct, Defendants are liable to Plaintiffs for copyright infringement pursuant to 17 U.S.C. § 501. Plaintiffs have suffered, and will continue to suffer, substantial losses, including but not limited to damage to its business reputation and goodwill.

26. Plaintiffs are entitled to recover damages, which include their losses and any and all profits Defendants have made as a result of its wrongful conduct. 17 U.S.C. § 504. Alternatively, Plaintiffs are entitled to statutory damages under 17 U.S.C. § 504(c). In addition, because Defendants' infringement was willful, the award of statutory damages should be enhanced in accordance with 17 U.S.C. § 504(c)(2).

27. Plaintiffs are also entitled to recover their attorneys' fees and costs of suit pursuant to 17 U.S.C. § 505.

Fraud

28. Plaintiffs incorporate herein by reference the factual statements set forth in paragraphs 1 through 27 above.

29. Defendants made numerous representations to the Plaintiffs concerning the agreement not to compete, how they would only do business with Plaintiffs and how their actions would benefit Plaintiffs. These representations were made both orally and in the various documents and agreements executed by the Defendants. For instance, Pro Tech represented to Plaintiffs that it would not compete with ApronCheck and that it would not have a competitive product or an

interest in a competitive product, which later proved to be false on both counts. As shown above and as clearly evidenced by their later conduct, acts and failures to act, Defendants' representations were known by them to be false when made or were made recklessly with the knowledge of their falsehood and were made as positive assertions. In connection with the discussions between Plaintiffs and Defendants and as shown above, Defendants directly and indirectly made material misrepresentations to the Plaintiffs or failed to disclose material facts to Plaintiffs concerning the nature of their tortious association and relations, their subsequent infringing design of and intent to introduce RadTrack as well as to not compete with Plaintiffs and to honor the confidentiality of the protected products, information, software and materials they were given access to by Plaintiffs. All Defendants, including ProTech, Struthers and Starr personally made representations to Plaintiffs regarding their underlying actions and commitments.

30. Defendants intended that the Plaintiffs rely to their detriment and injury upon the false statements and impressions of fact being made, and on the presumption that no material facts of the contrary existed. Part and parcel of their scheme was to convince Plaintiffs that everything they were doing was above board and not to the detriment of Plaintiffs. In other words, Defendants intended that Plaintiffs believe them when they represented to Plaintiffs that the agreements and confidentiality between the parties would be honored and that Plaintiffs' copyrighted materials protected. Plaintiffs relied to their detriment upon the false statements and impressions of fact purposely created by Defendants and allowed all Defendants, including ProTech, Struthers and Starr, access to proprietary and confidential information and company trade secrets all of which were misappropriated by all of these Defendants for their financial gain and Plaintiffs' financial detriment as a direct and proximate result of Defendants' tortious scheme. As a result of Defendants'

fraudulent statements, concealments and failures to disclose, Plaintiffs have been significantly damaged.

31. The actions of Defendants were intentional and made with knowing disregard for the rights of the Plaintiffs. Consequently, Plaintiffs pray for punitive damages in addition to compensatory damages.

Breach of Contract

32. Plaintiffs incorporate herein by reference the factual statements set forth in paragraphs 1 through 31 above.

33. Defendant 4 Imaging has an enforceable software licensing agreements and terms of website use agreements with Plaintiffs. Defendant Pro Tech has an enforceable boxed vendor licensing agreement, a exclusive “ApronCheck” dealership for New Zealand and terms of website use agreements with Plaintiffs. Defendants have both breached these agreements by their blatant refusals to fully and faithfully perform their respective duties as set forth in their respective contracts. The conduct of these Defendants also represents an interference with contracts and prospective contractual advantages and opportunities of Plaintiffs which have caused Plaintiffs significant damages. Additionally, the conduct of Defendants, motivated by self-interest, greed and profit of all Defendants, was willful and malicious.

34. As a direct and proximate result of said conduct, Plaintiffs have incurred actual damages. Plaintiffs are further entitled to an award of costs, attorneys’ fees and expenses incurred herein.

Breach of Fiduciary Duty

35. Plaintiffs incorporate herein by reference the factual statements set forth in paragraphs 1 through 34 above.

36. Defendants 4 Imaging, Struthers, Starr, Imaging Solutions of Australia and Pro Tech each had special duties owed to Plaintiffs through their contractual business relationship arising from the nature and length of their relationships and from the underlying agreements. As agents of the Plaintiffs, these Defendants owed Plaintiffs the duty of good faith, loyalty and full disclosure. Plaintiffs provided Defendants access to copyrighted materials and products that they would not have but for the relationships between these parties. If these Defendants had decided to undertake a course of action that was contrary to the relationships they had with Plaintiffs, they had a duty to disclose their intentions to rob and steal from Plaintiffs. They did not, instead staying silent and surreptitiously gathering information in furtherance of their underhanded, devious and deceitful scheme and course of conduct.

37. These Defendants have each, motivated by self-interest, greed and profit, breached the duties owed by engaging in the conduct described herein. The true intention of these Defendants, for example their secretive work on a competing product, was never disclosed to Plaintiffs. These Defendants were not loyal to Plaintiffs in this deception during and after the relationship and these Defendants most certainly did not act in good faith when they secretly used the Plaintiffs' product, customer list, copyright concepts, business innovations, trade secrets, software and images to seek out leads for their own monetary benefits.

38. As a direct and proximate result of said conduct, Plaintiffs have been significantly damaged. The above-described conduct by these Defendants was reckless, wanton and malicious and Plaintiffs are thereby entitled to an award of exemplary and punitive damages from each of said Defendants.

Civil Conspiracy

39. Plaintiffs incorporate herein by reference the factual statements contained in Paragraphs 1 through 38 above.

40. Pleading further, by the foregoing acts and omissions, all Defendants herein conspired, one with the other, for the common purpose of accomplishing an unlawful purpose by unlawful means. More specifically, Defendants knowingly and purposely committed one or more overt acts in furtherance of their conspiracy with the ultimate result being to steal money to benefit their own interests, construct the demise of ApronCheck, and use the stolen money and assets to start a new business product for their benefit. More specifically, after being given access to Plaintiffs' materials, Defendants, one with another, agreed to use the very same materials when advertising their own product, a product developed by infringing on Plaintiffs' copyright. As set out above, Defendant worked in concert with one another to develop a competing product after having access to Plaintiffs' protected materials and information. Defendants knew what they were doing and they also knew where Plaintiffs stood on various issues, such as the honoring of the Peak Medical contract in Australia, but nevertheless decided to take their own tortious course of action.

41. As a result of such conspiracy, Plaintiffs have been damaged and are entitled to recover from the Defendants, jointly and severally, all damages proximately resulting from Defendants' wrongful conduct.

42. Plaintiffs will further show that Defendants acted with tortious disregard of Plaintiff's rights. Further, Defendants acted in a wanton and malicious manner for the purpose of causing harm to the Plaintiffs. Such conduct entitles Plaintiffs to punitive damages to act as a deterrence to prevent similar behavior in the future.

APPLICATION FOR INJUNCTIVE RELIEF

43. The conduct of Defendants is causing and, unless enjoined and restrained by this Court, will continue to cause Plaintiffs great and irreparable injury that cannot fully be compensated or measured in money. Plaintiffs have no adequate remedy at law. Pursuant to 17 U.S.C. §§ 502 and 503, Plaintiffs are entitled to injunctive relief prohibiting Defendants from further infringing Plaintiffs' copyrights, and ordering Defendants to destroy all copies of materials made in violation of Plaintiffs' exclusive rights.

ATTORNEY'S FEES

44. Pursuant to the Copyright Act, 17 U.S.C. § 505 et seq., Plaintiffs seek reasonable attorney's fees and expenses for trial and/or appeal of this suit. Additionally, Plaintiffs further seek their reasonable attorney's fees for Defendants' breaches of the applicable underlying agreements between the parties.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs **MACRO NICHE SOFTWARE, INC., R/MED, INC.** and **MICHAEL J. RUTHEMEYER** request:

a. That this Court find that Defendants **4 IMAGING SOLUTIONS, L.L.C., PROTECH LEADED EYEWEAR, INC., MARK STRUTHERS, DEBBIE STARR,** and **IMAGING SOLUTIONS OF AUSTRALIA**, jointly and severally, willfully infringed Plaintiffs' rights in federally registered copyrights under 17 U.S.C. § 501;

b. That the Court issue injunctive relief against Defendants, and that Defendants, their agents, representatives, servants, employees, attorneys, successors and assigns, and all others inactive concert or participation with them, be enjoined and restrained from copying, continuing to use, posting or making any other infringing use or infringing distribution of any and all materials owned by or registered to Plaintiffs;

