

**UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE**

HARVEST TECHNOLOGIES
CORPORATION,

Plaintiff,

v.

THERMOGENESIS CORPORATION,

Defendant.

Civil Action No: _____

JURY TRIAL DEMANDED

COMPLAINT FOR PATENT INFRINGEMENT

Plaintiff Harvest Technologies Corporation (“Harvest Technologies” or “Plaintiff”), by its attorneys, Fish & Richardson P.C., for its complaint against Defendant ThermoGenesis Corporation (“ThermoGenesis” or “Defendant”) alleges as follows:

Nature of the Action

1. This is an action for patent infringement under 35 U.S.C. § 271, *et seq.*, by Plaintiff against ThermoGenesis Corporation for infringement of United States Patent Nos. 7,077,273 (“the ’273 patent”) and 7,547,272 (“the ’272 patent”) resulting from ThermoGenesis Corporation’s manufacture, use, sale, and offer for sale of its Res-Q 60 System.

The Parties

2. Harvest Technologies is a Delaware corporation with its principal place of business at 40 Grissom Road, Suite 100, Plymouth, MA.

3. Harvest Technologies is a wholly owned subsidiary of Terumo Americas Holding, Inc., a Delaware Corporation with its principal place of business at 2101 Cottontail Lane, Somerset, NJ.

4. On information and belief, ThermoGenesis is a Delaware corporation with its principal place of business at 2711 Citrus Road, Rancho Cordova, CA.

Jurisdiction and Venue

5. This action arises under the patent laws of the United States of America, United States Code, Title 35, Section 1, *et seq.* This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1338(a).

6. This Court has personal jurisdiction over ThermoGenesis because, on information and belief, ThermoGenesis is a Delaware corporation. Further, on information and belief, ThermoGenesis has committed acts of infringement in this District by advertising, marketing, offering for sale, and selling infringing products in this District. Further, on information and belief, ThermoGenesis has conducted business in the District and offers to sell and sells its products and services in this District.

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

Background

8. Harvest Technologies is engaged in the business of designing, manufacturing, and selling point-of-care autologous platelet and stem cell enrichment products. These products include the SmartPreP[®] and SmartPreP[®] 2 Platelet Concentration System and the SmartPreP[®] 2 BMAC System.

9. The '273 patent, entitled "Blood Component Separator Disk," issued to James R. Ellsworth and Steven F. Levesque on July 18, 2006. A copy of the '273 patent is attached as Exhibit A.

10. Harvest Technologies as assignee, owns the entire right, title, and interest in the '273 patent.

11. The '272 patent, entitled "Blood Components Separator Disk," issued to James R. Ellsworth and Steven F. Levesque on June 16, 2009. A copy of the '272 patent is attached as Exhibit B.

12. Harvest Technologies as assignee, owns the entire right, title, and interest in the '272 patent.

13. ThermoGenesis makes, uses, offers to sell, and sells the Res-Q 60 System. The Res-Q 60 BMC/PRP devices are point-of-care systems designed for the preparation of cell concentrates, including stem cells, from bone marrow aspirates, and platelet-rich plasma, from whole blood.

14. In 2008, SpineSmith, LP, ("SpineSmith") was a distributor of Harvest Technologies' SmartPreP[®] BMAC products. On information and belief, in the summer and fall of 2008, principals and employees of SpineSmith assisted ThermoGenesis in understanding all functional aspects of Harvest Technologies' SmartPreP[®] BMAC products, including information related to the anticoagulant drug dosages used with the system and information related to the design of the packaging, product sterility, and other know-how related to the practical use of Harvest Technologies' SmartPreP[®] BMAC products. On information and belief, this information was beneficial to ThermoGenesis and assisted ThermoGenesis in its effort to develop and commercialize the Res-Q 60 System.

15. In October 2008, at the North American Spine Society Annual Conference in Toronto, Canada, Mr. Brian Mosley, a Harvest Technologies employee, on a confidential basis, presented SpineSmith with a sample of a new SmartPreP[®] BMAC product then being developed by Harvest Technologies which was not yet available in the commercial marketplace. On information and belief, approximately one week later, Mr. Kevin Dunworth, SpineSmith's founder, delivered a sample of this new product to ThermoGenesis to enable ThermoGenesis to understand the type of product it would need to be able to compete in the marketplace, to assist ThermoGenesis in its efforts to develop

and commercialize the Res-Q 60 System, and to copy features of the Harvest Technologies product.

16. ThermoGenesis identified Harvest Technologies' SmartPreP[®] System as a major competitor of its Res-Q 60 System in its Annual Reports for 2009 and 2010 and Harvest Technologies' SmartPreP[®] 2 System as a major competitor of its Res-Q 60 System in its Annual Reports for 2011 and 2012.

17. ThermoGenesis has infringed and continues to infringe claims of the '273 patent, both directly and indirectly, and will continue to do so unless enjoined.

18. ThermoGenesis has infringed and continues to infringe claims of the '272 patent, both directly and indirectly, and will continue to do so unless enjoined.

COUNT I
(Infringement of U.S. Patent No. 7,077,273)

19. Paragraphs 1 to 18 of this Complaint are incorporated herein as set forth above.

20. ThermoGenesis has had actual knowledge of the '273 patent, at least since the filing of this Complaint.

21. On information and belief, ThermoGenesis is directly infringing and actively inducing others to infringe the '273 patent by making, using, offering to sell, and/or selling within the United States its Res-Q 60 System and will continue to do so unless enjoined by this Court.

22. On information and belief, the '273 patent is directly infringed by at least ThermoGenesis' own use, testing, and promotion of the Res-Q 60 System and also by direct and indirect customers of ThermoGenesis who use the Res-Q 60 System in a manner that directly infringes one or more claims of the '273 patent. ThermoGenesis'

customers directly infringe the '273 patent at least when they use the Res-Q 60 System to concentrate stem cells from bone marrow aspirates.

23. On information and belief, ThermoGenesis specifically intends the Res-Q 60 System to be used in a manner that directly infringes the '273 patent. On information and belief, ThermoGenesis' actions have, at a minimum, shown willful blindness or indifference to the '273 patent. On information and belief, ThermoGenesis induces its customers to directly infringe the '273 patent by promoting, advertising, and instructing distributors and customers on how to use the Res-Q 60 System to concentrate stem cells from bone marrow aspirates. ThermoGenesis' promotion, advertising, and instruction efforts that induce infringement of one or more of the claims of the '273 patent include, at a minimum, a video presentation on its website titled "Res-Q™ 60 BMC Instructional Video" and documents on its website titled "Res-Q™ 60 BMC Literature" and "Res-Q™ 60 BMC Brochure." A copy of the Res-Q™ 60 BMC Brochure is attached as Exhibit C.

24. On information and belief, ThermoGenesis' direct and indirect customers follow ThermoGenesis' promotion, advertising, and/or instructions and when they do so, they directly infringe the '273 patent. ThermoGenesis is aware and intends that its customers will and do follow ThermoGenesis' instructions for use of the Res-Q 60 System, and in doing so such customers are using a system that includes each limitation of claims of the '273 patent and, therefore, directly infringes claims of the '273 patent.

25. On information and belief, ThermoGenesis will continue to directly and indirectly infringe the '273 patent unless enjoined by the Court.

26. The infringement of the '273 patent has caused, and will continue to cause, Harvest Technologies irreparable injury and damage unless ThermoGenesis is enjoined from its infringement.

COUNT II
(Infringement of U.S. Patent No. 7,547,272)

27. Paragraphs 1 to 26 of this Complaint are incorporated herein as set forth above.

28. ThermoGenesis has had actual knowledge of the '272 patent, at least since the filing of this Complaint.

29. On information and belief, ThermoGenesis is directly infringing and actively inducing others to infringe the '272 patent by making, using, offering to sell, and/or selling within the United States its Res-Q 60 System and will continue to do so unless enjoined by this Court.

30. On information and belief, the '272 patent is directly infringed by at least ThermoGenesis' own testing and promotion of the Res-Q 60 System in a manner that directly infringes one or more claims of the '272 patent. ThermoGenesis' customers directly infringe one or more claims of the '272 patent at least when they use the Res-Q 60 System to concentrate stem cells from bone marrow aspirates.

31. On information and belief, ThermoGenesis specifically intends the Res-Q 60 System to be used in a manner that directly infringes the '272 patent. On information and belief, ThermoGenesis' actions have, at a minimum, shown willful blindness or indifference to the '272 patent. On information and belief, ThermoGenesis induces its customers to directly infringe the '272 patent by promoting, advertising, and instructing distributors and customers on how to use the Res-Q 60 System to concentrate stem cells from bone marrow aspirates. ThermoGenesis' promotion, advertising, and instruction efforts that induce infringement of one or more of the claims of the '272 patent include, at a minimum, product packaging, video presentations on its website, and product instruction for use on its website. ThermoGenesis' promotion, advertising, and instruction efforts include, at a minimum, a video presentation on its website titled "Res-

Q™ 60 BMC Instructional Video” and documents on its website titled “Res-Q™ 60 BMC Literature” and “Res-Q™ 60 BMC Brochure.”

32. On information and belief, ThermoGenesis’ direct and indirect customers follow ThermoGenesis’ promotion, advertising, and/or instructions and when they do so, they directly infringe the ’272 patent. ThermoGenesis is aware and intends that its customers will and do follow ThermoGenesis’ instructions for use of the Res-Q 60 System, and in doing so such customers will perform each limitation of claims of the ’272 patent and will directly infringe claims of the ’272 patent.

33. On information and belief, ThermoGenesis will continue to directly infringe the ’272 patent and induce infringement of the ’272 patent unless enjoined by the Court.

34. The infringement of the ’272 patent has caused, and will continue to cause, Harvest Technologies irreparable injury and damage unless ThermoGenesis is enjoined from its infringement.

Prayer for Relief

Wherefore, Plaintiff requests the following relief:

- A. Judgment against ThermoGenesis as to infringement of the ’273 patent;
- B. Judgment against ThermoGenesis as to infringement of the ’272 patent;
- C. An order enjoining, preliminarily and permanently, ThermoGenesis, its officers, servants, employees, attorneys, and all persons in active concert or participation with them, from making, using, selling or, offering for sale products which infringe the ’273 patent;
- D. An order enjoining, preliminarily and permanently, ThermoGenesis, its officers, servants, employees, attorneys, and all persons in active concert or

participation with them, from making, using, selling or, offering for sale products which infringe the '272 patent;

E. Award Harvest Technologies damages adequate to compensate it for ThermoGenesis' infringement of the '273 patent;

F. Award Harvest Technologies damages adequate to compensate it for ThermoGenesis' infringement of the '272 patent;

G. Find that ThermoGenesis' infringement has been willful and increase the damages awarded to Plaintiff to three times the amount assessed, pursuant to 35 U.S.C. § 284;

H. Award Plaintiff its prejudgment interest on their damages and their costs, pursuant to 35 U.S.C. § 284;

I. Make a post-judgment equitable accounting of damages for the period of infringement of the '273 patent following the period of damages established by Harvest Technologies at trial;

J. Make a post-judgment equitable accounting of damages for the period of infringement of the '272 patent following the period of damages established by Harvest Technologies at trial;

K. If a permanent injunction is not granted, make a judicial determination of the conditions of future infringement such as a royalty bearing compulsory license or such other relief as the Court deems appropriate;

L. Find that this is an exceptional case pursuant to 35 U.S.C. § 285;

M. Award prejudgment interest, costs and disbursements, and attorney fees; and

N. Award Plaintiff any such other and further relief as the Court may deem just and proper.

Jury Trial Demand

Plaintiff demands a trial by jury on all issues so triable.

FISH & RICHARDSON, P.C.

Dated: October 24, 2012

By: /s/ Susan M. Coletti

Douglas E. McCann (DE Bar No. 3852)
Susan M. Coletti (DE Bar No. 4690)
222 Delaware Avenue, 17th Floor
P.O. Box 1114
Wilmington, DE 19899-1114
Telephone: (302) 652-5070
Facsimile: (302) 652-0607

Of Counsel:

Mathias W. Samuel
Sara Cotton
Trevor Woodage
FISH & RICHARDSON, P.C.
3200 RBC Plaza
60 South Sixth Street
Minneapolis, Minnesota 55402
Telephone: (612) 335-5070
Facsimile: (612) 288-9696

*Attorneys for Plaintiff
Harvest Technologies Corporation*