

Kosciusko Superior Court 1

STATE OF INDIANA)
) IN THE KOSCIUSKO COUNTY SUPERIOR
) COURT, ROOM NO. 1
) SS:
COUNTY OF KOSCIUSKO) CAUSE NO.
 43D01-1903-PL-000020



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RICK C. SASSO, M.D.)
)
 Plaintiff,)
 v.)
)
 WARSAW ORTHOPEDIC, INC.)
 MEDTRONIC, PLC, MEDTRONIC)
 SOFAMOR DANEK, INC.)
)
 Defendants)

**COMPLAINT TO COMPEL REMOTE AUDIT
OF LEDGER AS PROVIDED BY WRITTEN AGREEMENTS**

The Plaintiff, Dr. Rick C. Sasso, for his “Complaint to Compel Remote Audit of Ledger as Provided By Written Agreements” against Defendants Warsaw Orthopedic, Inc. (“WOI”), Medtronic PLC (“Medtronic”), and Medtronic Sofamor Danek, Inc. (“MSD”) (collectively, “Medtronic”) states:

**I.
The Parties and the Agreements at Issue**

1. Dr. Sasso is a board certified orthopedic surgeon who resides and works in Carmel, Indiana.
2. Dr. Sasso is the president of Indiana Spine Group, P.C. in Carmel, Indiana, and specializes in treatment of the spine.
3. WOI is an Indiana corporation with offices in Warsaw, Indiana, and Memphis, Tennessee.

4. WOI is the successor by merger to Sofamor Danek Group, Inc. and Sofamor Danek Holdings, Inc. WOI is believed to be affiliated with Medtronic, headquartered in Minnesota and Sofamor Danek, headquartered in Memphis, Tennessee.

5. WOI, Medtronic, and Sofamor Danek together are leading manufacturing companies for spine implants and are collectively referred to as Medtronic.

6. This Complaint concerns Medtronic's failure to comply with the audit provisions contained in two agreements it entered into with Dr. Sasso: the 2001 Vertex Agreement and the 1999 Screw Delivery System Agreement.

7. The parties entered into the 2001 Vertex Agreement on July 26, 2001, a copy of which is attached as **Exhibit 1**.

8. The parties entered into the 1999 Screw Delivery System Agreement on November 18, 1999, to be effective December 1, 1999, a copy of which is attached as **Exhibit 2**.

9. Paragraph 5 of the 2001 Vertex Agreement provides in relevant part:

SDH shall keep and maintain complete and accurate records relating to this Agreement and the reports required by this Section 5...
DR.SASSO shall at his own expense have the right once per calendar year and upon reasonable notice and during normal business hours to inspect, examine, audit, and copy such records on a confidential basis to verify SDH's compliance with the terms of this Agreement.

10. Paragraph 5 of the 1999 Screw Delivery System Agreement provides in relevant part:

SDH shall keep and maintain complete and accurate records relating to this Agreement and the reports required by this Section 5...
DR.SASSO shall at his own expense have the right once per calendar year and upon reasonable notice and during normal business hours to inspect, examine, audit, and copy such records on a confidential basis to verify SDH's compliance with the terms of this Agreement.

II. Prior Litigation Establishing Right to Audit

11. Dr. Sasso previously filed suit against Medtronic in Kosciusko County in August 2013, which prior lawsuit addressed unpaid royalties under both agreements. The case was officially transferred for trial, by agreement of the parties under Trial Rule 79(N)(3)(a), to Marshall County, on June 6, 2018, as Cause No. 50C01-1806-PL-27.

12. On November 28, 2018—after a four-week trial—a Marshall County jury entered verdicts against Medtronic and in favor of Dr. Sasso on Dr. Sasso's claims for unpaid royalties under both the Vertex Agreement and the Screw Delivery System Agreement. The jury awarded \$32,657,548 under the Vertex Agreement and \$79,794,721 under the Screw Delivery System Agreement. These respective amounts are exactly what Dr. Sasso requested under each contract. A copy of the verdict is attached as **Exhibit 3**.

13. Judge Palmer entered judgment in favor of Dr. Sasso and against Medtronic consistent with the jury verdict. A copy of the final judgment is attached as **Exhibit 4**.

14. The amount Dr. Sasso sought in the Marshall County lawsuit, and the amount awarded, was limited to (a) unpaid Vertex royalties (and prejudgment interest) due up until the first day of trial, November 1, 2018, and (b) unpaid Screw Delivery System royalties (and prejudgment interest) due through December 31, 2017.

15. Dr. Sasso could not pursue additional royalties because the amounts owed by Medtronic cannot be determined until Medtronic completes sales of the relevant medical devices, and discloses and accounts for such sales.

16. Medtronic continues to sell both Vertex and medical devices that use the Screw Delivery System..

17. The Vertex Agreement requires Medtronic to continue paying royalties on sales of Vertex so long as “the Medical Device is covered by a valid claim of an issued patent arising out of the Intellectual Property Rights.” Several patents satisfy these criteria, as found by the jury, and those patents remain in force and thus provide the basis for continued Vertex royalties to Dr. Sasso.

18. The Screw Delivery System Agreement requires Medtronic to continue paying royalties until the expiration of two patents: U.S. Patent No. 6,287,313 and U.S. Patent No. 6,562,046. These patents will not expire until November 23, 2019, at the earliest.

III. Request for Access

19. On February 19, 2019, Dr. Sasso requested access to the Medtronic ledger pursuant to the rights provided to him in Paragraph 5 of the 2001 Vertex

Agreement and Paragraph 5 of the 1999 Screw Delivery System Agreement. Dr. Sasso requested that Medtronic respond to his request no later than February 26, 2019, and finished the letter, “If we do not have agreement on full and complete remote access with a specific agreed upon date by March 5, 2019, we will take all measures necessary to gain such access.” A copy of the letter request is attached as **Exhibit 5**.

20. On February 27, 2019, Medtronic responded that it was reviewing the request, but provided no date to respond nor any indication that it actually would allow Dr. Sasso to proceed with the audit. A copy of its response is attached as **Exhibit 6**.

IV. Prior Behavior Demonstrating Need for Access to Ledger

21. Based on its prior conduct and history, Medtronic will not provide access to its SAP sales ledger as provided in the 2001 Vertex Agreement and 1999 Screw Delivery System Agreement without an order compelling access.

22. Medtronic has been breaching its contracts with Dr. Sasso since 2010. Attached as **Exhibit 7** is a copy of the arbitration award entered on March 21, 2015, relating to the “One Pin Agreement” ordering Medtronic to pay \$2.34 million in damages and to account for sales of hip pins, which it never did. Alternative dispute resolution of the One Pin Dispute began in June 2010. Dr. Sasso requested mediation in 2011, which was held in Memphis. A second mediation was scheduled

for April 2012 but canceled by Medtronic. Finally, in January 2013, the parties mediated a second time, again unsuccessfully. In November 2013, Medtronic filed arbitration against Dr. Sasso after he filed suit on the Vertex Agreement in August.

23. In 2012, Medtronic, intentionally and in bad faith, breached the SiLo Agreement and the Bryan Disc Agreement. A copy of an arbitration award entered on April 20, 2016, finding Medtronic in breach of these two agreements is attached as **Exhibit 8**.

24. The breach of the SiLo Agreement sheds light on how Medtronic operates in the absence of a court order compelling access to the SAP ledger.

25. Dr. Sasso helped to invent a surgical instrument called the “Rock-N-Roll Reducer” for use in the “SiLo” spinal implant system sold by Medtronic.

26. By the terms of the SiLo Agreement, entered into effective September 2005, Dr. Sasso would receive royalties on sales of the SiLo system for a period of seven (7) years which would continue if there were a patent or patents naming him as a co-inventor that issued and covered the product.

27. Relevant patents did issue, beginning in 2011.

28. In October 2012, Medtronic wrongfully stopped payment of royalties notwithstanding the issuance of the patents.

29. Dr. Sasso first spoke with a Jay Pearson at Medtronic requesting resumption of royalties and then hired the undersigned counsel in 2013 to investigate.

30. On July 30, 2013, after the Vertex royalties had been wrongly curtailed, the undersigned wrote Medtronic relating to the breach of the SiLo Agreement. A copy of the letter is attached as **Exhibit 9**.

31. On September 4, 2013, Medtronic admitted that it had never logged for royalty payments the actual instruments covered by the patents and “offered to settle” by making the past due payments on such instruments. A copy of its offer letter is attached as **Exhibit 10**.

32. The breach of the Bryan Disc Agreement also sheds light on how Medtronic operates in the absence of a court order compelling access to the SAP ledger.

33. Dr. Sasso helped to invent a simpler surgical technique for implantation of the Bryan Cervical Disc.

34. By the terms of the Bryan Disc Agreement, entered into in February 2006, Dr. Sasso was to receive royalties on Bryan Disc system sales through January 2016 or beyond.

35. Use of the technique required approval by the FDA before sales within the United States were permitted, but sales outside of the United States began soon after the signing of the agreement.

36. Dr. Sasso served as the lead spokesperson before the FDA and appeared in the approval hearing in Maryland which resulted in FDA approval of the new technique. The approval led to a new launch of the Bryan Cervical Disc system in the United States.

37. Notwithstanding FDA approval and the US product launch, Dr. Sasso royalties did not increase. Dr. Sasso soon learned that Medtronic had generated new part numbers for several of the most profitable implant parts without informing him and did not include sales of those parts in his royalty calculations. In late 2013, Dr. Sasso began demanding access to the Medtronic ledger pursuant to the following provision in the Bryan Disc Agreement:

Assignee shall have the right annually at his own expense and on a confidential basis to have an independent certified public accountant reasonably acceptable to WOI review such records, at WOI's offices upon reasonable notice and during reasonable business hours, for the purpose of verifying royalties payable to Assignor hereunder. Such accountant shall execute a suitable confidentiality agreement reasonably acceptable to WOI prior to conducting such audit. Such accountant may disclose to Assignor only its conclusions regarding the accuracy and completeness of royalty payments and of records related thereto, and shall not disclose WOI's confidential business information to Assignor without the prior written consent of WOI. If the review reflects an underpayment of royalties to Assignor, such underpayment shall be promptly remitted by WOI to Assignor. If the review reflects an underpayment of Royalty Payments due Assignor, such underpayment shall be promptly remitted by WOI to Assignor. Further, if any such underpayment exceeds five percent (5%) of the actual Royalty Payments due to Assignor, then (i) WOI shall also reimburse Assignor for the reasonable third party costs and expenses incurred by Assignor in connection with such review and (ii) such underpayment shall bear interest from the date such underpayment was due and payable at an interest rate equal to the lessor of (A) one percent (1%) per month, or (B) the maximum rate of interest permitted by Minnesota law.

38. After requesting a Bryan Disc audit in early 2014, Dr. Sasso was forced to file litigation to compel the audit, as here. A copy of the order, at Paragraph 4, compelling the audit while also ordering the parties into arbitration, is attached as **Exhibit 11**.

39. Dr. Sasso selected Somerset CPAs to travel to Memphis to review the records. Mr. Gerald Horn executed a confidentiality agreement before the audit.

40. At the “audit,” Mr. Horn was given a thumb drive with Bryan Disc sales data that matched reports already provided.

41. There was no sales data provided for the newly numbered parts also covered by the Bryan Disc Agreement.

42. Mr. Horn detailed his efforts in an affidavit in prior litigation which is attached as **Exhibit 12**.

43. On June 25, 2014, after Mr. Horn returned to Indiana, Medtronic provided a list of part numbers it agreed were covered by the Agreement. The letter providing that information is attached as **Exhibit 13**.

44. Sales data for those part numbers had not been provided, notwithstanding Mr. Horn’s two day trip to Memphis to collect it.

45. On June 30, 2014, the undersigned counsel informed Medtronic’s counsel that it had not provided accurate sales data to Mr. Horn on the thumb drive handed to him after he flew to Memphis. A copy of that letter is attached as **Exhibit 14**.

46. On July 14, 2014, Medtronic was again informed that its accounting of Bryan Disc royalties was grossly in error. A copy of that letter is attached as **Exhibit 15**.

47. Medtronic knew it was providing false data in the thumb drive handed to Mr. Horn at the Memphis audit, yet took no measures to correct the inaccuracies.

48. Medtronic then insisted on mediation of the Bryan Disc dispute, knowing that it had not provided accurate sales data such that Dr. Sasso could not reasonably negotiate settlement.

49. After mediation, Dr. Sasso requested arbitration of the Bryan Disc Agreement.

50. After the matter was set for a final hearing, and just weeks before the hearing, Medtronic made an electronic “catchup” payment to Dr. Sasso in February 2016 of \$274,618.25. A copy of the email describing the payment is attached as **Exhibit 16**.

51. The making of the “catchup” payment in February 2016 just before the scheduled arbitration hearing demonstrates conclusively that Medtronic knew it was falsely stating the royalties owed on Bryan Disc and that it knew the thumb drive of Bryan Disc sales data it provided to Somerset CPAs in Memphis was inaccurate.

52. Medtronic knew of its false disclosures no later than June 2014, and did nothing for nearly two years.

53. On March 30 and 31, 2016, arbitration was held in Minnesota and further damages awarded because Medtronic wrongly contested the interest rate to be paid in the Bryan Disc Agreement it drafted and that it was liable only for royalties on the actual patented SiLo parts being sold, and not the system, as plainly set forth in the SiLo Agreement.

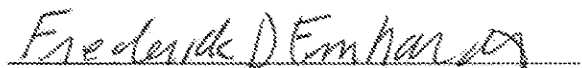
54. Through its course of dealing in these other agreements, Medtronic has demonstrated that it will not cooperate to enable Dr. Sasso to exercise the audit right in the 2001 Vertex Agreement or the 1999 Screw Delivery System Agreement. Medtronic's prior conduct demonstrates that Dr. Sasso should be entitled to exercise the audit right with CPA access to the SAP ledger, and not the passing of selected information on a thumb drive.

55. Based on discovery in the prior litigation, Dr. Sasso is informed and believes that the SAP sales ledger is available at any location in the United States via the internet with proper identification and password protection. There is no requirement of traveling to Memphis to examine the ledger. A qualified CPA firm, such as Somerset CPAs, could conduct the audit confidentially from their offices in Indianapolis, at a much lower cost to Dr. Sasso.

WHEREFORE, Dr. Sasso prays that this Court issue an injunction ordering Medtronic to provide full and complete remote access to its SAP sales ledger to the Somerset CPA firm on a "confidential basis" so that Dr. Sasso may investigate and determine royalties owed under the 2001 Vertex Agreement and 1999 Screw Delivery System, that this Court order Medtronic to account for and pay additional

amounts due if shown due by the audit, and further prays for all other just and proper relief.

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