

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

EMCYTE CORP.,
a Florida Profit Corporation,

Plaintiff,

v.

CERVOS MEDICAL LLC, a Delaware Limited
Liability Company,

Defendant.

Case No.

JURY TRIAL DEMANDED

COMPLAINT FOR PATENT INFRINGEMENT

Plaintiff EmCyte Corporation (“EmCyte”) for its Complaint against Defendant Cervos Medical LLC (“Defendant”) alleges as follows:

NATURE OF THE ACTION

1. This is an action for patent infringement arising under the patent laws of the United States, 35 U.S.C. § 100 *et seq.* including 35 U.S.C. § 271, which gives rise to the remedies specified under 35 U.S.C. §§ 281 and 283–85.

THE PARTIES

2. EmCyte is a Florida corporation and maintains its principal place of business at 4331 Veronica S. Shoemaker Blvd., Ste. 4, Fort Myers, Florida 33916. Among other things, EmCyte develops, improves, and commercializes state-of-the-art devices used in preparing autologous platelet rich plasma from blood samples.

3. Upon information and belief, Defendant is a limited liability company organized and existing under the laws of Delaware, having a principal place of business at 475 School St., Ste. 12, Marshfield, Massachusetts 02050. Defendant may be served with process through its

registered agent, The Corporation Trust Company, 1209 N. Orange Street, Wilmington, Delaware 19801.

JURISDICTION AND VENUE

4. This Court has subject-matter jurisdiction over this patent infringement action pursuant to 28 U.S.C. §§ 1331 and 1338.

5. This Court has personal jurisdiction over Defendant because it is an entity organized and existing under the laws of Delaware.

6. Venue is proper under 28 U.S.C. § 1400(b) because Defendant resides in this District.

THE PATENTS-IN-SUIT

7. EmCyte is the world leader in platelet rich plasma (“PRP”) and progenitor stem Cell Biologics.

8. For more than twenty years, EmCyte has innovated, improved upon and commercialized the most advanced blood concentrating systems available. EmCyte’s products lead the industry in terms of versatility, shorter processing times, reduced processing steps, better regenerative cell procurement and single processing devices.

9. EmCyte’s concentrating devices are the product of extensive bio-engineering research, focused on isolating and harvesting the most powerful regenerative components of patient blood and bone marrow.

10. Given the novel features of EmCyte’s concentrating devices, the United States Patent & Trademark Office (“USPTO”) has awarded EmCyte a number of patents in surgical, medical and veterinary fields.

11. On May 28, 2019, the USPTO issued U.S. Patent No. 10,300,481 (“’481 Patent”), titled “Centrifuge Tube Assembly for Separating, Concentrating, and Aspirating Constituents of a Fluid Product.”¹

12. On January 21, 2020, the USPTO issued U.S. Patent No. 10,537,888 (“’888 Patent,” and together with the ’481 Patent, the “Patents-in-Suit”), also titled “Centrifuge Tube Assembly for Separating, Concentrating, and Aspirating Constituents of a Fluid Product.”² The ’888 Patent is a continuation of the application that issued as the ’481 Patent.

13. EmCyte exclusively owns all right, title and interest in the Patents-in-Suit.

14. The Patents-in-Suit relate to a centrifuge tube that enables fluid biological products such as blood and bone marrow aspirate to be effectively separated and concentrated into constituent components. This permits aspiration and medical use of such constituent components.

THE ACCUSED DEVICE AND DEFENDANT’S INFRINGING ACTIVITIES

15. According to its website and related marketing materials, Defendant manufactures, offers for sale, and sells a suite of kits, packs and accessories that infringe the patents-in-suit. These include the Cervos PRP Single Pack (Catalog No. CER-PRP-SINGLE-BD), the PRP Double Pack-40CC with blood draw kit and ACDA (Catalog No. CER-PRP-40), the PRP triple pack (Catalog No. CER-PRP-TRIPLE), a centrifuge kit (Catalog No. CENTRIFUGE) and buckets for use in connection with the PRP packs and kits. Collectively, the PRP packs, kits, centrifuges and buckets comprise the Cervos PRP System, and are referred to herein as the “Accused Devices.”

¹ A copy of the ’481 patent is attached at Exhibit 1 to this Complaint.

² A copy of the ’888 patent is attached at Exhibit 2 to this Complaint.

16. An example of an infringing PRP collection device manufactured, sold and offered for sale by Defendant is shown below:



Figure 1

17. Defendant promotes the Accused Devices at www.cervos.com/explore-products/prp.html.

18. Moreover, upon information and belief, in addition to manufacturing, offering for sale and selling the Accused Devices, Defendant uses the Accused Devices, thus infringing one or more method claims of the Patents-in-Suit.

19. Upon information and belief, a distributor of Defendant together with Defendant provides an instructional video for using the Accused Devices.

20. The video illustrates a “[d]etailed step by step tutorial of producing Platelet-Rich Plasma (PRP) with the CERVOS Double PRP Process Chamber Set using the Syringe Aspiration Technique.” Aspire Medical Innovation, *CERVOS PRP - Process Steps with Syringe Aspiration*

Technique, YouTube (last visited December 2, 2022), <https://www.youtube.com/watch?v=VDWtby4QHwI>.³

21. Figures 2 and 3, derived from screenshots of the video referenced above, show multiple Accused Devices in use as claimed in the patents-in-suit:

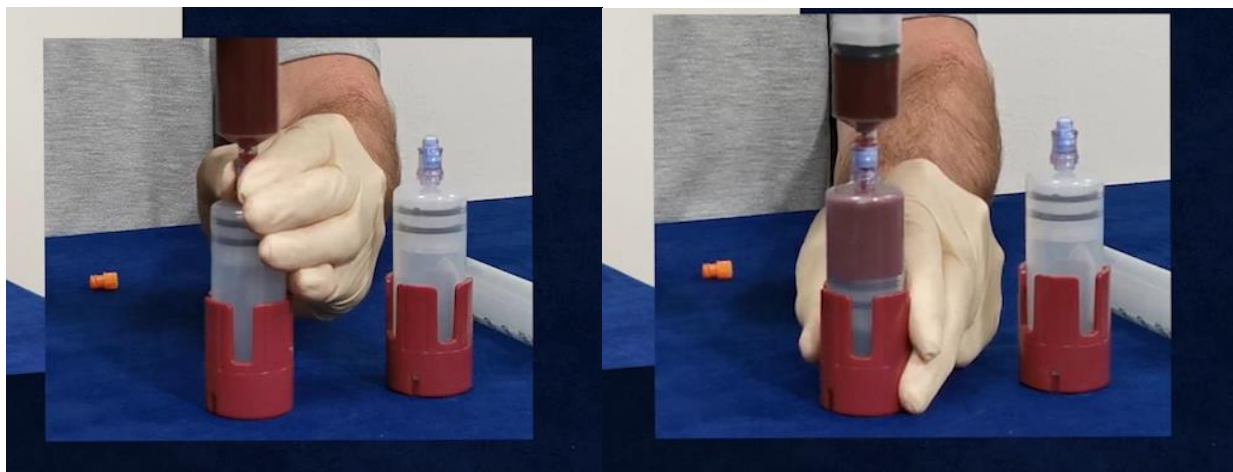


Figure 2



Figure 3

³ EmCyte attaches the video as Exhibit 3 to this complaint. A storage device containing the multi-media file has been provided to the Court.

22. Defendant has no lawful right to make, use, offer to sell, sell or import any invention(s) disclosed and claimed in the patents-in-suit.

23. Nevertheless, upon information and belief, Defendant distributed, sold, offered for sale, and used the Accused Devices, either as separate infringing products or in infringing combinations.

24. Upon information and belief, Defendant knows of EmCyte's patents-in-suit.

25. Notwithstanding these events, Defendant has continued its willful infringement by manufacturing, using, offering to sell, selling, and/or distributing PRP preparation devices incorporating EmCyte's patented technologies. These facts, as explained below, constitute willful infringement.

COUNT ONE
INFRINGEMENT OF U.S. PATENT NO. 10,300,481

26. EmCyte incorporates by reference the allegations in paragraphs 1 through 24 of this pleading as if fully set forth herein.

27. Upon information and belief, Defendant has infringed and is infringing one or more claims of the '481 Patent in violation of 35 U.S.C. § 271(a) by manufacturing, using, offering to sell, selling, and/or importing infringing products.

28. Upon information and belief, Defendant has directly infringed and is directly infringing one or more claims of the '481 Patent by one or more of the following infringing acts: making, using, offering to sell, selling, and/or importing the Accused Devices in the United States.

29. The full extent of Defendant's infringement is not presently known to EmCyte. Upon information and belief, Defendant has made and sold, or will make and sell, products under different names or part numbers that infringe the '481 Patent in a similar manner. EmCyte makes this preliminary identification of infringing products and infringed claims in Count One without

the benefit of discovery or claim construction in this action, and expressly reserves the right to augment, supplement, and revise its identifications based on additional information obtained through discovery or otherwise.

30. EmCyte has suffered and continues to suffer damages as a result of Defendant's infringement of the '481 Patent in an amount to be determined at trial.

31. Defendant's infringement of the '481 Patent is causing irreparable harm for which EmCyte has no adequate remedy at law unless Defendant is enjoined by this Court. Under 35 U.S.C. § 283, EmCyte prays for a permanent injunction against further infringement of the '481 Patent.

32. EmCyte marks its products with a notice of the '481 Patent. EmCyte, is a leader in the field of PRP preparation devices. Defendant could not have entered the PRP preparation device market without knowledge of the '481 Patent because, *inter alia*, EmCyte's own products covered by the '481 Patent comply with 35 U.S.C. § 287. Accordingly, Defendant has at least constructive knowledge of the '481 Patent. Defendant's pre-suit knowledge of the '481 Patent, coupled with Defendant's willful blindness or disregard as to Defendant's infringement, and failure to stop infringing the '481 Patent, is sufficient to support a plausible inference that Defendant's infringement was in bad faith, willful and egregious, warranting enhancement of damages under 35 U.S.C. § 284, and attorneys' fees and costs incurred under § 285.

COUNT TWO
INFRINGEMENT OF U.S. PATENT NO. 10,537,888

33. EmCyte incorporates by reference the allegations in paragraphs 1 through 24 of this pleading as if fully set forth herein.

34. Upon information and belief, Defendant has infringed and is infringing one or more claims of the '888 Patent in violation of 35 U.S.C. § 271(a) by manufacturing, using, offering to sell, selling, and/or importing infringing products.

35. Upon information and belief, Defendant has directly infringed and is directly infringing one or more claims of the '888 Patent by one or more of the following infringing acts: making, using, offering to sell, selling, and/or importing the Accused Devices in the United States.

36. The full extent of Defendant's infringement is not presently known to EmCyte. Upon information and belief, Defendant has made and sold, or will make and sell, products under different names or part numbers that infringe the '888 Patent in a similar manner. EmCyte makes this preliminary identification of infringing products and infringed claims in Count One without the benefit of discovery or claim construction in this action, and expressly reserves the right to augment, supplement, and revise its identifications based on additional information obtained through discovery or otherwise.

37. EmCyte has suffered and continues to suffer damages as a result of Defendant's infringement of the '888 Patent in an amount to be determined at trial.

38. Defendant's infringement of the '888 Patent is causing irreparable harm for which EmCyte has no adequate remedy at law unless Defendant is enjoined by this Court. Under 35 U.S.C. § 283, EmCyte prays for a permanent injunction against further infringement of the '888 Patent.

39. EmCyte marks its products with a notice of the '888 Patent. EmCyte, is a leader in the field of PRP preparation devices. Defendant could not have entered the PRP preparation device market without knowledge of the '888 Patent because, *inter alia*, EmCyte's own products that are covered by the '888 patent comply with 35 U.S.C. § 287. Accordingly, Defendant has at least

constructive knowledge of the '481 Patent. Defendant's pre-suit knowledge of the '888 Patent, coupled with their willful blindness or disregard as to Defendant's infringement, and failure to stop infringing the '888 patent, is sufficient to support a plausible inference that Defendant's infringement was in bad faith, willful and egregious, warranting enhancement of damages under 35 U.S.C. § 284, and attorneys' fees and costs incurred under § 285.

PRAYER FOR RELIEF

Wherefore, EmCyte prays for the following judgment and relief:

- a) A judgment that Defendant has infringed and is infringing the '481 Patent and the '888 Patent;
- b) A permanent injunction against Defendant and its affiliates, subsidiaries, assigns, employees, agents, or anyone acting in privity or concert with Defendant, from infringing the '481 Patent or the '888 Patent, including enjoining the making, offering to sell, selling, using, or importing into the United States products claimed in any of the claims of the '481 Patent or the '888 Patent; using or performing methods claimed in any of the '481 Patent or the '888 Patent; inducing others to use and perform methods that infringe any claim of the '481 Patent or the '888 Patent; or contributing to others using and performing methods that infringe any claim of the '481 Patent or the '888 Patent, until the expirations thereof;
- c) An award of damages adequate to compensate EmCyte for Defendant's patent infringement, and an accounting to adequately compensate EmCyte for the infringement, including, but not limited to, lost profits and/or a reasonable royalty;
- d) An award of pre-judgment and post-judgment interest at the maximum rate allowed by law;

e) An order finding that this is an exceptional case and awarding EmCyte its costs, expenses, disbursements, and reasonable attorneys' fees related to Defendant's patent infringement under 35 U.S.C. § 285 and all other applicable statutes, rules and common law; and

f) Such other further relief, in law or equity, as this Court deems just and proper.

JURY TRIAL

In accordance with Federal Rule of Civil Procedure 38, EmCyte hereby demands a jury trial on all issues triable before a jury.

Dated: December 2, 2022

Bayard, P.A.

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