

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THERMOTEK, INC.,	§	
	§	
Plaintiff-counterdefendant,	§	Civil Action 3:11-CV-0870-D
	§	(consolidated with
	§	Civil Action No. 3:10-CV-2618-D)
VS.	§	
	§	
ORTHOFLEX, INC. d/b/a	§	
INTEGRATED ORTHOPEDICS,	§	
MOTION MEDICAL TECHNOLOGIES, LLC, and	§	*This memorandum opinion and order was originally filed
WABASH MEDICAL COMPANY, LLC,	§	under seal on August 15, 2016. It was filed
	§	unsealed on September 7, 2016, after the parties agreed
Defendants-counterplaintiffs,	§	that no part needed to remain under seal.
	§	
and	§	
	§	
MIKE WILFORD,	§	
THERMO COMPRESSION	§	
SOLUTIONS, LLC, and	§	
TRI 3 ENTERPRISES, LLC,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION
AND ORDER

After extensive pretrial proceedings, plaintiff-counterdefendant ThermoTek, Inc. (“ThermoTek”), defendants-counterplaintiffs Orthoflex, Inc. d/b/a Integrated Orthopedics (“Orthoflex”),¹ Motion Medical Technologies, LLC (“Motion Medical”), Wabash Medical Company, LLC (“Wabash Medical”), and defendants Mike Wilford (“Wilford”), Thermo

¹Orthoflex is only a counterplaintiff. For ease of reference, the court refers to Orthoflex as a defendant-counterplaintiff.

Compression Solutions, LLC (“Thermo”), and Tri 3 Enterprises, LLC (“Tri 3”) tried to a jury ThermoTek’s remaining claims for fraud, unfair competition, and breach of contract, and Orthoflex, Motion Medical, and Wabash Medical’s counterclaim for breach of express warranty.² The jury returned a verdict in favor of ThermoTek, finding, in pertinent part, that Wilford committed fraud against ThermoTek, and that Wilford and Thermo unfairly competed with ThermoTek through common law misappropriation, and it awarded compensatory damages on both claims. The court entered judgment for ThermoTek in accordance with the jury verdict.

Defendants now move under Fed. R. Civ. P. 50(b) for judgment as a matter of law on ThermoTek’s fraud and unfair competition claims, and, in the alternative, for a new trial under Rule 59. ThermoTek moves under Rule 25 to substitute CMW Partners, LLC (“CMW”) and WMI Enterprises, LLC (“WMI”) for Thermo, or to join CMW and WMI as defendants for purposes of enforcing the judgment. For the reasons that follow, the court grants defendants’ motion for judgment as a matter of law, conditionally denies their motion for a new trial, and denies as moot ThermoTek’s Rule 25 motion to substitute or join CMW and WMI. The court is entering today an amended judgment dismissing the claims and counterclaims of all parties with prejudice.³

²Unless otherwise specified, the court will refer to Orthoflex, Motion Medical, and WMI collectively as the “Orthoflex companies.” Depending on the context, the court sometimes refers to Wilford and Thermo collectively as “defendants.”

³ThermoTek has pending a motion to determine the amount of attorney’s fees and expenses owed to ThermoTek as discovery sanctions. The granting of the motion for

I

Because this case is the subject of multiple prior opinions,⁴ the court will recount only the background facts and procedural history necessary to understand the present decision. ThermoTek designed and developed the VascuTherm System, which is a medical device intended to be used in conjunction with specially-designed wraps. Together, the VascuTherm System and wraps transfer pressure, heat, and cold to various body parts during medical therapy. ThermoTek sells its products to a network of distributors and nondistributors who then sell or lease the equipment to hospitals and clinics. They in turn provide the products to patients—the end-users.

Wilford is an executive of several medical supply companies, including Orthoflex, Motion Medical, and Wabash Medical, which are durable medical equipment providers that invest in and lease capital medical equipment. Tri 3 is a limited liability holding company for Motion Medical and Wabash Medical. Wilford is, in effect, the Chief Operating Officer of Wabash Medical and Motion Medical. Thermo is a medical sales company that Wilford also controls.

judgment as a matter of law does not adversely affect ThermoTek's recovery of such sanctions.

⁴*See, e.g., Orthoflex, Inc. v. ThermoTek, Inc.*, 2013 WL 4045206, at *1 (N.D. Tex. Aug. 9, 2013) (Fitzwater, C.J.) (granting in part and denying in part ThermoTek's motion for summary judgment); *Orthoflex, Inc. v. ThermoTek, Inc.*, 983 F.Supp.2d 866, 869 (N.D. Tex. 2013) (Fitzwater, C.J.) (granting in part and denying in part the motions for summary judgment of Motion Medical, Wabash Medical, Wilford, Thermo, and Tri 3); *Orthoflex, Inc. v. ThermoTek, Inc.*, 2014 WL 320155, at *2 (N.D. Tex. Jan. 29, 2014) (Fitzwater, J.) (granting motion to realign the parties).

Beginning in 2008, Wilford purchased large quantities of VascuTherm System units and wraps on behalf of his companies, including Motion Medical, Wabash Medical, and, eventually, Orthoflex. In his role as a distributor for ThermoTek, Wilford received from ThermoTek various types of information belonging to ThermoTek, such as billing codes and product manuals, and he visited the ThermoTek facilities at least twice. Wilford also reported various problems with the VascuTherm units and wraps and requested information about product design, manufacturing processes, and repairs. ThermoTek terminated its agreement with Wilford in August 2010. Wilford later developed and sold his own system (Recovery+) and wraps.

In March 2010 Orthoflex, Motion Medical, and Wabash Medical sued ThermoTek in the Northern District of Illinois. In November 2010 ThermoTek sued Wilford and WMI in Texas state court. ThermoTek's case was removed to this court and was consolidated with the Orthoflex case. The parties all moved for summary judgment or partial summary judgment, and the court granted in part and denied in part those motions. Before trial, the court realigned the parties.

Based on rulings of the court and refined pleadings, the parties tried the following claims and counterclaims to a jury: (1) Orthoflex, Motion Medical, and Wabash Medical's counterclaim against ThermoTek for breach of express warranty; (2) ThermoTek's claim against Wilford for fraud; (3) ThermoTek's claim against Motion Medical, Wabash Medical, and Tri 3 for breach of contract; and (4) ThermoTek's claim against Wilford and Thermo for unfair competition. The jury returned a verdict in favor of ThermoTek on its claim against

Wilford for fraud and its claim against Wilford and Thermo for unfair competition. The jury found that Motion Medical, Wabash Medical, and Tri 3 had breached the Distributor Agreement with ThermoTek, but it found no damages. And the jury found against Orthoflex, Motion Medical, and Wabash Medical on their counterclaim for breach of express warranty.

On ThermoTek's fraud claim against Wilford, the jury awarded lost profits damages in five subcategories: \$770,000 for lost profits from VascuTherm wrap sales, \$500,000 for lost profits from VascuTherm unit sales, \$193,000 for lost profits from additional expenses for VascuTherm unit repairs, \$90,000 for lost profits from additional engineering costs, and \$13,000 for lost profits for additional evaluation and tooling costs. On ThermoTek's unfair competition claim against Wilford and Thermo, the jury awarded \$4 million in lost profits as measured by infringing VascuTherm unit sales and \$2 million in lost profits as measured by infringing wrap sales.

Defendants now move for judgment as a matter of law under Rule 50, and, alternatively, for a new trial under Rule 59. ThermoTek moves under Rule 25 to substitute or join parties. The court has heard oral argument on both motions.

II

The court first addresses defendants' Rule 50(b) motion for judgment as a matter of law on ThermoTek's unfair competition and fraud claims. Defendants contend that ThermoTek's unfair competition claim is preempted by federal copyright and patent law, and that the evidence is legally insufficient to support the jury's award of damages on either claim.

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