

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PHARMACEUTICAL INVENTORIES, INC.,)
d/b/a PHARMACEUTICAL RETURNS)
SERVICE,)

Plaintiff,)

v.)

MICHAEL ZACCARO, and RETURNS R US,)
INCORPORATED, d/b/a PHARMA)
LOGISTICS, LTD.,)

Defendants.)

Case Nos. 05 C 6483

Judge Gottschall
Magistrate Judge Ashman

**SECOND AMENDED COMPLAINT FOR INJUNCTIVE RELIEF,
COPYRIGHT INFRINGEMENT AND OTHER RELIEF**

Plaintiff, Pharmaceutical Inventories, Inc., d/b/a Pharmaceutical Returns Service (“PRS”), by and through its attorneys, Bryan Cave LLP, for its Second Amended Complaint against Defendants, Michael Zaccaro (“Zaccaro”) and Returns R Us, Incorporated, d/b/a Pharma Logistics, Ltd. (“Pharma”), states as follows:

PARTIES

1. Plaintiff PRS is an Illinois corporation that currently operates under the assumed name, Pharmaceutical Returns Service. PRS’ principal place of business is located in Kane County, Illinois. PRS is in the pharmaceutical return and inventory business. John DeMars (“DeMars”) is the President of PRS.

2. At all times relevant to this action, Defendant Zaccaro was and is a citizen of the State of Illinois and resides in this district.

3. At all times relevant to this action, Defendant, Returns R Us Incorporated, d/b/a Pharma Logistics, Ltd., is an Illinois corporation.

JURISDICTION AND VENUE

4. Federal subject matter jurisdiction exists in this action pursuant to 28 U.S.C. §§ 1331 and 1338 because this action arises under the laws of the United States, particularly 17 U.S.C. §§ 101, et seq., 15 U.S.C. § 1125, and 180 U.S.C. § 1030. Jurisdiction exists over all other claims pursuant to 28 U.S.C. § 1367.

5. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391 and 1400. Personal jurisdiction and venue are proper because Zaccaro and Pharma reside in this district, and a substantial part of the events giving rise to this action occurred in this district.

FACTS COMMON TO ALL COUNTS

6. PRS is a service business that provides physical inventory and processing for credit of outdated pharmaceuticals and proper disposal of non-returnables for pharmacies and hospitals. The typical inventory and returns service includes performing pharmacy inventory on-site and pulling a pharmacy's outdated pharmaceuticals and over-the-counter medicines which then go to the PRS office for processing and shipping to the respective manufacturers for pharmacy credit. In or about September 1990, DeMars and his brother, Kevin DeMars ("Kevin"), began writing source code for computer programs (the "PRS Software") that would automate the inventory process for returns of prescription drugs to manufacturers and distributors for PRS.

7. In or about the middle of 1994, DeMars and Kevin completed the development of a first version of source code for the PRS software in FoxPro for UNIX. The PRS software became operational at that time.

8. DeMars installed the PRS software in the in-house processing department of PRS. Over the next year and a half, the processing department used the PRS software and gave

DeMars feedback regarding any bugs or flaws or additional automation required. DeMars made changes to the PRS software as needed.

9. In or about 1992, PRS hired Zaccaro. Zaccaro was assigned to perform inventories, office work, phone sales and processing of outdated pharmaceuticals. Zaccaro had no formal training or education in developing computer software or experience in the pharmaceutical industries. Zaccaro did not aid in the development of the PRS software.

10. In 1995, DeMars and Kevin completed a revised version of the source code for the PRS Software, which was operable in FoxPro for DOS in addition to remaining operable in FoxPro for UNIX.

11. Upon information and belief, while employed with PRS, Zaccaro became interested in entering the pharmaceutical returns and inventory business. In order to do so, he required software to perform automated processing of outdated inventory and returns for his business.

12. While Zaccaro was employed by PRS, Zaccaro obtained unauthorized access to the PRS source code for the PRS software and copied the operating version of the PRS software including the source code and databases.

13. On May 14, 1996, Zaccaro incorporated Returns-R-Us, Inc., d/b/a Pharma Logistics (“Pharma”). In his new business, Zaccaro planned to provide pharmaceutical returns service for outdated pharmaceuticals.

14. On or about July 24, 1996, Zaccaro resigned from PRS, without explanation or notice.

15. Earlier in 1996, Zaccaro hired a programmer to change the appearance of the PRS software in order to create software that was a derivative of or substantially similar to the PRS

software. Thereafter, Zaccaro, and others who operated under Zaccaro's direction, used the PRS software, including the source code, or a derivative software or a software that was substantially similar to the PRS software, in the operation of Zaccaro's and Pharma's pharmaceutical returns business.

16. From 1997 to the present, PRS has lost, and continues to lose, customers to Zaccaro and Pharma because Zaccaro and Pharma have been selling and using PRS software or derivative software or software that was and is substantially similar to the PRS software.

17. In February of 2004, Zaccaro, who was President of Pharma, hired Dwight Arant ("Arant") as a business consultant for Pharma.

18. In or about May 2005, Zaccaro told Arant that while Zaccaro was employed by his previous, unnamed, employer, Zaccaro knew someone who could access that former employer's UNIX operating system and software and make a copy of the software, thus allowing Zaccaro to open and operate his own business. Arant understood Zaccaro to mean that Zaccaro and another individual copied the former employer's software, including the source code, and that Zaccaro used that software and source code to start the Pharma pharmaceutical returns business.

19. In or about May 2005, Zaccaro revealed to Arant that PRS was the previous employer from whom he copied the software. Further, Zaccaro admitted that he had copied the source code, all databases, and the PRS software from PRS, which he and Pharma had been using, licensing and selling to several pharmacies, wholesalers, other returns services and hospitals.

20. In June 2005, Arant contacted DeMars and informed him that Zaccaro had told him that he had copied the source code and software from PRS and used it to start his company, Pharma.

21. Zaccaro has been and is currently operating Pharma using the PRS software, or software that is a derivative of or substantially similar to the PRS software, that he, without authorization, copied from PRS. Upon information and belief, Zaccaro and Pharma intend to sell to other companies the rights to the PRS software and software that is a derivative of or substantially similar to the PRS software.

22. As the creator and owner of the PRS software, including the source code, PRS has an exclusive right to use and sell the PRS software and to prepare all derivative works of the PRS software. PRS has a legitimate interest in need of protection, i.e., an interest in protecting its software, including the source code, from being stolen, duplicated, licensed, used and/or sold without authorization by any compan(ies) or person(s) other than PRS. If Zaccaro and Pharma are allowed to continue to use and/or sell the PRS software or any unauthorized duplications or derivatives thereof, PRS will be irreparably harmed. PRS has lost and continues to lose the ability to maintain exclusive use and sale of the PRS software, including the source code.

23. Since money damages are difficult to ascertain at this time, PRS does not have any adequate remedy at law.

24. PRS is, therefore, entitled to injunctive relief.

COUNT I
(COPYRIGHT INFRINGEMENT - ZACCARO)

25. PRS restates, realleges and incorporates by reference, Paragraphs 1-24 as if they were fully set forth herein.

26. PRS is the owner of a valid copyright to the PRS software that has been registered with the United States Copyright Office, a copy of which registration is appended hereto as **Exhibit A**. The PRS software is an original piece of authorship fixed in a tangible medium of expression.

27. Neither Zaccaro nor Pharma are licensed by PRS, and at all relevant times were not licensed by PRS to engage in the activities described herein.

28. On information and belief, Zaccaro and Pharma intend to continue to infringe PRS' copyright in the PRS software without Plaintiff's consent, in violation of 17 U.S.C. §§ 106 and 501.

29. Said conduct by Zaccaro and Pharma, on information and belief, was and is willfully done with knowledge of PRS' copyright.

WHEREFORE, Plaintiff, Pharmaceutical Inventories, Inc., d/b/a Pharmaceutical Returns Service, requests that the court:

- (a) Declare that Zaccaro and Pharma have infringed PRS' copyright in PRS software;
- (b) Order an accounting of all profits of Zaccaro and Pharma and award PRS its actual and/or statutory damages, including increased damages for willful violation;
- (c) Enter a permanent injunction under 17 U.S.C. § 502 enjoining Zaccaro and Pharma, and anyone acting in concert with either, including all of their respective employees, servants, agents, distributors and persons in active concert with them from:
 - i. using and/or selling the PRS software;
 - ii. using and/or selling any software that is the same as or substantially similar to the PRS copyright of its software; and

iii. using and/or selling any software that uses elements that are the same as, substantially similar to, or derivative of the PRS copyright of its software;

(d) Award PRS its costs and attorneys' fees; and

(e) Enter such other relief the court deems just and appropriate.

COUNT II
(VIOLATION OF FEDERAL COMPUTER FRAUD AND ABUSE ACT)

30. PRS repeats and realleges Paragraphs 1 through 29 above as if fully set forth herein.

31. PRS operates "protected computers" within the meaning of the Computer Fraud and Abuse Act, 18 V.S.C. § 1030, in that PRS' computers are used in interstate commerce and communication. 18 U.S.C. § 1030 (e)(2)(B). The Computer Fraud and Abuse Act provides for a civil cause of action against anyone who:

(5)(B) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or

(C) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage;

18 U.S.C. § 1030(a)(5)(B) and (C).

32. Zaccaro has intentionally accessed a PRS' computer without authorization, and as a result, has caused damage, and has recklessly caused damage, to PRS through his use of a PRS computer without authorization.

33. PRS has suffered irreparably, and continues to suffer irreparably because of Zaccaro's unauthorized access to and use of the PRS software and use of software that is a derivative of or substantially similar to the PRS software, all of which has been used, licensed and sold to others, including PRS' competitors. Damages will continue unless and until Zaccaro and all those to whom he has licensed or sold the PRS software, derivative software are

enjoined, their access to PRS' computers is completely foreclosed and any and all information which they have accessed, and any copies of the same, are recovered.

34. Though no adequate remedy at law exists in this instance because damages are difficult to approximate, PRS has been damaged economically by Zaccaro's actions in excess of \$5,000.

WHEREFORE, Plaintiff, Pharmaceutical Inventories, Inc., d/b/a Pharmaceutical Returns Service, requests that the Court:

(a) Enter an order allowing PRS through the United States Marshals to confiscate any and all computers, discs, drives, software and other related devices from Zaccaro and impound same in order to determine to what extent Zaccaro has accessed PRS' computers and taken PRS' copyrighted, confidential and proprietary information and copied the same;

(b) Enter an order requiring Zaccaro to preserve any and all evidence of his unauthorized access to PRS' computers;

(c) Enter an order requiring the return of any and all information, in whatever format saved or copied, which Zaccaro has copied, downloaded, or transmitted as a result of his unauthorized access to PRS' computers;

(d) Enter an order awarding Plaintiff compensatory damages in excess of \$100,000 for Zaccaro's wrongful actions;

(e) Enter an order awarding Plaintiff punitive damages in the amount of \$10 million for Zaccaro's malicious, willful and wanton conduct; and

(f) Enter an order awarding Plaintiffs its attorneys' fees and costs, and such other and further relief as this Honorable Court finds reasonable.

COUNT III
(VIOLATION OF ILLINOIS TRADE SECRETS ACT - ZACCARO AND PHARMA)

35. PRS restates, realleges and incorporates by reference, Paragraphs 1-29 as if they were fully set forth herein.

36. The PRS software, created and owned by PRS, is a trade secret of PRS.

37. Zaccaro misappropriated the PRS software through improper acquisition, disclosure and/or use of the PRS software for use with his then-newly formed company, Pharma.

38. PRS has been damaged by Zaccaro's misappropriation and Pharma's use of the PRS software.

WHEREFORE, Plaintiff, Pharmaceutical Inventories, Inc., d/b/a Pharmaceutical Returns Service, requests that the court:

(a) Enter judgment for damages against Zaccaro and Pharma and all of their respective employees, servants, agents, companies, licensees, distributors and persons acting in concert with them, in an amount to be proven at trial;

(b) Enter an injunction enjoining Zaccaro, Pharma and all of their respective employees, servants, agents, companies, licensees, distributors and persons acting in concert with them, from using and/or selling the PRS software;

(c) Enter an injunction enjoining Zaccaro, Pharma and all of their respective employees, servants, agents, companies, licensees, distributors and persons acting in concert with them, from using and/or selling any software that is based upon or is a duplication or derivative of the PRS software;

(d) Enter an injunction enjoining Zaccaro, Pharma and all of their respective employees, servants, agents, companies, licensees, distributors and persons acting in

concert with them, from using and/or selling any software that uses or duplicates elements of the PRS software;

(e) Award all costs and attorneys' fees to PRS; and F. Enter such other relief the court deems just and appropriate.

COUNT IV
(VIOLATION OF SECTION 43(A) OF THE LANHAM ACT (15 U.S.c. § 1125(A))-
ZACCARO)

39. PRS restates, realleges and incorporates by reference, Paragraphs 1-29 as if they were fully set forth herein.

40. Zaccaro has misappropriated the PRS software and misrepresented it or an unauthorized copy that is substantially similar to or derivative of the PRS software or elements thereof as his own and that of Pharma's, his company.

41. In doing so, Zaccaro and Pharma have used a false designation of the origin of the software they have used and/or sold.

42. Zaccaro and Pharma have used a false designation of the origin of the software they have used and/or sold in interstate commerce.

43. Zaccaro and Pharma have used and/or sold the software in connection with goods or services.

44. The designation has caused confusion, mistake or deception as to the origin, sponsorship or approval of Zaccaro's and Pharma's goods, services or commercial activities by other persons and/or entities.

45. PRS has been damaged as a result.

WHEREFORE, Plaintiff, Pharmaceutical Inventories, Inc., d/b/a Pharmaceutical Returns Service, requests that the court:

(a) Enter judgment for damages against Zaccaro and Pharma for all profits they obtained resulting from any violation of 15 U.S.C. § 1125(a), in an amount to be proven at trial;

(b) Enter judgment for damages against Zaccaro and Pharma for all other damages sustained by PRS as a result of any violation of 15 U.S.C. § 1125(a), in an amount to be proven at trial;

(c) Award all costs and attorneys' fees to PRS; and

(d) Enter such other relief the court deems just and appropriate.

COUNT V
(VIOLATION OF SECTION THE ILLINOIS DECEPTIVE TRADE PRACTICES ACT-
ZACCARO)

46. PRS restates, realleges and incorporates by reference, Paragraphs 1-21 as if they were fully set forth herein.

47. Zaccaro has misrepresented as his own, the software or elements thereof it currently uses and which he and Pharma have used.

48. Zaccaro has made false, misleading or deceptive statements regarding PRS' services to several of PRS' customers.

49. In doing so, Zaccaro has disparaged the services or business of PRS by a false or misleading representation of fact.

WHEREFORE, Plaintiff, Pharmaceutical Inventories, Inc., d/b/a Pharmaceutical Returns Service, requests that the court:

(a) Enter an injunction enjoining Zaccaro and all of his respective employees, servants, agents, companies, licensees, distributors and persons acting in concert with him, from using and/or selling the PRS software and/or any duplication of or software resembling the PRS software;

- (b) Award all costs and attorneys' fees to PRS; and
- (c) Enter such other relief the court deems just and appropriate.

JURY DEMAND

Plaintiff requests a jury demand on all issues so triable.

Dated: August 9, 2007

Respectfully submitted,

George Jackson III
One of the Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that a true and correct copy of the foregoing SECOND AMENDED COMPLAINT FOR INJUNCTIVE RELIEF, COPYRIGHT INFRINGEMENT AND OTHER RELIEF was served on the parties listed below via the Court's electronic filing system this 9th day of August, 2007:

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/s/ Jena Valdetero
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