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Counsel for Plaintiff: *ProMed Technologies, LLC*

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
**IN AND FOR THE COUNTY OF MARICOPA**

PROMED TECHNOLOGIES, LLC,	)	Case No.: CV2008-016576
	)	
Plaintiff,	)	<b><i>ProMed Technologies, LLC</i></b>
	)	
vs.	)	FIRST AMENDED COMPLAINT
	)	
ORTHOMEDS, INC., DESERT MOUNTAIN	)	(I) Breach of Contract/Breach of the
MEDICAL, INC., SCOTT	)	Covenant of Good Faith
RUESCHENBERG, BARRY MARFLEET,	)	
BILL BUE,	)	(II) Injunctive Relief
	)	
Defendants.	)	(III) Successor Corporate Liability
	)	(IV) Uniform Fraudulent Transfer Act
	)	(V) Civil Conspiracy/Fraud
	)	(VI) Aiding-and-Abetting Fraud
	)	(VII) Breach of Fiduciary Duty
	)	(VIII) Constructive Trust
	)	(IX) Intentional Concealment
	)	(X) Intentional Misrepresentation
	)	
	)	(Assigned to the Hon. Joseph B. Heilman)
	)	<b>JURY TRIAL DEMANDED</b>

1  
2 Introduction  
3

4 Plaintiff *ProMed Technologies, LLC*, (“*ProMed*”) for its *First Amended*  
5 *Complaint*, (hereinafter “FAC”), states:  
6

7 Parties, Jurisdiction, Venue, Operative Facts

8 1. Jurisdiction before this Court is authorized pursuant to a Settlement  
9 Contract, Promissory Note, Pledge and Security Agreement, and UCC-1 (Exhibit  
10 package “A” appended to the original complaint, incorporated herein and made a  
11 part of this FAC).<sup>1</sup>

12 2. The transactions, events, contracts, agreements, and conduct giving  
13 rise to this Complaint occurred within, or were sufficiently directed toward,  
14 Phoenix, Arizona, Maricopa County. Defendants’ collectively endorsed, approved,  
15 ratified, and knowingly, voluntarily, and intelligently waived their right to contest  
16 the damages complained of, in a trial/hearing on the merits, including advice of  
17 counsel (Quarles & Brady, LLP) to secure (or waive as the case here) any and all  
18 affirmative defenses to the debt characterized in the attached Settlement Contracts,  
19 Promissory Note, and Security Agreement (referred to collectively as “the  
20 Agreements”).<sup>2</sup>  
21

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22 <sup>1</sup> Plaintiff incorporates by reference the depositions of defendant **Scott A. Rueschenberg**  
23 (10.30.08); **Desert Mountain Medical’s 30(b)(6)** (10.30.08); defendant deposition of **Barry**  
24 **Marfleet, M.D.** (11.7.08); **Orthomeds, Inc., 30(b)(6)** taken (11.4.08); and, Defendant **Bue** taken  
6/5/09.

25 <sup>2</sup> Defendants’ admit: (a) Amounts claimed and calculated as plaintiff’s contract damage in  
26 this FAC are true, accurate, and are immediately due and owing. *See*, (**Rueschenberg Tr:** 92,  
lines 4-25; 98, lines 4-25; 99, lines 1-3; that (b) the *Settlement Contract* [incorporated into the

1           3.           Plaintiff is a lawfully formed, operated, and registered Arizona  
2 limited liability company in good standing with the Arizona Corporation  
3 Commission and is authorized to do, and doing business, in Arizona.

4           4.           Defendant Orthomed, Inc., is a registered Nevada corporation, in  
5 good standing, and is authorized to do business, and is continuing to do business in  
6 Arizona as a foreign corporation. As discussed *infra*. Orthomed, Inc., (hereinafter  
7 “Orthomed”) materially, and with the intent to defraud, attempted to eradicate the  
8 debt incurred under the Agreements by falsely representing its imminent  
9 “dissolution and demise”, “winding down”, and notice of intent to bankrupt itself.  
10 (Exhibit “C” previously attached).

11           5.           To forestall collection efforts Orthomed offered an “investment  
12 interest” in yet another enterprise which would have been a regulated registration  
13 exempt security, had it ever existed.

14           6.           [reserved]

16 FAC] was “fine”, pages 102-109, lines 11-19; that (c) the *Promissory Note* incorporated into this  
17 FAC, drafted by defendants’ counsel of record, *in these proceedings, Quarles & Brady, LLP*  
18 (along with *Quarles & Brady, LLP* drafting and approving the **Settlement Agreement, the**  
19 **Security Agreement, and the Promissory Note**, was executed by the parties May 8, 2007,  
20 incorporated into this FAC by this reference) ratified and approved as to form and content by all  
21 defendant Board Members; *See*, Rueschenberg Tr: 114, lines 8-25; and, (d) defendants’ admit  
22 that the **Security Agreement** signed by the parties, ratified by the Board Member defendants  
23 here, provided a FIRST PRIORITY SENIOR SECURED POSITION for *ProMed* (Tr: 170-181).

24           (e) That the agreements were enforceable according to their terms pursuant to the  
25 “*Payment Schedule*” incorporated herein (Tr: 176-177), against (f) the defendant Board of  
26 Directors, directly and personally, and that according to the contract terms defendant “officers”,  
directly and personally, were contract debtors, and that defendant “shareholders”, directly and  
personally were contract debtors, and, (g) that the defendants, and each of them, provided a  
complete “Release” to *ProMed*, including indemnification from defendants in their capacities as  
“shareholders”, “officers”, “directors”, and “employees”, of defendant Orthomed, Inc., at 18%  
interest. (Rueschenberg Tr: pages 178-184).

1           7.           Those misrepresentations were knowingly and voluntarily  
2 disclosed with a present intent not to perform as the post-solicitation facts reveal.<sup>3</sup>

3           8.           Defendant Desert Mountain Medical, Inc., (“Desert Mountain”)  
4 has so comingled its assets, accounting, employees, cash, and cash equivalents for  
5 and on behalf of Orthomed, Inc., as to render it indistinguishable as a separate  
6 corporate entity.<sup>4</sup> The defendants are supervised, controlled, maintained, and

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7  
8 <sup>3</sup> Defendants sworn testimony reflects: (a) As of October 30, 2008; Defendants and  
9 Quarles & Brady, LLP “lost” over \$200,000.00 in “payroll” during the payment terms of the  
10 settlement contracts; (Rueschenberg Tr: 31, lines 17-25, page 32); that; (b) Defendants and  
11 Quarles & Brady, LLP “misplaced”, as of October 30, 2008 listed “assets” of over \$215,000.00  
12 (Rueschenberg Tr: pages 33-34; page 46, lines 16-25, page 47, line 1); and that; (c) there were  
13 never any Arizona, Nevada, or other state corporation commission filings indicating an intent to  
14 “wind down”, “dissolve”, or “liquidate” Orthomed, Inc., (Rueschenberg Tr: 44, lines 15-21;  
15 pages 5-6; pages 11-12; page 29, lines 23-25, page 30; page 41-44; page 18; page 124, lines 3-  
16 21).

17           (d) Defendants and Quarles & Brady, LLP passed Orthomed, Inc., off as a regulated  
18 financially robust security to obtain the Settlement Contracts, Security Agreements, Promissory  
19 Notes, and the UCC-1 filings at issue, by attempting to induce a securities stock “debt swap” for  
20 a non-existent registration exempt regulated security. (*See*, Rueschenberg Tr: Defendants claim  
21 **no fiduciary duty to creditors**, as they claim **insolvency**, and claim no  
22 **Director/Officer/Employee** had any idea as to their own financial liquidity/integrity, because  
23 the financials of the defendants, under this Board, were never reviewed; (Rueschenberg Tr: page  
24 29-30; page 44, lines 15-21; page 41, lines 1-25, pages 42-44).

25           Quarles & Brady, LLP maintained oversight of the financials of **Orthomed, Inc./Quarles & Brady, LLP Private Placement Memorandum, and the Contracts at issue**  
26 **here;** (Rueschenberg Tr: page 32); Defendants, nor Quarles & Brady, LLP ever disclosed the  
liquidity/insolvency status of Orthomed, Inc., as they induced the *ProMed* financial settlement  
contracts; (Rueschenberg Tr: pages 66-69; pages 83-89; page 124, lines 3-21).

          At the same time Defendants with Q&B assistance **brought in equity of \$1,300,000.00-**  
**\$1,500,000.00 in cash;** (Rueschenberg Tr: page 168, lines 9-20). Defendants claim retroactive  
*insolvency in these proceedings* within weeks of the Agreements executed here. *See*,  
Rueschenberg Tr: “no money” as of September 2007 (3 months post-settlement 5.8.07) page 17,  
lines 13-21, page 124, lines 3-21).

<sup>4</sup> Successor Corporation Liability: Defendants admit: (a) Defendant Desert Mountain  
Medical (hereinafter “DMM”) and Defendant Orthomed, Inc., operated and listed the same

1 operated by the same individual defendants herein; and do not, and have not,  
2 maintained separate books, records of account, tax returns (state/federal); and in  
3 fact, Orthomed continues to “front” for and act as a distribution channel for  
4 Desert Medical merchandising as to render the companies indistinguishable from  
5 one another.<sup>5</sup>

6 9. Defendants Bue, Marfleet, and Rueschenberg are officers,  
7 directors, agents, employees, and shareholders as defined with Agreements.  
8 Defendants are fiduciaries with respect to funds owed **ProMed** Technologies, LLC  
9 (“**ProMed**”). These fiduciary and contractual duties as officers, directors, and  
10 agents for and on behalf of the defendant entities are non-delegable and are not  
11 assignable under the loan agreements.

12 10. All defendant executive officers, directors, board members, and all  
13 defendants with apparent, or *de facto*, legal authority and responsibility may not  
14 disassociate themselves from ensuring adequate capitalization, proper reserves, and  
15 accounting for the benefit of the senior secured first priority **ProMed** debt under  
16 the Agreements.

17 11. Defendant corporations act through their corporate by-laws,  
18 articles, and associated formation agreements which, in all circumstances, prohibit  
19 depletion of company resources (cash, assets, marketable securities, cash  
20 equivalents, intangibles) to or for the financial gain of a sister or *de facto* successor  
21

22 business address [1220 S. Park Lane, Tempe, AZ], used the same phone and fax numbers at  
23 DMM; used the same employees; selling the same DMM “durable medical equipment”; with the  
24 same DMM sales force and DMM sales contacts; using the same DMM internet connections and  
25 email domains; using the same accountants, at the DMM location. (*See*, Rueschenberg Tr: Pages  
26 147-149; 172-175; p.79, lines 10-23; p.118, lines 2-8; p.120, lines 19-24; pgs.116-117; pages 12-  
14).

<sup>5</sup> The deposition of Defendant Bue, admitting these facts, is incorporated herein by this  
reference, and appended.

1 company, or for the financial exploitation and personal gain by the Board  
2 Members, Officers, Directors, Shareholders, or employees as defined by contract,  
3 to the financial detriment of secured creditor *ProMed*. Cash transfers, wire  
4 transfers, or conveyances of any kind or nature to the detriment of the secured  
5 creditors are prohibited, are a breach of corporate responsibility and fiduciary duty  
6 to creditors, and constitute fraudulent conveyances under Arizona's adoption of the  
7 Uniform Fraudulent Transfer Act.

8 12. Venue is proper in Maricopa County, Arizona, pursuant to A.R.S.  
9 § 12-401.

#### 10 OPERATIVE FACTS

11  
12 13. On May 8<sup>th</sup>, 2007 the parties entered into contracts, which consisted  
13 of a "Settlement Agreement", "Pledge and Security Agreement", "Promissory  
14 Note", which authorized filing of a UCC-1 Financing Statement with the Nevada  
15 Secretary of State's office two days later, on May 10<sup>th</sup>, 2007 on "...all of the  
16 debtor's assets...all contracts of the debtor..." providing for ProMed as  
17 substituted obligee in extinguishment of all ProMed damages.

18 14. The "Settlement Agreement" is a fully integrated document (¶1);  
19 provided a payment schedule (¶2 (a)(i)(ii)(iii); incorporated the "Promissory Note"  
20 (¶2(b); incorporated by integration the "Pledge and Security Agreement" (¶2(c);  
21 and provided for provision to *ProMed* of Financial Information (on a quarterly  
22 basis consisting of balance sheets, and income statements) on Orthomed's financial  
23 condition. To the date of this Amended Complaint (7 financial quarters),  
24 Orthomed's has provided nothing.

25 15. ¶3 (a)(b) the "Release" expressly reserves to *ProMed* all rights and  
26 causes of action related to performance, or non-performance, under the collective

1 Agreements, including damages for patent and/or copyright infringement post-  
2 dating the “Effective Date” of the Agreements of May 8<sup>th</sup>, 2007.

3 16. The Agreement is enforceable according to its terms against those “in  
4 privity” with Orthomed including, “...subsidiaries, affiliates, directors, assigns,  
5 agents, officers, shareholders, employees, and successors...” (§5).

6 17. Indemnification and subrogation are required for the non-breaching  
7 party, by the breaching party and its “...affiliates, agents, employees, directors,  
8 shareholders, managers, members, officers, subsidiaries, successors or assigns.”  
9 (§6 (iv)(c)). The forum selection clause is Arizona. (§6 (iv)(h)).

10 18. The Promissory Note provides for a payment schedule identical to that  
11 contained within the Settlement Agreement, and provides for interest at 18% per  
12 annum, simple interest. (§§1 (a)(b)(c), 2). Default is defined, as well as recovery of  
13 all reasonable attorney fees, costs, and expenses associated with recovery,  
14 reincorporation of the Security Agreement, and again, provides for Arizona in its  
15 forum selection clause. (§§3, 5, 6, 7, 8).

16 19. Defendants agreed to provide ProMed a “...first priority security  
17 interest in the Collateral...” (**Pledge and Security Agreement**, RECITALS A.,  
18 B.). The Security Agreement is plenary with respect to the secured party’s rights,  
19 remedies, and default mechanics under the Arizona Uniform Commercial Code,  
20 including levying upon the “collateral”, exercising remedies concurrently,  
21 alternately, or in serial order, at the secured party’s instance, without limitation.  
22 (§1, 2, 4.2 (a)(b)(c)(d), 4.5, 4.6, 5.7. Under §§2.2, 2.3, 2.4, 2.5, 3, 4 the debtor is  
23 unable to transfer, convey, encumber, or devalue the collateral subject to the  
24 secured party’s full payment for all damages, expenses, fees, and cost of recovery.

25 20. Defendants, and each of them, have breached the payment schedules  
26 contained within the Settlement Agreement, the Promissory Note, and the Pledge



1 senior secured priority creditor, is left to expend extraordinary resources to recover  
2 that to which they were contractually entitled over two years ago.

3 25. The defendants operate as an interlocking directorate, act in concerted  
4 fashion to conceal the financial facts and financial condition of defendants, and  
5 have transferred, distributed, or otherwise caused assets of the debtor to be  
6 unlawfully conveyed to themselves, affiliates, successor companies, affiliated  
7 officers, directors, sister companies, relatives, agents, and/or subsidiaries in breach  
8 of the above enumerated Agreements, and in breach of the Uniform Fraudulent  
9 Transfer Act, and other enumerated state statutory claims detailed in the FAC.

10 26. Reasonable people would agree, minimally, that the defendants  
11 operate factually, and objectively, as a single unified operation, employing the  
12 same personnel, the same directors, the same officers, the same accounting staff,  
13 do not report discrete earnings to the I.R.S., do not have consolidated financials,  
14 (or independent financials as required and avowed to contractually as a matter of  
15 factual warranty by defendants); and as a reasonable probability, the funds of the  
16 entities are intentionally comingled in breach of Arizona law and reporting  
17 requirements to the Arizona Corporation Commission, and the Nevada Corporation  
18 Commission.

19 27. The failure to report to either Commission, the Internal Revenue  
20 Service (despite Court Order by this Division Defendants refuse production of their  
21 signed tax returns) or to the defendant company auditors raise serious issues of tax  
22 fraud and a fraud upon *ProMed*.



1 harassing conduct; and (6) the plaintiff shall be the prevailing party as a matter of  
2 law, on what is functionally a liquidated damage default by Defendants.

3 31. Specific Performance is requested on the contracts.  
4

5 COUNT THREE

6 Successor Corporate Liability/Usurpation of the Corporate Opportunity

7 32. Plaintiff reincorporates all prior paragraphs. Defendants have failed to  
8 maintain separate corporate identities and have so eviscerated normal boundaries  
9 associated with even minimal corporate formalities that the corporate form has  
10 been mocked by Defendants. The defendants have acted in concerted fashion to  
11 repudiate corporate formalities, identity, and distinction, instead using the  
12 corporations as their personal financial resources while enjoying (temporarily) a  
13 liability shield for which the laws of corporate governance were not designed or  
14 intended.

15 33. Defendants are personally liable to *ProMed* for their continued and  
16 uninterrupted abuse of their fiduciary duties to creditor *ProMed*, for propagating  
17 complete fabrications as to the status of the defendant entities, and defendants are  
18 liable personally for their concerted activities in violating standards of care as  
19 fiduciaries, and in breach of the “business judgment rule”, which has never served  
20 as a shield for express and intentional misrepresentation.  
21

22 COUNT FOUR

23 Breach of the Uniform Fraudulent Transfer Act (UFTA); A.R.S. § 44-1001

24 et seq.,

25 34. Defendants (affiliates, sister companies, etc.,) expressly incurred  
26 liability for the primary obligor, Orthomed, Inc., by contract. Liability under the

1 UFTA exists where indemnification is express; the debtor entity, and Defendant  
2 Board Members, Officers, Directors, Shareholders, and Employees have  
3 effectively “merged” or been absorbed by a “successor” company; and/or where,  
4 as here, the debtor entity which seeks to escape its debt exists as a mere  
5 reincarnation of its former self does not provide for the debt avoidance.

6 35. Creditor remedies under A.R.S. § 44-1007(A) provide for Provisional  
7 Remedies (i.e., garnishment/attachment), injunctive relief (as requested above),  
8 pre-judgment avoidance actions, and/or appointment of a receiver. Pursuant to  
9 A.R.S. § 44-1008(B) the creditor may sell defendants’ assets in amounts necessary  
10 to recover the creditor claims, in full. Transfers of “intangible assets”, such as, for  
11 example, “goodwill” is subject to the UFTA.

12 36. Defendants actions were taken to “hinder, delay, or defraud” *ProMed*  
13 as defined under Arizona law. ProMed is pursuing both intentional fraudulent  
14 transfers under A.R.S. § 44-1004(A)(1), and constructively fraudulent (non-intent)  
15 transfers under A.R.S. § 44-1004(A)(2), A.R.S. § 44-1005, A.R.S. § 44-1008(A).

16  
17 COUNT FIVE

18 Civil Conspiracy

19 37. Defendants represent the concerted conduct of two or more persons,  
20 reaching a specific accord, to intentionally misrepresent through deceit,  
21 manipulation, concealment, and obfuscation, elimination of a secured debt. The  
22 conspiracy as between the defendant board members, the defendant executive  
23 officers, the defendant affiliates, and defendants’, intentionally and actively  
24 conceal asset conveyances, transfers, and the draining of Orthomed’s financial  
25 wherewithal to pay its debts in the normal course. These acts constitute an  
26 actionable “civil conspiracy”.





1           b. All allowable contract, statutory, and discretionary attorney fees,  
2 costs, and expenses reasonably incurred in pursuit of this cause of action under  
3 applicable uniform, commercial, and state law, as well as an award of reasonable  
4 attorney fees, costs, and expense associated with the underlying litigation;

5           c. All applicable statutorily awarded damage and attorneys' fees under  
6 the Arizona Revised Statutes including, but not limited to, A.R.S. §§ 12-341.01, et  
7 seq. and 12-349;

8           d. An Order to Show Cause notice, setting, and hearing relative to  
9 plaintiff's count for injunctive relief and Order of Appearance to Give Testimony  
10 to; All named defendants in their capacities as Board Members, Officers,  
11 Members, Shareholders, Interest holders, transferees (not for value or in good  
12 faith), affiliate management, successor corporation management, as Investors, and  
13 in their respective contractual posture responsible for payment of ProMed secured  
14 first priority debt on all of the debtor defendants' assets.

15           e. Injunctive relief pursuant to A.R.S. §§12-1801 *et seq.* and  
16 Ariz.R.Civ.P. 65, together with an award of reasonable attorney fees, costs, and  
17 expense in association with the injunctive and/or Provisional Remedy relief  
18 requested;

19           f. Specific enforcement of the Agreements.

20           g. Contractual debt in the amount of \$125,000.00 together with accruing  
21 interest at 18% per annum.

22           h. Punitive or Exemplary Damages to be proven at trial.

23           i. Contract damages, extra-contractual damages, damages for breach of  
24 the covenant of good faith and fair dealing, along with damage associated with the  
25 expense, cost, and professional fees (attorney, expert and otherwise) incurred in the  
26 prosecution of this matter to be proven with sufficient particularity at trial.

1 Dated this 21<sup>st</sup> day of August 2009.

2 GRANT H. GOODMAN, PLLC

3 /s/ Grant H. Goodman (SBN 009463)

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5 Grant H. Goodman

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1 Copy of the foregoing *E-filed* this  
2 21<sup>st</sup> day of August 2009, to:

3 The Hon. Joseph B. Heilman  
4 Maricopa County Superior Court1  
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8/21/2009 /s/GHG