

ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse)		ADVERSARY PROCEEDING NUMBER (Court Use Only)
PLAINTIFFS PRIMCOGENT SOLUTIONS LLC	DEFENDANTS SANTA BARBARA MEDICAL INNOVATIONS, LLC	
ATTORNEYS (Firm Name, Address, and Telephone No.) Andrews Kurth LLP 1717 Main Street, Suite 3700 Dallas, Texas 75201, Attn: Paul Silverstein	ATTORNEYS (If Known)	
PARTY (Check One Box Only) <input checked="" type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input type="checkbox"/> Other <input type="checkbox"/> Trustee	PARTY (Check One Box Only) <input type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input checked="" type="checkbox"/> Other <input type="checkbox"/> Trustee	
CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED) Fraud and breach of contract dispute.		
NATURE OF SUIT (Number up to five (5) boxes starting with lead cause of action as 1, first alternative cause as 2, second alternative cause as 3, etc.)		
<p>FRBP 7001(1) – Recovery of Money/Property</p> <input type="checkbox"/> 11-Recovery of money/property - §542 turnover of property <input type="checkbox"/> 12-Recovery of money/property - §547 preference <input type="checkbox"/> 13-Recovery of money/property - §548 fraudulent transfer <input type="checkbox"/> 14-Recovery of money/property - other <p>FRBP 7001(2) – Validity, Priority or Extent of Lien</p> <input type="checkbox"/> 21-Validity, priority or extent of lien or other interest in property <p>FRBP 7001(3) – Approval of Sale of Property</p> <input type="checkbox"/> 31-Approval of sale of property of estate and of a co-owner - §363(h) <p>FRBP 7001(4) – Objection/Revocation of Discharge</p> <input type="checkbox"/> 41-Objection / revocation of discharge - §727(c),(d),(e) <p>FRBP 7001(5) – Revocation of Confirmation</p> <input type="checkbox"/> 51-Revocation of confirmation <p>FRBP 7001(6) – Dischargeability</p> <input type="checkbox"/> 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims <input type="checkbox"/> 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud <input type="checkbox"/> 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny (continued next column)	<p>FRBP 7001(6) – Dischargeability (continued)</p> <input type="checkbox"/> 61-Dischargeability - §523(a)(5), domestic support <input type="checkbox"/> 68-Dischargeability - §523(a)(6), willful and malicious injury <input type="checkbox"/> 63-Dischargeability - §523(a)(8), student loan <input type="checkbox"/> 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support) <input type="checkbox"/> 65-Dischargeability - other <p>FRBP 7001(7) – Injunctive Relief</p> <input type="checkbox"/> 71-Injunctive relief – imposition of stay <input type="checkbox"/> 72-Injunctive relief – other <p>FRBP 7001(8) Subordination of Claim or Interest</p> <input type="checkbox"/> 81-Subordination of claim or interest <p>FRBP 7001(9) Declaratory Judgment</p> <input type="checkbox"/> 91-Declaratory judgment <p>FRBP 7001(10) Determination of Removed Action</p> <input type="checkbox"/> 01-Determination of removed claim or cause <p>Other</p> <input type="checkbox"/> SS-SIPA Case – 15 U.S.C. §§78aaa <i>et seq.</i> <input checked="" type="checkbox"/> 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)	
<input checked="" type="checkbox"/> Check if this case involves a substantive issue of state law	<input type="checkbox"/> Check if this is asserted to be a class action under FRCP 23	
<input type="checkbox"/> Check if a jury trial is demanded in complaint	Demand \$unliquidated	
Other Relief Sought		

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES		
NAME OF DEBTOR PRIMCOGENT SOLUTIONS LLC		BANKRUPTCY CASE NO. 13-42368
DISTRICT IN WHICH CASE IS PENDING Northern District of Texas		DIVISION OFFICE Fort Worth
		NAME OF JUDGE D. Michael Lynn
RELATED ADVERSARY PROCEEDING (IF ANY)		
PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.
DISTRICT IN WHICH ADVERSARY IS PENDING		DIVISION OFFICE
		NAME OF JUDGE
SIGNATURE OF ATTORNEY (OR PLAINTIFF) /s/Paul N. Silverstein		
DATE May 24, 2013		PRINT NAME OF ATTORNEY (OR PLAINTIFF) Paul N. Silverstein

INSTRUCTIONS

The filing of a bankruptcy case creates an "estate" under the jurisdiction of the bankruptcy court which consists of all of the property of the debtor, wherever that property is located. Because the bankruptcy estate is so extensive and the jurisdiction of the court so broad, there may be lawsuits over the property or property rights of the estate. There also may be lawsuits concerning the debtor's discharge. If such a lawsuit is filed in a bankruptcy court, it is called an adversary proceeding.

A party filing an adversary proceeding must also must complete and file Form 104, the Adversary Proceeding Cover Sheet, unless the party files the adversary proceeding electronically through the court's Case Management/Electronic Case Filing system (CM/ECF). (CM/ECF captures the information on Form 104 as part of the filing process.) When completed, the cover sheet summarizes basic information on the adversary proceeding. The clerk of court needs the information to process the adversary proceeding and prepare required statistical reports on court activity.

The cover sheet and the information contained on it do not replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. The cover sheet, which is largely self-explanatory, must be completed by the plaintiff's attorney (or by the plaintiff if the plaintiff is not represented by an attorney). A separate cover sheet must be submitted to the clerk for each complaint filed.

Plaintiffs and Defendants. Give the names of the plaintiffs and defendants exactly as they appear on the complaint.

Attorneys. Give the names and addresses of the attorneys, if known.

Party. Check the most appropriate box in the first column for the plaintiffs and the second column for the defendants.

Demand. Enter the dollar amount being demanded in the complaint.

Signature. This cover sheet must be signed by the attorney of record in the box on the second page of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is pro se, that is, not represented by an attorney, the plaintiff must sign.

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Proposed Counsel to the Debtor

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

In re:	§	Chapter 11
	§	
PRIMCOGENT SOLUTIONS LLC,	§	Case No. 13-42368-DML-11
	§	
Debtor.	§	
_____	§	
	§	
PRIMCOGENT SOLUTIONS LLC,	§	Adversary No. 13-_____
	§	
Plaintiff.	§	
	§	
v.	§	
	§	
SANTA BARBARA MEDICAL INNOVATIONS, LLC,	§	
	§	
Defendant.	§	

**DEBTOR’S COMPLAINT AGAINST
DEFENDANT SANTA BARBARA MEDICAL INNOVATIONS, LLC**

Plaintiff Primcogent Solutions LLC, f/k/a Hercules Laser Group, LLC, the above-captioned debtor and debtor in possession (“Debtor” or “Primcogent”), for its Complaint against

Defendant Santa Barbara Medical Innovations, LLC (“Defendant” or “SBMI”), alleges as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 157 and 1334.

2. Venue is proper in the Northern District of Texas, Fort Worth Division, pursuant to 29 U.S.C. §§ 1408 and 1409. This adversary proceeding presents a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). This action is brought pursuant to 28 U.S.C. § 1334(b) and (e), and Rule 7001 of the Federal Rules of Bankruptcy Procedure, and applicable law of the State of Texas.

PARTIES

3. The Debtor is a limited liability company organized under the laws of Delaware, with its principal place of business in Texas.

4. On information and belief, SBMI is a company organized under the laws of Delaware, with its principal place of business in Texas.

INTRODUCTION

5. On May 20, 2013 (the “Petition Date”), the Debtor filed with this Court a petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”).

6. The Debtor is operating its business and managing its properties as debtor in possession, pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

7. An official creditors’ committee has not yet been appointed in this case. Neither a trustee nor an examiner has been appointed.

FACTUAL BACKGROUND

B. THE DEBTOR'S BUSINESS

8. The Debtor, which is headquartered in this District and currently has approximately fifteen (15) employees, is a supplier and distributor of medical equipment and services in North America.¹ The Debtor operates as the exclusive North American (and, through its European subsidiaries, Western European) distributor of equipment manufactured by Erchonia Corporation ("Erchonia") pursuant to exclusive license and supply agreements between the Debtor and Erchonia (collectively, the "Erchonia Agreements"). The Debtor's business principally is leasing, renting and/or selling such medical products to doctors and medical and health care institutions in exchange for purchase payments (for sold equipment) or recurring revenue payments (for leased or rented equipment). The Debtor acquired its North American business pursuant to an asset purchase agreement ("APA")² entered into with SBMI, Erchonia's prior exclusive North American distributor.

9. Under the APA and the Erchonia Agreements, among other things, the Debtor bought and presently has the exclusive right to sell, rent, lease and market products utilizing a non-invasive body-contouring laser technology trademarked under the name Zerona®, including the Zerona Body Laser (each, a "Zerona BODY Laser" and, collectively, "Zerona Body Lasers"). This non-invasive, body-contouring laser technology is collectively referred to as "Zerona." The Zerona Body Laser is the first (and so far only) FDA-cleared, non-invasive body contouring procedure that effectively removes excess fat from the arm, abdomen, hip and thigh target areas

¹ The Debtor also operates in Western Europe through certain wholly-owned non-Debtor European subsidiaries.

² A true and correct copy of the APA is appended as Exhibit B to the Declaration of David Boris in Support of Debtor's Verified Complaint for Declaratory, Injunctive and Other Relief, filed in Adversary Proceeding No. 13-04053-DML, Document No. 5.

without the negative side effects associated with surgical methods. The Zerona Body Lasers do so by utilizing “cold laser” technology to emulsify body fat and allow such fat to move to interstitial space.

10. As discussed below, SBMI has committed fraud, including fraudulently inducing the Debtor to enter into the APA, and breached, among other things, the representations and warranties in the APA. SBMI’s breaches and fraudulent conduct have caused the Debtor millions of dollars in damages and ultimately resulted in the Debtor seeking the protective relief of this Court’s jurisdiction under chapter 11 of the Bankruptcy Code.

C. THE NEGOTIATIONS

11. The Debtor had no operations prior to November 2011, when it was formed specifically for the purpose of acquiring the business and assets of SBMI and becoming the sole distributor of Zerona and other products pursuant to the Erchonia Agreements. SBMI itself was formed in 2009 by Erchonia and various debt and equity investors to serve as the “exclusive” distribution company in North America for Erchonia’s Zerona products, for which Erchonia had recently received FDA clearance. Erchonia, in turn, was the exclusive manufacturer and licensor of the Zerona products that were the core of SBMI’s business and SBMI’s primary assets.

12. In late 2011 and before the APA was executed, upon information and belief, SBMI was unable to satisfy its purchase commitments under its then-existing agreement(s) with Erchonia. On information and belief, SBMI’s alleged inability to satisfy such requirements triggered certain rights that Erchonia contended it held under its contract with SBMI. Erchonia increased its ownership interest in SBMI from twenty-five percent (25%) to approximately eighty-three percent (83%). Upon execution of the APA, Erchonia became the one-hundred percent (100%) owner of SBMI.

13. Upon information and belief, SBMI's inability to satisfy its contractual obligations to Erchonia in large part was due to end-user customers terminating their rental agreements with respect to Zerona and other products and "returning" such products to SBMI, thereby reducing SBMI's financial ability to satisfy its purchase commitments to Erchonia.

14. To resolve SBMI's alleged breach of its agreement with Erchonia, SBMI and Erchonia entered into negotiations with various parties about a possible sale of SBMI's business and assets to a third-party. In February 2011, SBMI (with representatives of Erchonia) approached David Boris ("Boris"), Chairman of the Debtor, about a possible deal. Boris was the principal of a predecessor entity to the Debtor which had an agreement with Erchonia to be the exclusive distributor of Zerona in Western Europe. Erchonia and SBMI initiated discussions with Boris about consolidating SBMI's North American Zerona distribution business with the Western European Zerona distribution business.

15. From the outset of these negotiations, SBMI misled the Debtor to believe that SBMI's business was extremely valuable. On information and belief, SBMI fraudulently represented that it was only in default of its purchase obligations with Erchonia because SBMI's non-Erchonia owners had failed to maximize the value of SBMI's business because, among other things, SBMI had not yet adequately implemented a training program to enable its employees to support the Zerona products properly and/or dedicated sufficient resources to marketing. During the negotiation process, SBMI provided numerous projections to the Debtor and its investors that, upon information and belief, intentionally misstated and misrepresented SBMI's business operations and financial performance and prospects. At the least, SBMI misrepresented (i) the number of Zerona Body Lasers being rented by customers, (ii) SBMI's relationship with its customers, including the level of returns by customers of the Zerona Body Lasers, (iii) the

revenues being generated by the Zerona Body Lasers, including recurring revenues from rentals, and (iv) the valuation of SBMI resulting from such cash flows.

D. THE TRANSACTION

16. On November 25, 2011, the Debtor entered into the APA and Erchonia Agreements (the “Transaction”) in reliance on, among other things, the above misrepresentations and the express representations and warranties made part of the APA that later proved false.

17. In the APA, SBMI made express representations and warranties about the state of its business, including its assets and financial condition. *See generally*, Article IV of the APA. On information and belief, SBMI has breached, among others, the following express representations and warranties:

- (i) The “Financial Statements and the Interim Financial Statements” provided by SBMI to the Debtor prior to execution of the APA “fairly present in all material respects the financial condition, results of operations, [and] cash flows;” (APA at Art. IV, 4.10(a))
- (ii) SBMI had had no “adverse change” in its business since December 31, 2010 that would have a Material Adverse Effect;”³ ((APA at Art. IV, 4.10(c))
- (iii) SBMI’s books, records and accounts “are accurate and complete and are maintained in all material respects in accordance with good business practice and all Laws;” (APA at Art. IV, 4.10(c))
- (iv) SBMI’s balance sheet “accurately and completely reflects the Assets and the Assumed Liabilities;” (APA at Art. IV, 4.11(a))
- (v) “Each material item of Tangible Property [including the Zerona Assets] included in the Assets is in good operating condition, normal wear and tear excepted, and is in adequate operating condition for the purposes for which it is used by [SBMI] in the Business;” (APA at Art. IV, 4.12)
- (vi) SBMI “has not ... suffered any Material Adverse Effect;” (APA at Art. IV, 4.14)
- (vii) SBMI “believes that substantially all relationships between [SBMI] and each of its customers are, and will continue to be, good. Except as set forth on Schedule

³ Capitalized terms not defined herein have the definition assigned in the APA.

4.15, Seller has not received any notice (formal or informal, oral or written) from any customer of an intention to substantially reduce or terminate its relationship with Seller, and Seller has not engaged in any material renegotiation of the terms of any contract between Seller and any such customer, which terms are not yet reflect in the Contracts;” (APA at Art. IV, 4.15) and

- (viii) “The Inventory is fit for the purpose for which it is procured, is not obsolete, defective or otherwise damaged and is saleable, leasable and/or licensable in each case in the ordinary course of business consistent with past practice. All Inventory that to the Knowledge of Seller is defective or otherwise damaged is clearly marked as such and is segregated from all other Inventory. Seller has no obligation, contingent or otherwise, to repurchase or replace any product it has sold, leased or licensed other than in the ordinary course of business and consistent in amount and scope with past practice.” (APA at Art. IV, 4.21).

18. By entering into the APA in reliance, *inter alia*, on the above, the Debtor acquired all of the operations and assets of SBMI, including SBMI’s “hard” assets and its exclusive contractual distribution rights with respect to the Erchonia products (primarily, Zerona). The “hard” assets acquired by the Debtor consisted of approximately eight hundred (800) Zerona Body Lasers. SBMI misrepresented to the Debtor that approximately six hundred (600) of these assets were in the possession of paying and revenue-generating customers, and only two hundred (200) Zerona Lasers were in SBMI’s inventory as yet unsold or unrented. In fact, as the Debtor would later discover, approximately two hundred (200) of such Zerona Body Lasers of the six hundred (600) assets that SBMI represented were being “rented by customers” were not generating any revenue, and many of those units were, in fact, being held on a “trial basis” or “demo’d” by customers.

19. In total, under the APA, the purchase price to Erchonia (including through the settlement of liabilities) from the Debtor for all of SBMI’s assets and its business as the exclusive licensee and distributor of the products manufactured by Erchonia was approximately \$18 million. As part of the purchase price, the Debtor also incurred a contingent liability in favor of

SBMI (and, ultimately, Erchonia, as SBMI's owners) in the amount of \$5 million, payable upon the Debtor achieving certain EBITDA targets (which it has not achieved).

20. The Debtor did not purchase SBMI "in a vacuum." On the same date that the APA was executed, the Debtor and Erchonia entered into the Erchonia Agreements. Under the terms of the Erchonia Agreements, the Debtor acquired the exclusive right to market, distribute and lease/rent/sell various products manufactured by Erchonia, including the Zerona Body Lasers, in North America (in addition to the exclusive rights to Zerona that the Debtor already held in Western Europe). Under the Erchonia Agreements, the Debtor had certain obligations to meet minimum purchase requirements and make minimum royalty payments.

E. EVENTS LEADING TO BANKRUPTCY

21. Upon consummation of the Transaction, the Debtor immediately began to infuse money into its new business in an attempt to expand what it was misled to believe was a successful and profitable business. In particular, the Debtor dedicated significant resources towards sales and marketing with respect to the Zerona and other products.

22. In addition, the Debtor also incurred a significant amount of secured debt, pursuant to a Loan and Security Agreement, dated as of March 29, 2012 (as amended, supplemented or otherwise modified prior to the Petition Date, the "Secured Loan Agreement" and, together with all other agreements and documents delivered pursuant thereto or in connection therewith, the "Secured Loan Documents"), among the Debtor, as borrower, and ORIX Venture Finance LLC (the "Secured Lender"), as secured lender. Under the terms of the Secured Loan Documents, the Debtor incurred secured indebtedness in the original aggregate principal amount of \$12 million. Pursuant to and to the extent set forth in the Secured Loan Documents, the Debtor granted first priority liens (the "Liens") on, and continuing pledges and security interests in, substantially all of the Debtor's assets to secure the Secured Loan

Obligations (all such collateral granted or pledged by the Debtor pursuant to the Secured Loan Documents shall collectively be referred to herein as the “Collateral”).⁴

23. On March 29, 2012, the Debtor, the Secured Lender, and Erchonia entered into a certain Consent, Agreement and Subordination (as amended, restated or otherwise modified from time to time prior to the Petition Date, the “Tri-Party Agreement”). The Tri-Party Agreement governs various respective rights, interests, obligations, priority, and positions of the Debtor, the Secured Lender, the certain subordinated noteholders and Erchonia. Pursuant to the Tri-Party Agreement, among other things, a default under the Erchonia Agreements would trigger a “cross-default” under the Secured Loan Documents.

24. In fall 2012, as a result of cash flow issues created by SBMI’s fraudulent statements and breach of the APA and Erchonia’s breach of the Erchonia Agreements, the Debtor was facing a potential default under its Secured Loan Documents. Moreover, the Debtor found itself unable to meet its purchase requirements to Erchonia. In order to address such issues and appease an increasingly obstinate Erchonia, an existing debt and equity investor in the Debtor “rolled up” its outstanding debt and invested approximately \$1.3 million of new financing into the Debtor. The Debtor also negotiated certain reductions to its minimum purchase requirements under the Erchonia Agreements.

25. The transaction closed on November 19, 2012. In connection therewith, the Debtor issued five (5) unsecured promissory notes (collectively, the “12% Unsecured Notes”), in an aggregate \$3,550,000 original principal amount. The 12% Unsecured Notes mature at various dates between May 2013 and November 2013. In connection with this transaction, the Debtor

⁴ The Secured Loan Obligations are also guaranteed by certain of the Debtor’s non-Debtor subsidiaries.

also issued a promissory note to Erchonia, in an aggregate original principal amount of \$500,000.

26. After the Debtor entered into the Transaction, the Secured Loan Documents, and the Tri-Party Agreement, it became apparent to the Debtor that various representations and statements made by SBMI in connection with the APA (and Transaction as a whole) had been materially false, misleading and/or otherwise inaccurate. Among other things, SBMI misrepresented that approximately six hundred (600) Zerona Body Lasers were being rented or leased by customers and generating recurring revenue. Such rented or leased Zerona Body Lasers were anticipated to be the source of a significant amount of the estimated future cash flow revenue on which the Debtor based its decision to purchase SBMI.

27. As noted above, however, approximately two hundred (200) of such Zerona Body Lasers that Erchonia and SBMI represented were being “rented by customers” were, in fact, being held on a “trial basis” or “demo’d” by customers and were generating no revenue. Moreover, during early-to-mid 2012, it became clear that Zerona Body Lasers were being returned by customers at a rate significantly greater than represented by SBMI to the Debtor in connection with the APA. By June 2012, approximately six (6) months after the APA was executed, one hundred seventy-nine (179) Zerona Body Lasers had been returned by customers. As of the Petition Date, less than approximately eighteen (18) months following the closing of the APA, only approximately one hundred fourteen (114) of the approximately six hundred (600) Zerona Body Lasers that were purportedly generating recurring rental revenues at the time the Debtor purchased SBMI’s business are being rented by customers and generating recurring revenues.

28. On May 15, 2013, as a direct consequence of SBMI's fraudulent actions and breach of the APA, the Debtor's Secured Lender seized control over the Debtor's cash account and the Debtor's warehouse inventory of Zerona Body Lasers, effectively putting a stranglehold on the Debtor's operations. On May 15, 2013, the Secured Lender also sent a letter to the Debtor stating that, if the Debtor did not allow the Secured Lender to "friendly foreclose" on the Collateral, the Secured Lender would take remedies against the Debtor. On May 17, 2013, the Secured Lender sent a further letter purportedly accelerating and declaring due and payable all amounts under the Secured Loan Documents.

29. On May 20, 2013, the Debtor was made aware by certain of its customers that such customers had received a notice from an entity named "Laser Light, LLC," which claimed that the Debtor had assigned to Laser Light, LLC the Debtor's rights in the accounts receivable owed by such customers and "directed" such customers to pay outstanding amounts to Laser Light, LLC rather than to the Debtor. Later on May 20, 2013, the Debtor became aware that Laser Light, LLC had been formed on May 13, 2013 by Wade Holt, an officer of the Secured Lender, two (2) days prior to the Secured Lender's seizure of the Debtor's cash and warehouse inventory and four (4) days prior to the Secured Lender's "acceleration" letter.

30. On May 20, 2013, as a matter of last resort and as a direct result of SBMI's fraud and breach of contract and the Secured Lender, the Debtor filed a Chapter 11 petition for reorganization with this Court.

31. As a result of SBMI's material misrepresentations and fraudulent acts, SBMI is liable to the Debtor for fraud, fraud by non-disclosure, and breach of contract.

CLAIMS FOR RELIEF

F. FRAUD/FRAUDULENT INDUCEMENT

32. The Debtor realleges and incorporates by reference as though fully set forth herein the allegations contained in each of the preceding paragraphs.

33. During the negotiations of the APA, SBMI made materially false representations to the Debtor including, but not limited to, misrepresenting (i) the number of Zerona Body Lasers being rented by customers, (ii) SBMI's relationship with its customers, including the level of returns by customers of the Zerona Body Lasers, (iii) the revenues being generated by the Zerona Body Lasers, including recurring revenues from rentals, and (iv) the valuation of SBMI resulting from such cash flows.

34. SBMI made these representations with knowledge of their falsity, or with reckless disregard of their truth, and with the intention that such representations be acted upon by the Debtor.

35. SBMI made these misrepresentations with the purpose of inducing the Debtor to enter into the APA and/or the Erchonia Agreements.

36. The Debtor justifiably relied on SBMI's misrepresentations to the Debtor's detriment by, among other things, entering into the APA, incurring a contingent liability in favor of SBMI, entering into the Erchonia Agreements, and raising and expending capital to fund the business, including incurring a significant amount of debt.

37. SBMI's conduct was fraudulent, malicious, and resulted in harm to the Debtor.

38. SBMI's fraud directly and proximately caused injury to the Debtor, for which it is entitled to damages, including exemplary damages.

G. FRAUD BY NON-DISCLOSURE

39. The Debtor realleges and incorporates by reference as though fully set forth herein the allegations contained in each of the preceding paragraphs.

40. In connection with negotiating and executing the APA, SBMI concealed or failed to disclose material facts within its knowledge.

41. SBMI knew that the Debtor did not have knowledge of these facts and did not have an equal opportunity to discover their truth.

42. SBMI had a duty to disclose such information because SBMI had voluntarily and partially disclosed certain information to the Debtor concerning the state of SBMI's business and assets, including but not limited to, its operations, the quality of its assets, customer relationships, and its financials.

43. By SBMI's above-described concealment and/or failure to disclose, SBMI intended to induce, and did induce, the Debtor to enter into the APA (and other transactions).

44. The Debtor justifiably relied on SBMI's misrepresentations to the Debtor's detriment by, among other things, entering into the APA, incurring a contingent liability in favor of SBMI, entering into the Erchonia Agreements, and raising and expending capital to fund the business, including incurring a significant amount of debt.

45. SBMI's conduct was fraudulent, malicious, and resulted in harm to the Debtor.

46. SBMI's silence and/or non-disclosure directly and proximately caused injury to the Debtor, for which it is entitled to damages, including exemplary damages.

A. BREACH OF CONTRACT

47. The Debtor realleges and incorporates by reference as though fully set forth herein the allegations contained in each of the preceding paragraphs.

48. The APA is a valid and enforceable contract between SBMI and the Debtor.

49. SBMI breached the APA by, among other things, breaching the express representations and warranties in the APA as set forth in Section D above.

50. The Debtor has fully or substantially performed all contractual obligations under the APA, or such performance has been excused.

51. SBMI's breach of the APA directly and proximately caused injury to the Debtor, for which it is entitled to damages to maximum extent provided by the law.

52. As a result of SBMI's breach of the representations and warranties in the APA, SBMI must also indemnify the Debtor "from and against any and all losses, liabilities, and damages, costs and expenses (including reasonable fees and disbursements of counsel)," under Article IX, 9.2 of the APA.

ATTORNEYS' FEES

53. The Debtor realleges and incorporates by reference as though fully set forth herein the allegations contained in each of the preceding paragraphs.

54. The Debtor is entitled to recover reasonable and necessary attorneys' fees under the APA and Chapter 38 of the Texas Civil Practice & Remedies Code.

CONDITIONS PRECEDENT

55. All conditions precedent to the Debtor bringing these claims have been performed, have occurred, or have been excused.

PRAYER

56. The Debtor respectfully requests that Defendant Santa Barbara Medical Innovations, LLC be cited to appear and answer, and that on final trial hereof, the Debtor have judgment against Defendant for the following:

- i. Damages, including exemplary damages;
- ii. Indemnity pursuant to Article IX of the APA;

- iii. Attorneys' fees;
- iv. Pre-judgment and post-judgment interest;
- v. Court costs; and
- vi. All other and further relief at law or in equity to which the Debtor may be justly entitled.

Respectfully submitted this 24th day of May, 2013.

ANDREWS KURTH LLP

By: /s/ Paul N. Silverstein

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Proposed Counsel to the Debtor

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 24th day of May, 2013, he caused a true and correct copy of the foregoing document to be hand delivered to the Office of the United States Trustee, Room 9C60, 1100 Commerce Street, Dallas, Texas 75242, and caused the same to be served on the counsel to the Secured Lender and the holders of the thirty (30) largest unsecured claims against the Debtor via first class United States mail, postage prepaid and, where possible, via electronic mail and/or overnight mail.

/s/ Jason N. Thelen _____
Jason N. Thelen