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Axiom Wins Sanctions In Medical Device Trademark Row

By **Aaron Taube**

Law360, New York (May 16, 2013, 6:57 PM ET) -- A Florida federal judge on Wednesday issued sanctions against several affiliated Chinese companies accused of producing counterfeit versions of Axiom Worldwide Inc. medical devices, ruling that the companies, created by a former Axiom sales agent, have used the disputed trademarks and copyrights in the U.S.

However, U.S. District Judge Virginia M. Hernandez Covington refused to grant Axiom's requests to enter default judgment against HTRD Group Hong Kong Ltd. and its Chinese affiliates, adopting a magistrate's April 26 recommendation against instituting such additional measures as punishment for HTRD's failure to comply with a discovery order.

"The court finds that the report and recommendation thoughtfully addresses the issues presented, and the objections do not provide a basis for rejecting the report and recommendation," Judge Hernandez Covington said.

Axiom **filed** the suit in July 2011 alleging that its former sales agent David Ren created HTRD and related entities, including the U.S. affiliate Excite Medical Group, in order to generically produce Axiom products in violation of a confidentiality pact. Axiom said the defendants, which include former Axiom employees Saleem N. Musallam and Andrew Deweerd, have sold illegally constructed medical devices using Axiom trademarks, usurping overseas business from authorized Axiom partners.

In doing so, Axiom said HTRD drew unsuspecting buyers into purchasing generic medical devices under the belief that they were authorized Axiom products, including a version of the plaintiff's flagship back pain treatment device, the DRX9000.

Axiom said in August that it has discontinued manufacturing operations in the U.S., but that it has not sold or transferred its intellectual property for the DRX9000 series of devices. HTRD and Excite have disputed this claim in court, saying they are the rightful owners of the DRX9000 copyrights and trademarks.

Judge Hernandez Covington's Wednesday order not only granted an evidentiary presumption that the Chinese entities used the allegedly infringing marks in the U.S., but also barred the defendants from introducing further evidence to dispute the assumption.

Magistrate Judge Thomas B. McCoun III's order had recommended that the judge impose monetary sanctions for the costs and legal expenses Axiom incurred from the defendants' failure to produce documents related to its distribution of the allegedly infringing products, but Judge Hernandez Covington said Axiom did not submit an affidavit requested by the magistrate outlining the costs it had incurred. Axiom submitted the affidavit Thursday as

part of a request for \$37,000 in reimbursement.

Scott A. Frick, an attorney representing Axiom, said Thursday that he was surprised by Magistrate Judge McCoun's recommendation, saying the judge had previously said in court that he intended to recommend default judgment against HTRD and its Chinese affiliates.

"I was a little disappointed that he did not enter the order he said he was going to write, and I was also fearful that his sanctions were not enough to prevent these folks from benefiting from their willful violations of the court order," Frick said. "I would like to see harsher sanctions, but [Magistrate Judge McCoun and Judge Hernandez Covington] made a ruling that they feel is correct, and we have to live with that."

Attorneys for the defendants were not immediately available for comment Thursday.

Axiom is seeking an injunction blocking the defendants from infringing its trademarks and copyrights, improperly using its trade secrets, drawings and designs, and further breaching confidentiality agreements. It also seeks damages, attorneys' fees, costs and expenses.

Axiom is represented by Scott A. Frick of The Frick Law Group.

HTRD and its affiliates are represented by Lee William Atkinson and Zala L. Forizs of Forizs & Dogali PA.

--Additional reporting by Jacqueline Bell. Editing by Lindsay Naylor.

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