

**UNITED STATES DISTRICT COURT  
DISTRICT OF RHODE ISLAND**

ALIFAX HOLDING SPA,

Plaintiff,

VS.

ALCOR SCIENTIFIC INC.

and

FRANCESCO A. FRAPPA

Defendants.

Civil Action No.: 14-440/S

## JURY TRIAL DEMANDED

## SECOND AMENDED AND SUPPLEMENTAL COMPLAINT

Alifax Holding SpA (“Alifax” or “Plaintiff”), by and through its attorneys, for its Second Amended and Supplemental Complaint against Alcor Scientific Inc. (“Alcor”) and Francesco A. Frappa (collectively, the “Defendants”) state as follows:

## THE PARTIES

1. Alifax is an Italian corporation with its principal place of business in Padua, Italy. It specializes in the development, production and distribution of automated clinical diagnostic instrumentation for the determination of the erythrocyte sedimentation rate (ESR) and bacterial culture in urine and human biological liquids. Alifax sells its products in more than ninety countries around the world, including the United States. Alifax acquired Sire Analytical Systems Srl (“Sire”) and, since the filing of the initial Complaint, has merged Sire entirely into Alifax.

2. Frappa worked for Sire in the Sire plant in Nimis, Italy. Alifax is informed and believes that Frappa is now employed by Alcor and resides in Italy.

3. On information and belief, Alcor is a Rhode Island corporation with its principal place of business in Smithfield, Rhode Island.

#### NATURE OF THE ACTION

4. This action arises out of Defendant Frappa's unauthorized removal and misappropriation of Alifax's proprietary, confidential, copyrighted, and trade secret information in connection with his resignation from Sire to join Defendant Alcor, and the use by Frappa and Defendant Alcor of that information in the production and sale of clinical diagnostic instrumentation in competition with Plaintiff. This action also arises out of Alcor's infringement of two of Alifax's patents and Alcor's infringement of Alifax's copyright in its ESR software by its production and sale of this instrumentation.

5. Plaintiff develops, produces and sells clinical diagnostic instrumentation. One of its most important products is instrumentation for the determination of the erythrocyte sedimentation rate (ESR) in human blood. Plaintiff's ESR analyzers are the industry standard. Based on patented technology, they automatically test for inflammation in blood and produce reliable results in 20 seconds. They represent a substantial improvement over traditional ESR analyzers, which take an hour to produce results. Until Defendant Frappa left Sire and joined Defendant Alcor, no other company in the world made an ESR analyzer that could compete with the Plaintiff's analyzers.

6. Defendant Frappa was employed at Sire from 2002 to 2011. During that time, he was intimately involved in the design and development of Plaintiff's ESR analyzers. In this capacity, he was provided access to the proprietary, confidential and trade secret information of Alifax and Sire. As an employee of Sire involved in the company's research and development,

Frappa owed a duty to Sire and its parent company, Alifax, to maintain the confidentiality of their proprietary, confidential and trade secret information.

7. Frappa resigned from Sire, effective November 1, 2011. Even before his resignation was final, he had joined Defendant Alcor and became its director of research and development.

8. Before Frappa joined it, Alcor had never developed or produced an ESR analyzer. But by July 2012, Alcor had developed and was promoting an ESR analyzer that analyzes blood samples and produces results in 20 seconds, just like Plaintiff's ESR analyzers. Suddenly, after never having made an ESR analyzer before, Alcor is now in direct competition with Plaintiff in the sale of these instruments and is selling the only other ESR analyzer in the world with the capabilities of Plaintiff's patented analyzers.

9. The Alcor ESR analyzer incorporates technology that infringes patents and copyrights owned by Alifax. Frappa and Alcor used Plaintiff's proprietary, confidential and trade secret information in the design and production of Alcor's ESR analyzer, and this enabled Alcor to design and produce an instrument that it otherwise would not have able to design and produce, or that would have taken it much longer to design and produce than it did.

10. Plaintiff brings this action to protect its intellectual property rights, specifically its patents, copyrights, and trade secrets and confidential information, and to seek redress from the harm that Defendants' wrongful conduct have caused and will cause Plaintiff. Plaintiff seeks an injunction and an award of damages against Alcor for patent infringement, copyright infringement, and misappropriation of trade secrets, and an injunction against misappropriation of trade secrets and confidential information by Frappa.

### JURISDICTION AND VENUE

11. This action arises under the patent and copyright laws of the United States, Titles 35 and 17 of the United States Code. Accordingly, this Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1338(a).

12. The Court also has supplemental jurisdiction under 28 U.S.C. § 1367 over the nonpatent claims because they are so related to the patent claims that they form part of the same case or controversy under Article III of the United States Constitution.

13. This Court has personal jurisdiction over Defendant Alcor because it maintains its principal place of business in Smithfield, Rhode Island.

14. This Court has personal jurisdiction over Defendant Frappa under G.L. 1956 § 9-5-33(a).

15. Venue is proper in this Court under 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to the claims occurred in Rhode Island.

16. Venue is proper in this Court under 28 U.S.C. § 1400 because defendant Alcor maintains its principal place of business in Rhode Island.

### FACTUAL ALLEGATIONS

#### Alifax's Trade Secret and Confidential Information and Patents and Copyrights

17. Alifax specializes in the development, production and sale of automated clinical diagnostic instrumentation for the determination of the ESR and bacterial culture in human biological liquids. It has obtained many patents worldwide in the fields of hematology and bacteriology. Alifax sells the products to customers around the world, including in the United States.

18. Alifax is strongly focused on scientific research and technology innovation. In 1998, it acquired Sire. Prior to its merger with Alifax, Sire was Alifax's center for production and research and development. Sire was active in the field of in vitro diagnostic devices. Among its products were ESR analyzers. In 2015, Sire merged into Alifax, and Alifax is the successor to the entirety of Sire's ESR analyzer business, including the entire right, title, and interest in and to Sire's trade secrets, confidential information, good will, patents, copyrights, and other intellectual property.

19. An ESR analyzer is a device used to test the rate of erythrocyte sedimentation in the blood in order to diagnose a clinical process of inflammation. It is among the most common diagnostic tests. The test is performed by measuring the speed of sedimentation of the blood sample; a higher rate of sedimentation than normal indicates the presence of inflammation. Before the invention of Sire's ESR analyzer, ESR tests relied on gravity for the sedimentation and the test took approximately an hour. With Sire's ESR analyzer, the time necessary for the test was reduced to 20 seconds.

20. On October 14, 2003, the United States Patent and Trademark Office awarded U.S. Patent No. 6,632,679 (the "'679 patent"), titled *Method to Determine the Speed of Sedimentation of Blood and Other Parameters Correlated Thereto, and Relative Apparatus*, to Enzo Breda. Mr. Breda assigned the '679 patent to Sire. The '679 patent is now owned by Alifax. A complete and authentic copy of the '679 patent is attached as Exhibit. A.

21. On February 28, 2006, the United States Patent and Trademark Office awarded U.S. Patent No. 7,005,107 (the "'107 patent"), titled *Apparatus for Determining the Speed of Sedimentation of Blood and Other Parameters Correlated Thereto*, to Enzo Breda. Mr. Breda

assigned the '107 patent to Sire. The '107 patent is now owned by Alifax. A complete and authentic copy of the '107 patent is attached as Exhibit B.

22. Frappa was hired by Sire on October 7, 2002 as an entry-level employee. In 2004, he joined the company's software development group where he was involved in developing the firmware and software used in the company's ESR analyzers. He then became responsible for firmware development. After that, he was placed in charge of electronic and software planning. In 2008, he became the assistant director of research and development of the company. He held that position until he left the company. During his employment with Sire, Frappa received compensation in the form of salary, bonuses and benefits.

23. During his employment with Sire, Frappa was intimately involved in the design and development of the company's ESR analyzers. In this connection, he was provided access to all of the company's proprietary, confidential and trade secret information relating to its ESR analyzers, including the source code for the firmware used in the ESR analyzers.

24. When Frappa began working at Sire, a version of the firmware had been developed by other engineers working for Sire. During his tenure with Sire, Frappa became the principal developer responsible for the proprietary and confidential source code used in Plaintiff's ESR analyzers. In this role, Frappa personally wrote and led the development of several iterations of Plaintiff's source code, such as the code used to determine the ESR of a blood sample from photometric data acquired by the ESR analyzer.

25. One of the aspects of ESR analyzers in which Frappa was directly involved was the development of a plastic capillary photometer sensor. The capillary photometer sensor, or "CPS," is the part of an ESR analyzer in which optical images are taken for measurement of the sedimentation rate of the blood sample. The blood flows through the capillary tube in the

analyzer and, once inside the CPS, is stopped suddenly and subjected to optical measurements of the sedimentation rate. It was noted by Sire employees that the results of these measurements were subject to some variability; the same sample might produce somewhat different results when measured in different tests or in different machines. The company set out to address this problem. Frappa was placed in charge of this project, which was code named “Mecca.”

26. In studying the problem, Sire determined that the variability of results was due to the Teflon capillary tube, which part was extruded and did not guarantee a constant centering of the internal passage, through which the blood sample flowed. The result of the “Mecca” project was a new invention. Inside the CPS, the Teflon capillary tube was replaced by a plastic channel obtained by piercing or milling, thus providing consistent results and improvement in reading the sample.

27. Frappa remained in charge of the “Mecca” project until he left Sire. As such, he was intimately involved in all aspects of the project, including the research, design, and development of the resulting plastic CPS. In addition, Frappa was principally responsible for updating the algorithms and related firmware employed in Plaintiff’s ESR analyzers to calculate the ESR from photometric measurements obtained using the plastic CPS.

28. On October 11, 2011, after he had given notice of his resignation but while he was still employed by Sire, Frappa wrote a report on the status of the “Mecca” project.

29. When Frappa left Sire, the “Mecca” project was briefly suspended. It was then re-started and completed. Sire then set about incorporating the plastic CPS into its various ESR analyzers.

30. Alifax has since filed applications for patents on its plastic CPS, specifically International Patent App. No. PCT/IB2013/001565 and related national phase patent

applications, including U.S. Patent App. Ser. No. 14/418,870. Those patent applications published in 2014 and 2015; but at the time of its development and at the time Frappa left the company, the plastic CPS was confidential information.

31. Plaintiff has invested substantial money to create proprietary designs, solutions, initiatives and equipment to ensure that Alifax provides cutting edge technologies and services to its customers. One important aspect of these efforts was the “Mecca” plastic CPS for Alifax’s ESR analyzers.

32. As an employee of Sire, Frappa had an obligation to maintain the confidentiality of information learned in the course of his employment.

33. Frappa joined Sire immediately after he completed his education. All of the information learned by him concerning ESR analyzers up to the time he left the company was learned in the course of his employment at Sire.

34. Research and development of new or improved products and ideas, such as the “Mecca” project or developing Plaintiff’s proprietary firmware, is by its nature confidential and was understood by employees of Alifax and Sire to be confidential information not to be shared outside the companies. In the hands of competitors or potential competitors, this information could be used to harm Alifax and Sire.

35. Plaintiff’s business information, including its confidential, proprietary and trade secret information, are of paramount importance to its business reputation and success. The “Mecca” project resulted in a new part (the plastic CPS) for the ESR analyzer. The plastic CPS significantly improved the reliability and consistency of the results of the ESR analyzers and therefore gave a further, important competitive advantage over Plaintiff’s competitors or potential competitors.



36. Plaintiff has taken reasonable steps to protect the confidentiality of its proprietary, confidential and trade secret information.

37. Communications, such as email messages and product drawings, stipulated that the information contained in them was confidential company information.

Misappropriation of Alifax's Business, Trade Secret and Confidential Information

38. On August 30, 2011, Frappa gave notice to Sire that he was resigning from the company, but he promised to continue his work at Sire for the full two months from the date of notice as provided in his employment contract.

39. Nevertheless, on September 26, 2011, Frappa notified the company that he had taken on another commitment and that this new commitment prevented him from rendering services to Sire.

40. Plaintiff later learned that Frappa had accepted the position of director of research and development at Alcor.

41. Plaintiff is informed and believes and therefore alleges that, prior to its employment of Frappa, Alcor had never developed or produced an ESR analyzer.

42. Plaintiff is informed and believes and therefore alleges that, in late 2012, within a year of Frappa's resignation from Sire, Alcor introduced an ESR analyzer for sale in the United States. Alcor called its ESR analyzer the "iSED."

43. Alcor advertised its "iSED" ESR analyzer, including at the Congress AACC in Houston, Texas, in the period July 30, 2013 to August 1, 2013 through its distributor, Arkray, as providing blood test results in 20 seconds. Plaintiff is informed and believes, and on that basis alleges, that no other ESR analyzer on the market today, except those sold by Alifax and Alcor, is capable of producing results in anything close to 20 seconds.

44. Plaintiff believes and therefore alleges that Alcor could not have produced the “iSED” ESR analyzer without the benefit of information provided to it by Frappa, all of which he learned during his employment at Sire. Some of this information was proprietary, confidential and trade secret information belonging to Plaintiff. Among this information was proprietary, confidential and trade secret information concerning the plastic CPS.

45. Alcor’s “iSED” analyzer competes directly with Plaintiff’s ESR analyzers. Alcor has sold the “iSED” to customers who had previously purchased ESR analyzers from Alifax. These sales for Alcor constitute lost sales for Plaintiff, which has suffered lost income and lost customers, including in the U.S. market, as a result.

46. ESR analyzers have been and remain a key component of Plaintiff’s business, and were a focus of Frappa’s duties and responsibilities while he was employed as assistant director of research and development at Sire.

47. On March 7, 2014, Alifax, through counsel, sent a cease and desist letter to Alcor, demanding that Alcor stop manufacturing, selling and offering for sale its iSED ESR analyzer.

48. On March 28, 2014, Alcor, through counsel, refused Alifax’s demand.

49. Frappa’s and Alcor’s actions are a serious threat to Plaintiff’s business, are in violation of applicable law, and unjustly enrich Frappa and Alcor. Injunctive relief is necessary to remedy the harm.

50. Plaintiff has no adequate remedy at law.

FIRST CAUSE OF ACTION

(Patent Infringement against Alcor)

51. Alifax hereby incorporates by reference and realleges each of the allegations contained in the foregoing paragraphs 1 through 53, inclusive, as though fully set forth in this cause of action.

52. On information and belief, Alcor has had notice of the '679 and '107 patents at least since Frappa joined Alcor.

53. Alcor manufactures, offers to sell, sells and distributes iSED ESR analyzers. These analyzers practice the claimed invention of the '679 and '107 patents.

54. Alcor provides manuals with each iSED ESR analyzer that instruct the user, such as an Alcor customer, to use the iSED ESR analyzer in a manner that infringes the '679 and '107 patents, including at least claim 1 of the '679 patent and claim 1 of the '107 patent.

55. Alcor has infringed and continues to infringe one or more claims of the '679 and '107 patents under 35 U.S.C. § 271(a), either literally and/or under the doctrine of equivalents, by making, using, selling and/or offering for sale in the United States, products encompassed in at least claim 1 of the '679 patent and claim 1 of the '107 patent, namely the iSED analyzer.

56. Alcor has induced infringement and continues to induce infringement of one or more claims of the '679 and '107 patent under 35 U.S.C. § 271(b), either literally and/or under the doctrine of equivalents, by selling and/or offering for sale in the United States the iSED ESR analyzer to distributors whom Alcor has induced to use, sell, and offer for sale the infringing iSED ESR analyzer and by instructing users of the iSED ESR analyzer, including, among others, Alcor's customers, to use them in a manner that directly infringes one or more claims of the '679 and '107 patent, including at least claim 1 of the '679 patent and claim 1 of the '107 patent.

57. Alcor has contributed to infringement and continues to induce to infringement of one or more claims of the '679 and '107 patent under 35 U.S.C. § 271(c), either literally and/or under the doctrine of equivalents, by selling and/or offering for sale in the United States the iSED ESR analyzer to distributors whom Alcor has induced to use, sell, and offer for sale the infringing iSED ESR analyzer and by instructing users of the iSED ESR analyzer, including, among others, Alcor's customers, to use them in a manner that directly infringes one or more claims of the '679 and '107 patent, including at least claim 1 of the '679 patent and claim 1 of the '107 patent.

58. Alcor's willful direct and indirect infringement of the '679 and '107 patents has injured and continues to injure Plaintiff and will cause irreparable injury and damage to Plaintiff unless the Court enjoins Alcor from infringing the '679 and '107 patents.

59. As a direct and proximate result of Alcor's willful direct and indirect infringement of the '679 and '107 patents, Plaintiff has suffered, and will continue to suffer, monetary loss to its business, reputation, and goodwill. Plaintiff is entitled to recover from Alcor, in amounts to be determined at trial, the damages that Plaintiff has sustained and will sustain as a result of Alcor's willful infringement of the '679 and '107 patents.

60. Alifax's conduct in infringing the '679 and '107 patents renders this case exceptional within the meaning of 35 U.S.C. § 285.

## SECOND CAUSE OF ACTION

(Misappropriation of Trade Secrets against Alcor and Frappa)

61. Plaintiff hereby incorporates by reference and realleges each of the allegations contained in the foregoing paragraphs 1 through 53, inclusive, as though fully set forth in this cause of action.

62. At all relevant times, Alifax and Sire were in possession of trade secret information as defined by Rhode Island's Uniform Trade Secrets Act ("RIUTSA"), R.I. Gen. Laws § 6.41.1 *et seq.* As described above, Frappa was provided access to such trade secrets in his positions at Sire. The proprietary business and customer information of Alifax and Sire that Frappa was provided access to constitutes trade secrets because it is information, including a device, method, technique, or process, that derives independent economic value from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and because it is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Plaintiff's trade secret information described herein is not and was not generally known to other producers in the industry.

63. Plaintiff is informed and believes and therefore alleges that Frappa and Alcor have actually misappropriated and continue to threaten to misappropriate Plaintiff's trade secrets in violation of RIUTSA.

64. Frappa disclosed trade secret information described above to Alcor having acquired the information under circumstances giving rise to a duty to maintain its secrecy or limit its use.

65. Alcor acquired trade secret information described above from Frappa while knowing or having reason to know that the information was acquired by Frappa by improper means.

66. Alcor and Frappa intend improperly to use or disclose Plaintiff's trade secrets to others in violation of the RIUTSA.

67. Alcor and Frappa will continue wrongfully to use Plaintiff's trade secrets unless enjoined.

68. As a proximate result of Alcor's and Frappa's misappropriation and threatened misappropriation of Plaintiff's trade secrets, Plaintiff has suffered, and will continue to suffer, damages in an amount to be proved at the time of trial, but which are substantial and in excess of the minimum jurisdictional amount of this Court.

69. Plaintiff's remedy at law is inadequate, and therefore Plaintiff seeks permanent injunctive relief. Plaintiff is threatened with losing customers, technology, its competitive advantage, its trade secrets and good will in amounts which may be impossible to determine, unless Alcor and Frappa are enjoined and restrained by order of this Court, as alleged above.

70. Alcor's and Frappa's actual and threatened misappropriation has been willful and egregious. Frappa was a trusted employee who helped develop Plaintiff's ESR analyzer and then left the company and immediately used the knowledge gained at Sire to build the same machine for another company, Alcor, embodying the technology developed in confidence at Sire and sold in direct competition with Plaintiff. Therefore, Plaintiff is entitled to an award of exemplary damages and attorneys' fees.

**THIRD CAUSE OF ACTION**  
**(Breach of a Confidential Relationship)**

71. Plaintiff hereby incorporates by reference and realleges each of the allegations contained in the foregoing paragraphs 1 through 53, inclusive, as though fully set forth in this cause of action.

72. At all relevant times, Alifax and Sire were in possession of confidential information as described above.

73. As an employee of Sire, Frappa owed a fiduciary to Sire and its parent company, Alifax, not to use the confidential information of Sire and Alifax to compete with his former employer or Alifax.

74. Frappa disclosed Plaintiff's confidential information to Alcor and Frappa and Alcor used the information to compete with Plaintiff.

75. Frappa and Alcor breached Frappa's fiduciary duty to Plaintiff.

76. Plaintiff has suffered damage proximately caused by the breach of fiduciary duty by Frappa and Alcor including lost sales, lost customers and lost good will.

**FOURTH CAUSE OF ACTION**  
**(Copyright Infringement)**

77. Plaintiff hereby incorporates by reference and realleges each of the allegations contained in the foregoing paragraphs 1 through 53, inclusive, as though fully set forth in this cause of action.

78. Plaintiff owns copyrights in the source code, documentation, and other materials that constitute the firmware used in Plaintiff's ESR analyzers. Plaintiff has registered its copyrights with the United States Copyright Office. A complete and authentic copy of the copyright filing is attached as Exhibit C.

79. The firmware implemented in Alcor's iSED ESR analyzers, which, on information and belief, was written and developed by Frappa, was derived from and directly copies substantial portions of Plaintiff's copyrighted ESR analyzer firmware.

80. By developing, reproducing, and distributing the firmware implemented in the iSED ESR analyzers Alcor has infringed and continues to infringe Plaintiff's exclusive rights under 17 U.S.C. § 106 to reproduce, distribute, and prepare derivative works of their copyrights.

81. On information and belief, Alcor has induced third parties to distribute its iSED ESR analyzers, which distribution violates Plaintiff's exclusive rights under 17 U.S.C. § 106 to distribute their copyrights.

82. On information and belief, Alcor's direct and indirect infringement of Plaintiff's registered copyrights has been and continue to be knowing and willful.

83. Alcor has realized and will continue to realize unjust profits, gains, and advantages as a proximate result of its copyright infringement.

84. Alcor's infringement of Plaintiff's copyrights has injured and continues to injure Plaintiff and will cause irreparable injury and damage to Plaintiff unless the Court enjoins Alcor from infringing those copyrights.

85. As a direct and proximate result of Alcor's willful direct and indirect infringement of Plaintiff's registered copyrights, Plaintiff has suffered, and will continue to suffer, monetary loss to its business, reputation, and goodwill. Plaintiff is entitled to recover from Alcor, in amounts to be determined at trial, the damages that Plaintiff has sustained and will sustain, and any gains, profits, and advantages obtained by Alcor as a result of its copyright infringement.

#### PRAYER FOR RELIEF

WHEREFORE, Plaintiff pray that the Court enter an Order:

1. That Alcor has willfully infringed, induced infringement of, and contributed to infringement of U.S. Patent Nos. 6,632,679 and 7,005,107;

2. Permanently enjoining Alcor and its respective agents, servants, officers, directors, employees, and all persons acting, directly or indirectly, in concert with them from directly or indirectly infringing U.S. Patents Nos. 6,632,679 and 7,005,107;



3. Permanently enjoining Alcor and Frappa and Alcor's respective agents, servants, officers, directors, employees, and all persons acting, directly or indirectly, in concert with them from obtaining, accessing, using, retaining, utilizing or disclosing Plaintiff's confidential, proprietary or trade secret information;

4. Requiring the immediate disclosure and return to Plaintiff of all misappropriated materials, including all media and electronic storage devices and virtual repositories, including but not limited to any Memeo accounts, portable USB storage devices utilized by Frappa or Alcor, and hard drives utilized by Frappa or Alcor;

5. That Alcor has willfully infringed, induced infringement of, and contributed to infringement of Plaintiff's copyrights in its proprietary firmware used in its ESR analyzers;

6. Permanently enjoining Alcor and its respective agents, servants, officers, directors, employees, and all persons acting, directly or indirectly, in concert with them from directly or indirectly infringing Plaintiff's copyrights in its proprietary firmware;

7. That Plaintiff be awarded compensatory damages it has suffered, in an amount to be proved at trial;

8. That Plaintiff be awarded exemplary damages for all claims for which such damages are authorized;

9. That Plaintiff be awarded attorneys' fees and the costs of this action as permitted by statute;

10. That Alcor and Frappa be ordered to disgorge all improper benefits, profits, or gains;

11. For an accounting of the misuses of Plaintiff's information and property and other unlawful acts; and

12. That Plaintiff be awarded such other and further relief as the Court deems equitable and just.

JURY DEMAND: Alifax hereby demands trial by jury on all issues so triable.

Date: March 20, 2017

Respectfully submitted,

/s/ Christopher H. Little

/s/ Michael J. Daly

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 20, 2017, a copy of the foregoing was electronically filed with the Clerk of the Court and electronically served on all counsel of record. This filing is available for viewing and downloading through the Court's CM/ECF system.

/s/ Michael J. Daly