IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

R421A LLC, d/b/a Choice Refrigerants, Plaintiff, v. Dynatemp International, Inc., FluoroFusion Specialty Chemicals, Inc., BMP USA, Inc., IGas USA, Inc., T.T. International Co., Ltd., Harold B. Kivlan, IV, William Gresham, and David Couchot Defendants.	CIVIL ACTION NO:

COMPLAINT

Plaintiff R421A LLC d/b/a Choice Refrigerants ("Choice" or "Plaintiff") files this Complaint against Defendants Dynatemp International, Inc. ("Dynatemp"), FluoroFusion Specialty Chemicals, Inc. ("FluoroFusion"), BMP USA, Inc. ("BMP"), IGas USA, Inc. ("IGas"), T.T. International Co., Ltd. ("TTI"), Harold B. Kivlan, IV ("Kivlan"), William Gresham ("Gresham"), and David Couchot ("Couchot"), and in support thereof alleges as follows:

NATURE AND BASIS OF ACTION

1. This is an action for patent infringement under the patent laws of the United States, 35 U.S.C. § 1 *et seq.* Choice seeks injunctive relief, damages, and recovery of its reasonable costs and attorneys' fees.

THE PARTIES

2. Plaintiff Choice is a limited liability company organized and existing under the laws of the State of Georgia having its principal place of business at 610 McFarland 400 Drive, Alpharetta, Georgia, 30004.

3. Defendant Dynatemp International, Inc. ("Dynatemp") is a corporation organized and existing under the laws of the State of Pennsylvania, having its principal place of business at 100 Sterling Parkway, Suite 111, Mechanicsburg, Pennsylvania, 17050. Dynatemp has a registered office at 2626 Glenwood Ave., Suite 550, Raleigh, North Carolina, 27608. Dynatemp also has a distribution center at 8184 U.S. 70 Business Hwy W., Clayton, North Carolina 27520. Upon information and belief, Dynatemp may be served by serving its Registered Agent, Corporation Service Company, 2626 Glenwood Ave., Suite 550, Raleigh, North Carolina, 27608.

4. Upon information and belief, Defendant Harold B. Kivlan, IV ("Kivlan") is a resident of Durham, North Carolina and is Chief Executive Officer and Chief Financial Officer of Defendant Dynatemp and personally oversees Dynatemp's operations in North Carolina and is also an officer in Defendant FluoroFusion Specialty Chemicals, Inc.

5. Upon information and belief, Defendant William ("Will") Gresham ("Gresham") is a resident of Durham, North Carolina and is Vice-President of Defendant Dynatemp and is the sales manager of its refrigerant products including the Dynatemp R421A refrigerant product described herein and the subject of this Complaint.

6. Defendant FluoroFusion Specialty Chemicals, Inc. ("FluoroFusion") is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 3950 Powhatan Road, Clayton, North Carolina, 27520. Upon information and

belief, FluoroFusion may be served by serving its Registered Agent, Corporation Service Company, 2626 Glenwood Ave., Suite 550, Raleigh, North Carolina, 27608.

7. Upon information and belief, Defendant David Couchot ("Couchot") is President of Fluorofusion and personally oversees Fluorofusion's operations in North Carolina and coordinates FluoroFusion's operations with those of Defendant Dynatemp particularly regarding the Dynatemp R421A refrigerant product that is described herein and the subject of this Complaint.

8. Defendants Dynatemp, FluoroFusion, Kivlan, Gresham, and Couchot will sometimes collectively be referred to herein as the "Dynatemp Defendants."

9. Defendant BMP USA, Inc. ("BMP") is a Florida corporation with a principal place of business at 5814 Mariner Street, P.O. Box 15762, Tampa, FL 33609, and is involved in the importation and sale of refrigerants from the People's Republic of China to the United States and the distribution and/or sale of refrigerants to the Dynatemp Defendants in North Carolina.

10. Defendant IGas USA, Inc. ("IGas") is a Florida corporation with a principal place of business at 5814 Mariner Street, P.O. Box 15762, Tampa, FL 33609, and is the successor to BMP, and is involved in the importation and sale of refrigerants from the People's Republic of China to the United States and the distribution and/or sale of refrigerants to the Dynatemp Defendants in North Carolina.

11. Defendant T.T. International Co. Ltd. ("TTI") is a company organized under the laws of the People's Republic of China, which at all material times had its principal place of business in Dalian, China.

12. Defendants BMP, IGas and TTI are collectively referred to herein as the "BMP Defendants." Upon information and belief, each and all of the BMP Defendants are affiliated and under common control.

13. Upon information and belief, each BMP Defendant is engaged in the import and/or sale of refrigerants into the United States, markets and/or sells imported refrigerants in the United States generally, and markets and/or sells refrigerants imported by the BMP Defendants or affiliates in the United States, including supply of refrigerants and/or refrigerant gasses and/or blends, to the Dynatemp Defendants for its Dynatemp R421A refrigerant product described herein and the subject of this Complaint.

JURISDICTION AND VENUE

14. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1338 because this Complaint includes a cause of action for patent infringement under the patent laws of the United States, including but not limited to, 35 U.S.C. §§ 271, 281, 283-285, and 287.

15. Venue is proper in this District under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the claim occurred in North Carolina.

16. Venue is proper in this District under 28 U.S.C. § 1400(b) because the Defendants have committed acts of infringement here and have regular and established places of business here. Namely, Defendant Dynatemp has a regular and established place of business at 8184 U.S. 70 Business Hwy W., Clayton, North Carolina 27520 and Defendant FluoroFusion has a regular and established place of business at 3950 Powhatan Road, Clayton, North Carolina, 27520. Upon information and belief, the BMP Defendants conspired in North Carolina to carry out acts of infringement that are the subject of this Complaint in North Carolina.

CHOICE'S INNOVATIVE REFRIGERANT BLEND

17. Choice is an innovative manufacturer of heating, ventilation, and air conditioning (HVAC) products, namely refrigerants and condensing units.

18. One HVAC product, chlorodifluoromethane, referred to as R-22 or Freon, is a known ozone-depleting refrigerant common in many industrial applications, including residential air conditioning systems.

19. R-22 itself is a refrigerant gas within the class of chemicals known as hydrochlorofluorocarbons or "HCFCs." Use of R-22 in the United States has been phased out by the U.S. Environmental Protection Agency ("EPA") pursuant to the Montreal Protocol on Substances that Deplete the Ozone Layer (the "Montreal Protocol"), a protocol to the Vienna Convention for the Protection of the Ozone Layer, and domestic legislation under the federal Clean Air Act, 42 U.S.C. §§ 7671-7671q, and the Stratospheric Ozone Protection regulations promulgated by the EPA in Title 40, Code of Federal Regulations, Part 82, due to the environmentally damaging effect of HCFCs on the global ozone layer.

20. As of January 1, 2020, production and import of R-22 was banned in the United States by the Environmental Protection Agency pursuant to the Clean Air Act. The banned R-22 was subject to a phaseout period beginning January 1, 2010.

21. In anticipation of the R-22 ban, Choice, by and through its predecessors in interest, developed a novel blend of two refrigerant gases, known as R125 and R134a, as a replacement for R-22. This novel refrigerant blend became known in the industry as R-421A

22. Choice applied to the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) to receive a new refrigerant designation for its aforementioned new refrigerant blend and for approval of its new refrigerant blend as a substitute refrigerant and replacement for R-22.

23. ASHRAE approved Choice's new refrigerant, giving it the designation R-421A.

24. Choice also applied to the US Environmental Protection Agency (EPA) for approval of a particular embodiment of Choice's R-421A refrigerant including an additive in the form of a proprietary lubricant under the EPA's Significant New Alternatives Policy (SNAP) Program under which the EPA evaluates and has authority to approve new refrigerants as substitutes for ozone-depleting substances, such as R-22. The EPA approved the particular embodiment of Choice's R-421A refrigerant including a proprietary lubricant, and that embodiment of Choice's R-421A refrigerant is an EPA SNAP-approved R-22 substitute refrigerant and replacement.[1]

25. In accordance with ASHRAE's designation, for a refrigerant to be called or referred to as R-421A it must have certain fixed properties and, more specifically, must constitute a blend of refrigerant gasses comprising 58% (plus or minus 1%) R-125 and 42% (plus or minus 1%) R-134a.[2] R-125 is a refrigerant gas known as pentafluoroethane, and R-134a is a refrigerant gas known as tetrafluoroethane, in particular 1,1,1,2-tetrafluoroethane.[3] Accordingly, for any refrigerant to be marketed as R-421A in accordance with ASHRAE's designated standard, the refrigerant so marketed must include 58% (plus or minus 1%) R-125 refrigerant gas and 42% (plus or minus 1%) R134a refrigerant gas, wherein the combined weights of R-125 and R-134a total 100% by mass of the two refrigerant gasses in the refrigerant composition.

26. Further, as set forth by ASHRAE, there are non-refrigerant gas components that are considered additives that can be included in a refrigerant composition but that are not considered in determining the refrigerant gas composition of a refrigerant product or whether a refrigerant

[1] https://www.epa.gov/snap/compositions-refrigerant-blends
[2] https://www.ashrae.org/technical-resources/standards-and-guidelines/ashrae-refrigerant-designations
[3] *Id.*

product meets a particular refrigerant designation such as R-421A. Such additives can include, for example, a lubricating oil, a corrosion inhibitor, a surfactant and a foaming agent.

27. A blend of refrigerant gasses comprised of components having different boiling temperatures will undergo a phase change that results in a gliding evaporation and condensing temperature, affecting the functionality of the blend of refrigerant gasses. The particular ratio of pentafluoroethane and tetrafluoroethane in Choice's R-421A provides a temperature glide that makes it particularly effective as a substitute and replacement for R-22. R-421A is thus designed to retrofit and for use in systems that previously accepted R-22, without requiring further modification.

28. Choice's predecessors spent a substantial amount of time and resources designing, developing, and bringing Choice's innovative R-421A product to the market. As a result, beginning in 2012, Choice has been granted multiple patents for its R-421A product, including U.S. Patent No. 9,982,179, entitled, "Refrigerant with Lubricating Oil for Replacement of R22 Refrigerant".

29. Choice's R-421A is a valuable gas refrigerant composition or blend used in residential and commercial air conditioning and refrigeration equipment as a substitute for the older refrigerant R-22.

30. Choice's R-421A is a more ozone-friendly substitute to replace HCFCs such as R-22.

31. Choice's R-421A is marketed in the United States under the registered incontestable trademark Choice®. Information regarding Choice® R-421A is available at http://rmsgas.com/r-421a-info/.

32. Choice® R-421A is manufactured by a single global source for U.S. markets licensed and imported into the U.S. exclusively by Choice Refrigerants.

33. Defendant Dynatemp was formerly an exclusive distributor of Choice's R-421A refrigerant product.

THE '179 PATENT

34. Choice is the owner, by assignment, of all right, title, and interest in and to U.S. Patent No. 9,982,179 ("the '179 Patent") which issued from the United States Patent and Trademark Office on May 29, 2018.

35. A true and correct copy of the '179 Patent is attached hereto as Exhibit A.

36. Claim 21 of the '179 Patent reads as follows:

> In an apparatus designed for use with chlorodifluoromethane refrigerant, the improvement comprising substituting the chlorodifluoromethane with a refrigerant composition designed to achieve a phase change,
>
> [a] the refrigerant composition comprising a combination of refrigerant gases, said refrigerant gases consisting of a blend of tetrafluoroethane and pentafluoroethane, the ratio of the tetrafluoroethane to the pentafluoroethane being selected such that the blend exhibits a dew point at about −32° F. or a bubble point at about −41.5° F. at about one standard atmosphere of pressure,
>
> [b] wherein in the substitute refrigerant said pentafluoroethane is present in an amount of 59% to 57% by weight and said tetrafluoroethane is present in an amount of 41% to 43% by weight of the combined weight of the pentafluoroethane and tetrafluoroethane on the basis of the combined weights of said pentafluoroethane and said tetrafluoroethane totaling 100%, and
>
> [c] wherein the tetrafluoroethane is 1,1,1,2-tetrafluoroethane.

37. Claim 26 of the '179 Patent reads as follows:

> A method for refilling an apparatus designed for use with a chlorodifluoromethane refrigerant, the method comprising:
>
> [a] selecting a substitute refrigerant composition designed to achieve a phase change and comprising a combination of refrigerant gases, the refrigerant gases consisting of a blend of tetrafluoroethane and pentafluoroethane, the ratio of the tetrafluoroethane to the

pentafluoroethane being selected such that the blend exhibits a dew point at about −32° F. or a bubble point at about −41.5° F. at about one standard atmosphere of pressure, wherein in the substitute refrigerant said pentafluoroethane is present in an amount of 59% to 57% by weight and said tetrafluoroethane is present in an amount of 41% to 43% by weight of the combined weight of the pentafluoroethane and tetrafluoroethane on the basis of the combined weights of said pentafluoroethane and said tetrafluoroethane totaling 100%,

[b] supplying the substitute refrigerant composition under pressure, in a cylinder can fitted with an outlet compatible with a chlorodifluoromethane recharging manifold of the apparatus; and

[c] adding to said apparatus via the manifold the substitute refrigerant composition for chlorodifluoromethane, and wherein the tetrafluoroethane is 1,1,1,2-tetrafluoroethane.

38. Claim 31 of the ’179 Patent reads as follows:

A refrigerant composition comprising a combination of refrigerant gases, the refrigerant gases consisting of

[a] a blend of tetrafluoroethane and pentafluoroethane, the ratio of the tetrafluoroethane to the pentafluoroethane being selected such that the blend exhibits a dew point at about −32° F. or a bubble point at about −41.5° F. at about one standard atmosphere of pressure,

[b] wherein in the substitute refrigerant said pentafluoroethane is present in an amount of 59% to 57% by weight and said tetrafluoroethane is present in an amount of 41% to 43% by weight of the combined weight of the pentafluoroethane and tetrafluoroethane on the basis of the combined weights of said pentafluoroethane and said tetrafluoroethane totaling 100%, and

[c] wherein the tetrafluoroethane is 1,1,1,2-tetrafluoroethane.

39. Claims 24, 29 and 34 further recite that the blend of refrigerant gasses of claims 21, 26 and 31, respectively, “exhibits a glide of about 9.5°F.”

40. Claims 25, 30 and 35 recite that “said pentafluoroethane is present in the ratio of about 58% by weight to said tetrafluoroethane present in an amount of about 42% by weight.”

THE INFRINGING PRODUCTS

41. None of the Defendants have a license to manufacture, import or sell any product that practices the ’179 Patent and are not authorized to otherwise practice the ’179 Patent in any manner.

42. Any refrigerant not manufactured according to and licensed under Choice's '179 Patent is not Choice® R421A under applicable environmental or customs laws.

The Dynatemp Defendants' Infringing Products

43. In response to Defendant Dynatemp's termination as Choice's exclusive distributor, in early 2020 the Dynatemp Defendants began marketing a product called "Dynatemp R421A" for sale in the U.S. refrigerant market as a replacement for, and in direct competition with, the Choice® R421A refrigerant product of which Dynatemp previously was the exclusive distributor.

44. Upon information and belief, Defendant FluoroFusion is a blender of refrigerants.

45. Upon information and belief, FluoroFusion orders, combines, blends and/or packages pentafluoroethane (R-125) and 1,1,1,2-tetrafluoroethane (R-134a) such that pentafluoroethane is present in an amount of 59% to 57% by weight and tetrafluoroethane is present in an amount of 41% to 43% by weight.

46. Upon information and belief, FluoroFusion orders, combines, blends and/or packages pentafluoroethane (R-125) and 1,1,1,2-tetrafluoroethane (R-134a) such that pentafluoroethane is present in an amount of 59% to 57% by weight and tetrafluoroethane is present in an amount of 41% to 43% by weight knowing and intending that it will be used in place of or as an alternative to or a substitute for chlorodifluoromethane (R-22) refrigerant and also as an alternative to or as a substitute for Choice® R421A.

47. Defendant Dynatemp is a distributor and seller of refrigerant products. Upon information and belief, Dynatemp purchases a product that contains pentafluoroethane (R-125) and 1,1,1,2-tetrafluoroethane (R-134a) such that pentafluoroethane is present in an amount of 59% to 57% by weight and tetrafluoroethane is present in an amount of 41% to 43% by weight from or

through Defendant FluoroFusion and uses, distributes, sells, and/or offers for sale that refrigerant product labeled as Dynatemp R-421A that it offers as an alternative to or a substitute for chlorodifluoromethane (R-22) refrigerant and also as an alternative to or as a substitute for Choice® R421A.

48. Upon information and belief, R-421A refrigerant is being supplied by the BMP Defendants to the Dynatemp Defendants and re-labeled as Dynatemp R-421A and/or components used to manufacture or blend Dynatemp R-421A, namely pentafluoroethane (R125) and 1,1,1,2-tetrafluoroethane (R134a), and/or are being sold and supplied by the BMP Defendants to the Dynatemp Defendants for combining, blending and/or packaging by Defendant FluoroFusion to make the Dynatemp R421A refrigerant product used, distributed, sold and/or offered for sale by Defendant Dynatemp.

49. Upon information and belief, Defendant Kivlan, who is Chief Executive Officer of Defendant Dynatemp and also an officer of Defendant FluoroFusion, Defendant Gresham, who is Vice-President and sales manager of Defendant Dynatemp and Defendant Chouchot who is President of Defendant FluoroFusion have collaborated together and directed the activities of Defendant Dynatemp and Defendant FluoroFusion complained of herein.

50. Upon information and belief, another officer of Defendant FluoroFusion is William B. Gresham, IV, who is listed as its Vice-President.

51. Upon information and belief, Defendant Gresham issued a statement, on behalf of Defendant Dynatemp, informing customers of their new Dynatemp R421A product to replace Choice's R-421A product that it previously exclusively distributed with its new Dynatemp R421A refrigerant product, touting the Dynatemp R421A product has having a refrigerant formulation that "has remained the same; therefore, [pressure/temperature] charts are identical, Glide is

identical, and the refrigerant performance is identical. The only changes in the product are the name and the lubricant it is packaged with. … This means the only noticeable change for the end-user will be the packaging. … It will be important to stress that the product … falls under the ASHRAE-approved designation of R421A. … We are very excited to continue to provide this R22 alternative to our customers." A true and correct copy of Defendant Dynatemp's statement offering the Dynatemp R421A product is attached as Exhibit B (hereinafter also "Defendant Dynatemp's Statement").

52. A true and correct copy of Dynatemp's Safety Data Sheet for its Dynatemp R421A product, issued 3/8/2019, is attached as Exhibit C.

The BMP Defendants' Infringing Activities

53. In 2015, the U.S. Department of Commerce ("Commerce") and the International Trade Commission ("ITC") began an investigation into whether the People's Republic of China was unfairly dumping (*i.e.*, subsidizing) various blends of refrigerants into the U.S. refrigerant market. The investigation focused on a class of refrigerants known as hydrofluorocarbons ("HFCs") which includes R-421A and other HFC refrigerants. *See Hydrofluorocarbon Blends and Components Thereof from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 81 Fed. Reg. 42314 (June 29, 2016) ("Final Determination").

54. In 2016, Commerce and ITC determined that China was indeed illegally dumping HFC refrigerants into U.S. markets, and consequently imposed significant antidumping duties on imports of HFC blends from China. *See Hydrofluorocarbon Blends From the People's Republic of China: Antidumping Duty Order,* Dck. A–570–028, 81 Fed. Reg. 55436 (Aug. 19, 2016) ("HFC Blends Order").

55. Choice® R-421A, as a patented refrigerant, is expressly excluded from the HFC Blends Order. *See* HFC Blends Order, 81 Fed. Reg. at 55436:3 ("Also excluded from this investigation are **patented HFC blends**, including, but not limited to, ISCEONR blends, including MO99TM (R–438A), MO79 (R–422A), MO59 (R–417A), MO49PlusTM (R–437A) and MO29TM (R–422D), GenetronR PerformaxTM LT (R–407F), **Choice® R–421A**, and Choice®–421B.") (emphasis added).

56. In addition, imports of the HFC component R-134a from China are subject to a separate antidumping duty of 167.02%. *See 1,1,1,2 Tetrafluoroethane (R–134a) from the People's Republic of China: Antidumping Duty Order*, Dck. A-570-044, 82 Fed. Reg. 18,422 (Apr. 19, 2017) (the "134a Order"). Choice® R-421A contains 42% (plus or minus 1%) R-134a by volume.

57. Between November 2016 and early 2018, the BMP Defendants, directly or indirectly, imported at least 640,000 kilograms of chemicals which were identified by Defendant BMP and affiliates of Defendant BMP on Customs forms as refrigerant goods designated "R421A" (the "Shipments").

58. On information and belief, the BMP Defendants arranged for the import of the Shipments from China to the BMP Defendants with knowledge of Choice's patent rights. In particular, the BMP Defendants, as importer of record for such shipments, would have prepared shipping papers reflecting the declaration of "R-421A" when they knew or should have known that the goods were patented in order to claim the shipments were expressly excluded from the HFC Blends Order.

59. The BMP Defendants declared the value of the Shipments as exceeding $3,000,000.

60. Indeed, Defendant BMP and affiliates of Defendant BMP admitted in various filings in a government investigation initiated by the Department of Commerce that the Shipments were of "patented R421A".

61. Furthermore, the BMP Defendants stated to the Department of Commerce that the Shipments comprised 58% pentafluoroethane (R125) refrigerant gas and 48% 1,1,1,2-tetrafluoroethane (R134a) refrigerant gas.

62. Defendant BMP and affiliates of Defendant BMP also admitted in the same Department of Commerce proceeding that they lack any patent or license rights in the patented R421A.

63. Upon information and belief, the BMP Defendants have and are continuing to provide, offer to sell, and sell R421A from the Shipments and from new shipments either in its blended form comprising 58% pentafluoroethane (R125) refrigerant gas and 48% 1,1,1,2-tetrafluoroethane (R134a) refrigerant gas, and/or in the form of the individual components of R421A knowing and expecting the components will be re-blended by the Dynatemp Defendants for the packaging and sale of the Dynatemp R421A refrigerant product that is the subject of this Complaint.

The Infringement of the '179 Patent

64. Upon information and belief, Defendants' ongoing manufacture, use, offer for sale, and sale of refrigerant gasses that are ultimately packaged and marketed as the Dynatemp R421A product infringes at least Claims 21, 24, 25, 26, 29, 30, 31, 34 and 35 of the '179 Patent.

65. The Dynatemp R421A refrigerant product is designed for use in an apparatus that is designed for use with chlorodifluoromethane (R22) refrigerant, as set forth in the preamble of Claim 21.

66. Based on the Dynatemp Defendants' own Statement, Defendants' Dynatemp R421A product is a refrigerant composition provided as a substitute for chlorodifluoromethane (R-22) in an apparatus designed for use with chlorodifluoromethane (R-22), the Dynatemp R421A product being a refrigerant composition designed to achieve a phase change, the Dynatemp R421A refrigerant composition comprising a combination of refrigerant gases, said refrigerant gases consisting of a blend of tetrafluoroethane and pentafluoroethane, the ratio of the tetrafluoroethane to the pentafluoroethane being selected such that the blend exhibits a bubble point at about −41.5° F at about one standard atmosphere of pressure, as set forth in feature [a] of claim 21 of the '179 Patent.

67. Based on the Dynatemp Defendants' own Statement and Safety Data Sheet, the substitute refrigerant of Defendants' Dynatemp R421A product is a combination of refrigerant gasses, in which pentafluoroethane is present in an amount of 59% to 57%, i.e., 58% (plus or minus 1%), by weight and said tetrafluoroethane is present in an amount of 41% to 43%, i.e., 42% (plus or minus 1%), by weight of the combined weight of the pentafluoroethane and tetrafluoroethane on the basis of the combined weights of said pentafluoroethane and said tetrafluoroethane totaling 100%, more particularly the pentafluoroethane is present in an amount of 58% by weight and said tetrafluoroethane is present in an amount of 42% by weight of the combined weight of the pentafluoroethane and tetrafluoroethane on the basis of the combined weights of said pentafluoroethane and said tetrafluoroethane totaling 100%, as set forth in feature [b] of claim 21, and also in claim 25, of the '179 Patent.

68. Based on the Dynatemp Defendants' own Safety Data Sheet, the tetrafluoroethane of Defendants' Dynatemp R421A product is 1,1,1,2-tetrafluoroethane as set forth in feature [c] of claim 21 of the '179 Patent.

69. Defendants' Dynatemp R-421 refrigerant is offered for carrying out a method for refilling an apparatus designed for use with a chlorodifluoromethane (R-22) refrigerant, as set forth in the preamble of Claim 26.

70. Based on the Dynatemp Defendants' own Statement and Safety Data Sheet, Defendants' Dynatemp R-421A product is offered as an alternative or substitute refrigerant composition to chlorodifluoromethane (R-22) and is designed to achieve a phase change and comprising a combination of refrigerant gases, the refrigerant gases consisting of a blend of tetrafluoroethane and pentafluoroethane, the ratio of the tetrafluoroethane to the pentafluoroethane being selected such that the blend exhibits a bubble point at about −41.5° F. at about one standard atmosphere of pressure, wherein in the substitute refrigerant said pentafluoroethane is present in an amount of 59% to 57%, i.e., 58% (plus or minus 1%), by weight and said tetrafluoroethane is present in an amount of 41% to 43%, i.e., 42% (plus or minus 1%), by weight of the combined weight of the pentafluoroethane and tetrafluoroethane on the basis of the combined weights of said pentafluoroethane and said tetrafluoroethane totaling 100% to meet the ASHRAE-approved designation for R-421A, more particularly the pentafluoroethane present in an amount of 58% by weight and said tetrafluoroethane present in an amount of 42% by weight of the combined weight of the pentafluoroethane and tetrafluoroethane on the basis of the combined weights of said pentafluoroethane and said tetrafluoroethane totaling 100%, as set forth in feature [a] of Claim 26, and also in Claim 30.

71. Based on the Dynatemp Defendants' own Statement and Safety Data Sheet, Defendants supply their Dynatemp R421A product under pressure, in a cylinder that can fitted with an outlet compatible with a chlorodifluoromethane (R-22) recharging manifold of the apparatus, as set forth in feature [b] of Claim 26.

72. Based on the Dynatemp Defendants' own Safety Data Sheet, Defendants' Dynatemp R421A product is designed to be added to the apparatus via the manifold the substitute refrigerant composition for chlorodifluoromethane, and the tetrafluoroethane of Defendants' R421A is 1,1,1,2-tetrafluoroethane, as set forth in feature [c] of Claim 26.

73. Defendants' Dynatemp R421A product is a refrigerant composition comprising a combination of refrigerant gases, as set forth in the preamble of Claim 31.

74. Based on the Dynatemp Defendants' own Statement and Safety Data Sheet, Defendants' Dynatemp R421A product includes a blend of tetrafluoroethane and pentafluoroethane, the ratio of the tetrafluoroethane to the pentafluoroethane being selected such that the blend exhibits a bubble point at about −41.5° F. at about one standard atmosphere of pressure, as set forth in feature [a] of Claim 31.

75. Based on the Dynatemp Defendants' own Statement and Safety Data Sheet, in Defendant's Dynatemp R421A product, the pentafluoroethane is present in an amount of 59% to 57%, i.e., 58% (plus or minus 1%), by weight and said tetrafluoroethane is present in an amount of 41% to 43%, i.e., 42% (plus or minus 1%), by weight of the combined weight of the pentafluoroethane and tetrafluoroethane on the basis of the combined weights of said pentafluoroethane and said tetrafluoroethane totaling 100% to meet the ASHRAE-approved designation for R-421a, more particularly the pentafluoroethane is present in an amount of 58% by weight and said tetrafluoroethane is present in an amount of 42% by weight of the combined weight of the pentafluoroethane and tetrafluoroethane on the basis of the combined weights of said pentafluoroethane and said tetrafluoroethane totaling 100%, as set forth in feature [b] of Claim 31, and also in Claim 35.

76. Based on the Dynatemp Defendants' own Safety Data Sheet, the tetrafluoroethane in Defendants' Dynatemp R421A is 1,1,1,2-tetrafluoroethane, as set forth in feature [c] of Claim 31.

77. Furthermore, based on the Dynatemp Defendants' own Statement admitting that "Glide is identical" Defendants' Dynatemp R421A meets the features as set forth in Claims 24, 29 and 34.

78. Accordingly, Defendants directly infringe at least claims 31, 34 and 35 of the '179 Patent under 35 U.S.C. § 271(a) by making, using, offering to sell, or selling the Dynatemp R421A product.

79. Defendants also indirectly infringe at least claims 21, 24, 25, 26, 29 and 30 of the '179 Patent under 35 U.S.C. § 271(b) and (c). Defendants have knowingly and intentionally induced and/or contributed to the infringement of the '179 Patent with the Dynatemp R421A product by, *inter alia*, i) providing instructions on how to install and use the Dynatemp R421A product in an infringing manner, ii) directing and encouraging the actions of employees, distributors, and customers to directly infringe; and/or iii) offering a product with no substantial non-infringing use that is not a stable article or commodity of commerce.

COUNT I
Direct Infringement of the '179 Patent, 35 U.S.C. § 271(a)

80. Choice incorporates by reference the allegations contained in paragraphs 1-79 of this Complaint, as if fully set forth herein.

81. Defendants directly infringe, literally or under the doctrine of equivalents, at least Claims 31, 34 and 35 of the '179 Patent by, without authority, making, using, importing, selling,

or offering to sell a product that is ultimately packaged and marketed as Dynatemp R421A within the United States in violation of 35 U.S.C. § 271(a).

82. As a result of Defendants' infringement of the '179 Patent, Choice has been damaged and will continue to be damaged by Defendants' unlawful conduct. Choice is entitled to recover damages pursuant to 28 U.S.C. § 284 adequate to compensate it for Defendants' infringing activities in an amount to be determined at trial, but in no event less than a reasonable royalty.

83. Defendants' infringement of the '179 Patent has injured and continues to injure Choice and will continue to cause irreparable harm to Choice unless Defendants are enjoined from infringing one or more claims of the '179 Patent. Choice is entitled to preliminary and/or permanent injunctive relief against Defendants from further infringement pursuant to 28 U.S.C. § 283.

84. Upon information and belief, Defendants' past and continued infringement of the '179 Patent has been deliberate and willful, which warrants an award of treble damages and attorneys' fees to Choice pursuant to 28 U.S.C. §§ 284 & 285.

COUNT II
Induced Infringement of the '179 Patent, 35 U.S.C. § 271(b)

85. Choice incorporates by reference the allegations contained in paragraphs 1-84 of this Complaint, as if fully set forth herein.

86. Upon information and belief, Defendants instruct their customers on how to install and use the refrigerant product that is ultimately packaged and marketed as Dynatemp R421A in an infringing manner.

87. Upon information and belief, Defendants direct and encourage their employees, distributors, and customers to install and use a refrigerant product that is ultimately packaged and

marketed as the Dynatemp R421A product in an infringing manner, in particular as an alternative or a substitute for chlorofluoromethane (R-22) refrigerant.

88. When the Dynatemp R421A product is used by Defendants' employees, distributors, and customers in the manner instructed and directed by Defendants, Defendants' employees, distributors, and customers directly infringe at least Claims 21, 24, 25, 26, 29 and 30 of the '179 Patent, as set forth above.

89. Accordingly, Defendants indirectly infringe the '179 Patent by inducing the infringement by others of the '179 Patent, pursuant to 35 U.S.C. § 271(b).

90. As a result of Defendants' infringement of the '179 Patent, Choice has been damaged and will continue to be damaged by Defendants' unlawful conduct. Choice is entitled to recover damages pursuant to 28 U.S.C. § 284 adequate to compensate it for Defendants' infringing activities in an amount to be determined at trial, but in no event less than a reasonable royalty.

91. Defendants' infringement of the '179 Patent has injured and continues to injure Choice and will continue to cause irreparable harm to Choice unless Defendants are enjoined from infringing one or more claims of the '179 Patent. Choice is entitled to preliminary and/or permanent injunctive relief against Defendants from further infringement pursuant to 28 U.S.C. § 283.

92. Upon information and belief, Defendants' past and continued infringement of the '179 Patent has been deliberate and willful, which warrants an award of treble damages and attorneys' fees to Choice pursuant to 28 U.S.C. §§ 284 & 285.

COUNT III
Contributory Infringement of the ’179 Patent, 35 U.S.C. § 271(c)

93. Choice incorporates by reference the allegations contained in paragraphs 1-92 of this Complaint, as if fully set forth herein.

94. Defendants have had knowledge of the ’179 Patent.

95. Based on the Dynatemp Defendants’ own Statement and Safety Data Sheet, Defendants are selling, packaging and marketing a refrigerant product ultimately called Dynatemp R421A separately rather than as a part of a system.

96. Dynatemp R-421A is essential to practicing claims 21, 24, 25, 26, 29 and 30 of the ’179 Patent, because the claimed substituting the chlorofluoromethane in an apparatus designed for use with chlorofluoroethane of claims 21, 24 and 25 and the method of claims 26, 29 and 30 cannot be carried out using an product described as R421A refrigerant, such as the Choice® R421A product, unless the refrigerant product meets ASHRAE’s criteria for designation of an R421A refrigerant product, meaning the product must consist of 58% (plus or minus 1%) pentafluoroethane (R125) and 48% (plus or minus 1%) 1,1,1,2-tetrafluoroethane (R134a).

97. Dynatemp R421A has no substantial non-infringing use(s), because, being labelled an R421A refrigerant, it is intended for use as a substitute or alternative to chlorodifluoromethane (R22) and must be used in an apparatus also designed for use with chlorodifluoromethane (R-22) refrigerant.

98. When Dynatemp R421A is introduced or installed by the customer into an apparatus designed for use with a chlorodifluoromethane (R-22) refrigerant, pursuant to the Dynatemp Defendants’ Statement and Safety Data Sheet, the apparatus and the method of refilling the apparatus directly infringe at least claims 21, 24, 25, 26, 29 and 30 of the ’179 Patent.

99. Defendants are aware that the refrigerant product packaged and marketed as Dynatemp R421A is especially made or especially adapted for use in infringement of the '179 Patent, in that it can only be used in a manner that infringes the '179 Patent.

100. Accordingly, Defendants indirectly infringe the '179 Patent by contributing to infringement of the '179 patent, pursuant to 35 U.S.C. § 271(c).

JURY DEMAND

Choice hereby respectfully requests a trial by jury of all issues raised in this Complaint, pursuant to Rule 38 of the Federal Rules of Civil Procedure.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Choice prays that this Court enter judgment in favor of Choice and against Defendants Dynatemp International, LLC, FluoroFusion Specialty Chemicals, LLC, BMP USA, Inc., IGas USA, Inc., T.T. International Co., Ltd., Harold B. Kivlan, IV, William Gresham, and David Couchot, as follows:

A. Entry of judgment that Defendants have directly and indirectly infringed the '179 Patent pursuant to 35 U.S.C. § 271 (a), (b) and (c);

B. An order preliminarily and permanently enjoining Defendants, and their respective agents, servants, officers, directors, employees, attorneys, affiliated companies, successors-in-interest, and all those in active concert or participation with them, and all other parties properly enjoined by law, from infringing directly or indirectly, inducing others to directly infringe, and/or contributing to the infringement of the claims of the '179 Patent;

C. An order that Defendants be ordered to file with this Court, and to promptly serve on counsel for Choice, within twenty (20) days after entry of any

injunction issued by the Court in this action, a sworn statement setting forth in detail the manner and form in which Defendants have complied with the injunction;

D. An order that Defendants provide an accounting and pay to Choice damages in an amount adequate to compensate Choice for Defendants' infringement of the '179 Patent, including damages for lost profits, but in no event less than a reasonable royalty, including up to treble damages for Defendants' willful infringement pursuant to 35 U.S.C. § 284;

E. An order that this is an exceptional case under 35 U.S.C. § 285 meriting that Choice be awarded its costs, including its reasonable attorneys' fees and other expenses incurred in connection with this action;

F. Any other relief that the Court finds legal, just and equitable, as may be available under law or equity, and which the Court finds proper.

This the 8th day of April, 2020.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Case Number: **5:20-CV-00142**

DYNATEMP INTERNATIONAL, INC., and FLUOROFUSION SPECIALTY CHEMICALS, INC., Plaintiffs, v. RMS OF GEORGIA, LLC d/b/a Choice® Refrigerants Defendant and Counter-Plaintiff, v. DYNATEMP INTERNATIONAL, INC. and FLUOROFUSION SPECIALTY CHEMICALS, INC. Counter-Defendants	**DEFENDANT'S AMENDED ANSWER TO COMPLAINT and COUNTERCLAIMS**

Defendant RMS of Georgia, LLC d/b/a/ Choice® Refrigerants ("Defendant" or "RMS"), by and through its undersigned counsel, hereby amends its Answer to Plaintiffs' Complaint, as a matter of right pursuant to Fed. R. Civ. P. 15(a)(1). Defendant incorporates by reference the responses and affirmative defenses set forth in Defendant's Answer to Complaint filed on September 4, 2020 as if set forth fully herein.

Pursuant to Rule 13 of the Federal Rules of Civil Procedure, RMS hereby presents its counterclaims against Dynatemp International, Inc. ("Dynatemp") and FluoroFusion Specialty Chemicals, Inc. ("FluoroFusion"), and in support thereof alleges as follows:

Parties and Jurisdiction

1. RMS is a limited liability company organized under the laws of the State of Georgia with a principal place of business located at 610 McFarland 400 Drive, Alpharetta, Georgia 30004-3374.

2. Dynatemp is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal place of business in Mechanicsburg, Pennsylvania. Dynatemp is authorized by the North Carolina Secretary of State to conduct business in the State of North Carolina. It maintains a registered address at 2626 Glenwood Avenue, Suite 500, Raleigh, North Carolina 27608 and operates a distribution warehouse in Clayton, North Carolina.

3. FluoroFusion is a corporation organized and existing under the laws of the State of Delaware with a principal place of business located at 3950 Powhatan Road, Clayton, North Carolina 27520.

4. This Court has jurisdiction over the subject matter of these counterclaims under 28 U.S.C. § 1331, 1338, and 1367.

5. This Court may exercise personal jurisdiction over Dynatemp and FluoroFusion for the purpose of adjudicating the counterclaims recited herein because Dynatemp and FluoroFusion have submitted themselves to the personal jurisdiction of this Court through the commencement of this action.

6. Venue for the adjudication of these counterclaims is proper within this judicial district pursuant to 28 U.S.C. § 1391.

Factual Background

7. RMS, also known as Choice or Choice Refrigerants ("Choice"), is the exclusive licensee of R421A LLC to, for example, make, have made, import, offer to sell and sell a refrigerant product known as R421A, covered and protected under various patents owned by R421A LLC.

8. Choice is an innovator of heating, ventilation, and air conditioning (HVAC) products, namely refrigerants and condensing units.

9. One HVAC product, chlorodifluoromethane, referred to as R-22 or Freon, is a known ozone-depleting refrigerant common in many industrial applications, including residential air conditioning systems.

10. R-22 itself is a refrigerant gas within the class of chemicals known as hydrochlorofluorocarbons or "HCFCs." Use of R-22 in the United States has been phased out by the U.S. Environmental Protection Agency ("EPA") pursuant to the Montreal Protocol on Substances that Deplete the Ozone Layer (the "Montreal Protocol"), a protocol to the Vienna Convention for the Protection of the Ozone Layer, and domestic legislation under the federal Clean Air Act, 42 U.S.C. §§ 7671-7671q, and the Stratospheric Ozone Protection regulations promulgated by the EPA in Title 40, Code of Federal Regulations, Part 82, due to the environmentally damaging effect of HCFCs on the global ozone layer.

11. As of January 1, 2020, production and import of R-22 was banned in the United States by the Environmental Protection Agency pursuant to the Clean Air Act. The banned R-22 is subject to a phaseout period beginning January 1, 2010.

12. In anticipation of the R-22 ban, R421A, LLC, by and through its predecessors in interest, developed a novel blend of two refrigerant gases, known as R125 and R134a, as a replacement for R-22. This novel refrigerant blend became known in the industry as R-421A.

13. Choice applied to the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) to receive a new refrigerant designation for its aforementioned new refrigerant blend and for approval of its new refrigerant blend as a substitute refrigerant and replacement for R-22.

14. ASHRAE approved Choice's new refrigerant, giving it the designation R-421A.

15. Choice also applied to the U.S. Environmental Protection Agency (EPA) for approval of a particular embodiment of Choice's R-421A refrigerant including an additive in the form of a proprietary lubricant under the EPA's Significant New Alternatives Policy (SNAP) Program under which the EPA evaluates and has authority to approve new refrigerants as substitutes for ozone-depleting substances, such as R-22. The EPA accepted Choice's application and granted approval of "R-421A (Choice R421A) as a substitute for HCFC-22 [R-22]" and has listed by brand name the Choice R-421A as an approved alternative in its Summary of Substitute Refrigerants Listed in SNAP Notice 25, and, thus, the Choice® R-421A refrigerant is an EPA SNAP-approved R-22 substitute refrigerant and replacement.[1]

16. In accordance with ASHRAE's designation, for a refrigerant to be called or referred to as R-421A it must have certain fixed properties and, more specifically, must constitute a blend of refrigerant gasses comprising 58% (plus or minus 1%) R-125 and 42% (plus or minus 1%) R-134a.[2] R-125 is a refrigerant gas known as pentafluoroethane, and R-134a is a refrigerant gas

[1] https://www.epa.gov/snap/compositions-refrigerant-blends
[2] https://www.ashrae.org/technical-resources/standards-and-guidelines/ashrae-refrigerant-designations

known as tetrafluoroethane, in particular 1,1,1,2-tetrafluoroethane.[3] Accordingly, for any refrigerant to be marketed as R-421A in accordance with ASHRAE's designated standard, the refrigerant so marketed must include 58% (plus or minus 1%) R-125 refrigerant gas and 42% (plus or minus 1%) R134a refrigerant gas, wherein the combined weights of R-125 and R-134a total 100% by mass of the two refrigerant gasses in the refrigerant composition.

17. Further, as set forth by ASHRAE, there are non-refrigerant gas components that are considered additives that can be included in a refrigerant composition but that are not considered in determining the refrigerant gas composition of a refrigerant product or whether a refrigerant product meets a particular refrigerant designation such as R-421A. Such additives can include, for example, a lubricating oil, a corrosion inhibitor, a surfactant and a foaming agent.

18. A blend of refrigerant gasses comprised of components having different boiling temperatures will undergo a phase change that results in a gliding evaporation and condensing temperature, affecting the functionality of the blend of refrigerant gasses. The particular ratio of pentafluoroethane and tetrafluoroethane in the Choice® R-421A refrigerant provides a temperature glide that makes it particularly effective as a substitute and replacement for R-22. The Choice®R-421A is thus designed to retrofit and for use in systems that previously accepted R-22, without requiring further modification.

19. R-421A, LLC's predecessors spent a substantial amount of time and resources designing, developing, and bringing the innovative R-421A product to the market, known as Choice® R421A refrigerant. As a result, beginning in 2012, multiple patents have been granted for the Choice® R-421A refrigerant product, including: 1) U.S. Patent No. 9,982,179, entitled, "Refrigerant with Lubricating Oil for Replacement of R22 Refrigerant"; 2) U.S. Patent No.

[3] *Id.*

8,197,706, entitled, “Refrigerant with Lubricating Oil for Replacement of R22 Refrigerant”; and 3) U.S. Patent No. 10,703,949, entitled, “Refrigerant with Lubricating Oil for Replacement of R22 Refrigerant.”

20. The Choice® R-421A refrigerant is a valuable gas refrigerant composition or blend used in residential and commercial air conditioning and refrigeration equipment as a substitute and retrofit for the older refrigerant R-22.

21. The Choice® R-421A refrigerant is a more ozone-friendly substitute to replace HCFCs such as R-22.

22. The Choice® R-421A refrigerant is marketed in the United States under the trademark Choice®, that is the subject of incontestable U.S. Trademark Registration No. 3,059,315 for refrigerants and under the trademark THE EASY CHOICE® that is the subject of incontestable U.S. Trademark Registration No. 2,964,645 also for refrigerants, both in the name of RMS/ Choice. Information regarding Choice® R-421A is available at http://rmsgas.com/r-421a-info/.

23. The Choice® R-421A refrigerant is packaged in a distinctive package and trade dress on which the trademarks Choice® and THE EASY CHOICE® are displayed, for example, the packaging depicted below.

24. The Choice® R-421A refrigerant is manufactured by a single global source for U.S. markets, licensed and imported into the U.S. exclusively by Choice Refrigerants.

25. Dynatemp was formerly a distributor of the Choice® R-421A refrigerant product.

26. In response to Dynatemp's termination as a distributor of Choice's R421A refrigerant product, Dynatemp and FluoroFusion began blending and marketing a product called "Dynatemp R421A" for sale in the U.S. refrigerant market as a replacement for, and in direct competition with, the Choice® R421A refrigerant product that Dynatemp previously distributed for Choice.

27. Paragraph 23 of the present Complaint admits that the Dynatemp R421A product is supplied in cannisters to Dynatemp by FluoroFusion.

28. Upon information and belief, FluoroFusion orders, combines, blends and/or packages the Dynatemp R421A product knowing and intending that it will be offered, promoted and sold as an alternative to, and in direct competition with, the Choice® R421A refrigerant product.

29. Upon information and belief, Dynatemp acquires or obtains from FluoroFusion the refrigerant product labeled as Dynatemp R421A that it offers as an alternative to, and in direct competition with, Choice's R421A refrigerant product.

30. Upon information and belief, Dynatemp and FluoroFusion are offering the Dynatemp R421A product under and using images of Choice's distinctive R421A trade dress product packaging and displaying the Choice® and THE EASY CHOICE® trademarks to promote the sale of their competing Dynatemp R421A product.

31. Choice has complained to Dynatemp and FluoroFusion about their unauthorized use of images of Choice's R421A trade dress packaging displaying the Choice® and THE EASY CHOICE® trademarks to promote and sell their Dynatemp R421A product, such as Choice's product image displayed above.

32. Attached as Exhibit A is a true and correct download and printed copy of a web page dated 5/4/2020 of Johnstone Supply, that upon information and belief is a customer of Dynatemp and FluoroFusion, promoting the sale of R421A Refrigerant prominently displaying an image of Choice's R421A trade dress packaging displaying the trademark Choice® and the with the label "Brand: Dynatemp" and lower on the page under the heading "Brand Name" stating "Dynatemp-R421A."

33. Attached as Exhibit B is a true and correct download and printed copy of a more recent web page dated 8/29/2020 of Johnstone Supply still promoting the sale of R421A Refrigerant prominently displaying an image of Choice's R421A trade dress packaging displaying the trademarks Choice® and THE EASY CHOICE® with the label "Brand: Dynatemp," even after Choice complained of such use of the image of Choice's R421A trade dress packaging to promote their competing product. Clicking on the link "All Dynatemp Products" towards the

bottom of the page leads to another page, Exhibit C, which is also a true and correct download and printed copy, promoting "R421A Refrigerant," that again prominently displays an image of Choice's R421A trade dress packaging displaying the Choice® trademark with the label "Brand: Dyantemp" to promote the competing Dynatemp R421A product.

34. Attached as Exhibit D is a true and correct download and printed copy of a web page dated 8/6/2020 of Southern Pipe & Supply, upon information and belief another customer of Dynatemp and FluoroFusion, also promoting the sale of R421A Refrigerant prominently displaying an image of Choice's R421A trade dress packaging displaying the Choice® trademark with the label "Dynatemp International R-421A" and lower on the page stating "Mfg. Name Dynatemp International."

35. Furthermore, upon information and belief, Dynatemp and FluoroFusion have neither submitted the formulation for their Dynatemp R421A refrigerant product to the U.S. EPA for approval under the Significant New Alternatives Policy (SNAP) program, nor have they received EPA SNAP approval for their competing R421A product formulation.

36. Yet, Dynatemp and FluoroFusion promote their Dynatemp R421A product as "produced within AHRI-700 standards (which are promulgated by the Air-Conditioning, Heating and Refrigeration Institute (AHRI) and not by the U.S. EPA) and, thus, complies fully with the EPA SNAP regulations" (see Exhibit E) Further, as shown in Paragraph 29 of the present Complaint, Dynatemp and FluoroFusion assert their Dynatemp R421A product has received EPA SNAP approval. Upon information and belief, Dynatemp and FluoroFusion make these assertions intending to confuse the consuming public into believing that they have received EPA SNAP approval for the formulation of their Dynatemp R421A refrigerant that they assert is the same as Choice's R421A refrigerant product that received EPA SNAP approval, when Dynatemp and

FluoroFusion have neither submitted their assertedly different formulation for their Dynatemp R421A refrigerant product for SNAP approval let alone received EPA SNAP approval for their Dynatemp R421A product.

37. Further, Dynatemp and FluoroFusion have promoted and continue to promote their Dynatemp R421A refrigerant as being "identical" to that of Choice's R421A refrigerant while at the same time containing "a different lubricant that we [Dynatemp and FluoroFusion] believe you will find works even better." *Id*, Exhibit E. Upon information and belief, Dynatemp and FluoroFusion have no performance specification or data to show their Dynatemp R421A product with what they assert includes a different lubricant than Choice's R421A product performs identically or even better than Choice's R421A product.

38. Dynatemp's Executive Vice President, Will Gresham, issued a public statement titled "Introducing DYNATEMP R421A™", informing customers of their new Dynatemp R421A product to replace Choice's R-421A product that it previously distributed with its new Dynatemp R421A refrigerant product, touting the Dynatemp R421A product as having a refrigerant formulation that "has remained the same; therefore, [pressure/temperature] charts are identical, Glide is identical, and the refrigerant performance is identical. The **only** changes in the product are the name and the lubricant it is packaged with. … This means the only noticeable change for the end-user will be the packaging. … It will be important to stress that the product … falls under the ASHRAE-approved designation of R421A. … Marketing collateral will be available and distributed soon." (Emphasis added). The statement also falsely states: "It will be important to stress that the product does not infringe any intellectual property." Exhibit F, Gresham Statement regarding R421A.

39. Dynatemp has admitted in the aforementioned Gresham Statement that the Dynatemp R421A refrigerant is the same as Choice's patented R421A refrigerant with the only changes in the Dynatemp R-421A product (as compared with Choice R-421A) being "the name and the lubricant it is packaged with," *Id*, thereby admitting infringement of both of the '949 Patent and the '179 Patent.

40. Additionally, Choice learned this summer, providing notice by email to Defendants on July 2, 2020, that the different lubricant of Dynatemp's Statement is polyol ester ("POE") that is covered by Choice's third patent, the '706 Patent.

41. Dynatemp and FluoroFusion have offered and promoted, and continue to offer and promote, their Dynatemp R421A refrigerant product as a two-component refrigerant substitute for R22 refrigerant in direct competition against Choice's R421A refrigerant.

42. Dynatemp is promoting the Dynatemp R421A product as an "R22 retrofit" on its website, along with a Safety Data Sheet (SDS), a true copy of which is attached as Exhibit G.

43. Dynatemp's Safety Data Sheet states that the Dynatemp R421A product is a blend of two refrigerant gases consisting of 58% pentafluoroethane (R125) and 42% 1,1,1-2 tetrafluoroethane (R134a), thereby admitting infringement of the '949 Patent.

44. Further, Dynatemp and FluoroFusion state in Paragraph 22, and again in Paragraph 27 (wherein they state that, while having different lubricant additives, "the formulations of the refrigerants are the same"), of the present Complaint that their "Dynatemp R-421A™ [product] is a mixture of 58% pentafluoroethane (by weight) and 42% 1,1,1-2 tetrafluoroethane (by weight)," as demonstrated by their Safety Data Sheet, further admitting their infringement of the '949 Patent.

45. Additionally, Dynatemp and FluoroFusion state in Paragraph 29 of the present Complaint that additionally "Dynatemp R-421A™ and Choice® R-421A exhibit the same pressure-temperature characteristics," further admitting infringement of the '179 Patent.

FIRST CLAIM FOR RELIEF:
FEDERAL TRADE DRESS AND TRADEMARK INFRINGEMENT, DILUTION, PASSING OFF AND UNFAIR COMPETITION

46. Plaintiff incorporates and realleges Paragraphs 1 through 45 above, as if fully set forth herein.

47. Dynatemp and FluoroFusion are, through their customers, promoting and selling their Dynatemp R421A refrigerant product using images of Choice's distinctive trade dress packaging and displaying Choice's registered incontestable trademarks Choice® and THE EASY CHOICE®. Dynatemp and FluoroFusion's use thereof constitutes a false and/or misleading designation of origin, and/or a false or misleading representation that their Dynatemp R421A refrigerant originates from, is sponsored by, affiliated with, or is connected with Choice. Choice's use of its distinctive trade dress packaging for its R421A refrigerant has been, through its own use and that of its predecessor, continuous since at least about 2010 and 2017, respectively, and its use of the above trademarks has been, through its own use and that of its predecessors, continuous since at least 1997.

48. On numerous occasions, Choice has demanded that Dynatemp and FluoroFusion stop the use of Choice's R421A product trade dress and its registered marks displayed thereon in promoting and selling their Dynatemp R421A refrigerant product. Despite this, Dynatemp and FluoroFusion have failed to cease and instead continue their infringement thereof in the promotion and sale of their Dynatemp R421A product. Dynatemp's and FluoroFusion's continued use of

Choice's distinctive product packaging trade dress and trademarks has, therefore, being knowing, willful and intentional.

49. Dynatemp's and FluoroFusion's continuing use of Choice's distinctive product packaging trade dress and trademarks is likely to cause, and has caused, confusion, mistake, or deception as to the affiliation, connection, or association of Dynatemp and FluoroFusion with Choice, and as to the origin, sponsorship, or approval of Dynatemp's and FluoroFusion by Choice. It has further diluted the value of the trade dress and trademarks to Choice.

50. The foregoing acts of Dynatemp and FluoroFusion constitute trademark and trade dress infringement, dilution, passing off, false designation of origin, false advertising unfair competition and violate Sections 32(1), 43(a) and 43(c) of the Lanham Act, 15 U.S.C. §§ 1114 and 1125.

51. Dynatemp and FluoroFusion have profited as a result of their actions, and have caused Choice to suffer damages, and to continue to suffer damages and costs, in an amount to be proven at trial.

52. Unless enjoined by this Court, Dynatemp and FluoroFusion will continue their acts of infringement and unfair competition causing continuing, significant and irreparable damage to Choice and its trade dress and trademarks.

53. Choice has no adequate remedy at law because of the confusion likely to be caused in the marketplace by Dynatemp's and FluoroFusion's wrongful use of Choice's trade dress and trademarks. Choice is, therefore, entitled to a preliminary and permanent injunction prohibiting Dynatemp and FluoroFusion from continuing to infringe on Choice's trade dress and trademarks.

SECOND CLAIM FOR RELIEF
FALSE ADVERTISING – 15 U.S.C. § 1125(a)

54. Plaintiff incorporates and realleges Paragraphs 1 through 53 above, as if fully set forth herein.

55. Dynatemp and FluoroFusion have made false representations of fact in commercial advertising about the Choice® R-421A product and the Dynatemp R-421A product.

56. Dynatemp's and FluoroFusion's false representations of fact about the Choice® R-421A product and the Dynatemp R-421ATM product are likely to influence a purchaser's decision to buy Choice® R- 421A instead of Dynatemp R-421A.

57. Dynatemp's and FluoroFusion's false representations of fact alleged herein are literally false. They have the tendency to deceive, and upon information and belief have deceived, a substantial segment of their audience.

58. The false representations of fact alleged herein have been placed by Dynatemp and FluoroFusion into interstate commerce.

59. As a direct and proximate result of Dynatemp's and FluoroFusion's false advertising, Choice has been or is likely to be injured by a direct diversion of sales and by a lessening of goodwill associated with its Choice® R-421A product and its other products, causing Choice to sustain lost profits and injury to its business and reputation.

60. Dynatemp's and FluoroFusion's false representations of fact alleged herein were willful.

61. Upon information and belief, as a direct and proximate result of Dynatemp's and FluoroFusion's false advertising, Dynatemp and FluoroFusion have earned profits through their sale of Dynatemp R-421A product.

62. As a direct and proximate result of Dynatemp's and FluoroFusion's false advertising, Choice has sustained irreparable injury to its products' goodwill and business reputation that is not fully compensable through money damages. Choice will continue to sustain such irreparable injury if the false advertising by Dynatemp and FluoroFusion alleged herein is not enjoined and Dynatemp and FluoroFusion are not directed to issue appropriate corrective statements to the United States refrigerant market.

THIRD CLAIM FOR RELIEF
COMMON LAW UNFAIR COMPETITION

63. Plaintiff incorporates and realleges Paragraphs 1 through 62 above, as if fully set forth herein.

64. Through their commercial advertising and false representations of fact concerning the Choice® R-421 product and the Dynatemp R-421A product, Dynatemp and FluoroFusion have engaged in acts that are unfair and/or deceptive and constitute unfair competition under North Carolina common law.

65. As a direct and proximate result, Choice's legitimate business interests have been injured.

66. Dynatemp and FluoroFusion are liable to Choice for unfair competition under North Carolina common law.

67. Upon information and belief, as a result of their unfair and/or deceptive acts, Dynatemp and FluoroFusion have been unjustly enriched through its generation of profits which in equity they should not be permitted to retain.

68. As a direct and proximate result of Dynatemp's and FluoroFusion's unfair and/or deceptive acts, Choice has sustained irreparable injury to its products' goodwill and business reputation that is not fully compensable through money damages. Choice will continue to sustain

such irreparable injury if the unfair competition by Dynatemp and FluoroFusion alleged herein is not enjoined and Dynatemp and FluoroFusion are not directed to issue appropriate corrective statements to the United States refrigerant market.

69. Dynatemp's and FluoroFusion's unfair competition has been willful, wanton, and in reckless disregard of Choice's rights and interests. Choice, therefore, should be awarded punitive damages in an amount to punish Dynatemp and FluoroFusion for such misconduct and to deter such misconduct in the future.

FOURTH CLAIM FOR RELIEF
TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

70. Plaintiff incorporates and realleges Paragraphs 1 through 69 above, as if fully set forth herein.

71. Upon information and belief, through their activities alleged herein, Dynatemp and FluoroFusion have intentionally induced one or more potential customers not to enter into contracts to purchase Choice® R-421A from Choice. Such potential customers would have purchased Choice® R-421A product from Choice but for Dynatemp's and FluoroFusion's activities alleged herein.

72. Dynatemp's and FluoroFusion's inducement of potential customers not to enter into contracts to purchase Choice® R-421A from Choice is without justification.

73. As a direct and proximate result, Choice has sustained damages in an amount to be proved at trial.

FIFTH CLAIM FOR RELIEF
VIOLATION OF N.C. GEN. STAT. § 75-1.1, et seq.

74. Plaintiff incorporates and realleges Paragraphs 1 through 73 above, as if fully set forth herein.

75. Dynatemp's and FluoroFusion's activities alleged herein were and are in or affecting commerce in North Carolina and constitute unfair and deceptive acts or practices in violation of N.C. Gen. Stat. §75- 1.1, *et seq.*

76. As a direct and proximate result, Choice has sustained damage in its business or property in amounts to be proved at trial, which amounts should be trebled pursuant to N.C. Gen. Stat. §75-16.

77. As a direct and proximate result, Choice has sustained irreparable injury to its business, reputation and goodwill and will continue to do so unless and until RMS' unfair and deceptive acts or practices in violation of N.C. Gen. Stat. § 75-1.1, *et seq.* are enjoined.

78. Dynatemp's and FluoroFusion's activities alleged herein that constitute unfair and deceptive acts or practices in violation of N.C. Gen. Stat. §75-1.1, *et seq.* were willful. Choice, therefore, is entitled, pursuant to N.C. Gen. Stat. § 75-16.1, to recover its reasonable attorneys' fees incurred in connection with this action.

PRAYER FOR RELIEF

WHEREFORE, Choice respectfully requests:

(a) Entry of judgment in Choice's favor against each of Dynatemp and FluoroFusion on each and every claim for relief set forth herein;

(b) An award of compensatory damages to Choice in an amount to be proved at trial;

(c) Entry of an order directing each of Dynatemp and FluoroFusion (i) to account to Choice for all profits earned by Dynatemp and FluoroFusion in association with their trade dress and trademark infringement, dilution, passing off, unfair competition, and false advertising alleged herein and (ii) to disgorge such profits to Choice;

(d) An award of enhanced damages up to three times all damages awarded to Choice for Dynatemp's and FluoroFusion's trade dress and trademark infringement, dilution, passing off, unfair competition, and false advertising in violation of 15 U.S.C. §1125(a);

(e) An award of punitive damages to Choice in such amount as a jury may deem just and appropriate;

(f) An award of treble damages to Choice pursuant to N.C. Gen. Stat. §75-16;

(g) Entry of an order permanently enjoining each of Dynatemp and FluoroFusion, their officers, directors, members, managers, agents, employees, servants and attorneys, and any persons in active concert with them, from any and all trade dress and trademark infringement, dilution, passing off, unfair competition, and false advertising concerning the Choice® R-421A product, the Dynatemp R-421A product, Choice, and Choice's products;

(h) Entry of an order permanently enjoining each of Dynatemp and FluoroFusion, their officers, directors, members, managers, agents, employees, servants and attorneys, and any persons in active concert with them, from tortuously interfering with customers and potential customers of Choice concerning Choice, the Choice® R-421A product, and Choice's other products;

(i) Entry of an order directing each of Dynatemp and FluoroFusion to issue such corrective advertising as the Court shall deem appropriate to correct Dynatemp's and FluoroFusion's false advertising concerning the Choice® R-421A product, the Dynatemp R-421A product, Choice, and Choice's products;

(j) An award of reasonable attorneys' fees incurred by Choice in connection with this action as may be allowed by law;

(k) An award of all costs incurred by Choice in connection with this action;

(l) An award to Choice of prejudgment and post-judgment interest; and

(m) Such other and further relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Choice hereby demands trial by jury as to all issues in this action so triable as of right.

This the 25th day of September, 2020.

/s/ David Wisz
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