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7 **UNITED STATES DISTRICT COURT**
 8 **SOUTHERN DISTRICT OF CALIFORNIA**

9 XpandOrtho, Inc.;
 Exactech, Inc.
 10 Plaintiffs,

11 v.

12 Zimmer Biomet Holdings, Inc.;
 Zimmer, Inc.;
 13 Zimmer US, Inc. d/b/a Zimmer
 Biomet Southern California;
 14 ORTHOsoft ULC d/b/a Zimmer CAS.
 Defendants.

Case No. '21CV105 BEN KSC

COMPLAINT

1. Violation Of Defend Trade Secrets Act
2. Aiding And Abetting Violation Of Defend Trade Secrets Act
3. Violation Of California Uniform Trade Secret Act
4. Aiding And Abetting Violation Of California Uniform Trade Secret Act
5. Breach Of Contract
6. Tortious Interference With Contract
7. Breach Of The Implied Covenant Of Good Faith And Fair Dealing
8. Fraud
9. Conversion
10. Unjust Enrichment
11. Intentional Interference With Prospective Economic Advantage
12. Negligent Interference With Prospective Economic Advantage
13. Breach Of Confidence
14. Copyright Infringement
15. Violation Of Cal. Bus & Prof. Code Section 17200

DEMAND FOR JURY TRIAL

1 INTRODUCTION AND NATURE OF THE ACTION

2 1. This civil action is brought by Plaintiffs XpandOrtho, Inc.
3 (“XpandOrtho”) and Exactech, Inc. (“Exactech”) (collectively, “Plaintiffs”)
4 against Defendants Zimmer Biomet Holdings, Inc., Zimmer, Inc., Zimmer US,
5 Inc., and ORTHOsoft ULC (collectively, “Zimmer” or “Defendants”) in light of,
6 *inter alia*, Defendants’ misappropriation of XpandOrtho’s property, including
7 confidential, proprietary, and trade secret information, as well as Defendants’
8 unfair competition, breach of contract, and infringement of certain of
9 XpandOrtho’s registered copyrighted works.

10 2. In 2012, two orthopedic surgeons associated with Scripps Health,
11 Dr. Clifford Colwell and Dr. Darryl D’Lima, founded XpandOrtho to develop
12 new technology to address the problem of inaccurate soft tissue balancing during
13 total knee arthroplasty (also known as knee replacement). XpandOrtho was a
14 small startup and sought to join forces with an established company to bring its
15 technology to market.

16 3. In 2018, Zimmer used the guise of a potential acquisition of
17 XpandOrtho to convince XpandOrtho to provide extensive information about its
18 technology and business. XpandOrtho ensured a Non-Disclosure Agreement
19 (“NDA”) was in place to cover this transfer of information so that it could
20 maintain the integrity of its confidential information, which was its major asset.
21 Relying on this NDA and believing Zimmer was legitimately interested in an
22 acquisition of XpandOrtho, XpandOrtho shared its design files, allowed Zimmer
23 to test XpandOrtho’s proprietary devices at Zimmer’s labs, and allowed Zimmer
24 to attend live clinical and cadaver surgeries in which XpandOrtho’s devices were
25 used.

26 4. After receiving all of this information, Zimmer stated that it was not
27 interested in acquiring XpandOrtho. Zimmer then began misusing XpandOrtho’s
28 proprietary information for its own benefit and in violation of the NDA. For

1 example, mere weeks calling off its purported potential acquisition, Zimmer
2 secretly filed patent applications that incorporated XpandOrtho technology: U.S.
3 Provisional Application Nos. 62/697,220 (attached as Exhibit 1 to this
4 Complaint) and 62/697,227 (attached as Exhibit 2 to this Complaint) and
5 corresponding publications U.S. Patent Application Publication Nos.
6 2019/0240045 (attached as Exhibit 3 to this Complaint) and 2019/0240046
7 (attached as Exhibit 4 to this Complaint). Zimmer used images of XpandOrtho's
8 XO¹ product in their patent figures and even referenced XpandOrtho's product
9 by name—initially trying to cover up its misappropriation by redacting out
10 XpandOrtho's name. XpandOrtho did not consent to Zimmer's use of
11 XpandOrtho's proprietary information in their patent applications and did not
12 find out about the applications until after they were published, which publication
13 occurred approximately a year after the applications were filed. Zimmer could
14 not have developed the devices described in those applications without access to
15 XpandOrtho's proprietary information. Zimmer misused XpandOrtho's
16 proprietary information without consent in an effort to gain unfair competitive
17 advantages, such as competing with XpandOrtho and improperly advancing
18 Zimmer's own R&D and patenting process.

19 5. After Zimmer misappropriated XpandOrtho's proprietary
20 information, XpandOrtho entered into acquisition negotiations with Exactech. In
21 March 2019, Exactech acquired XpandOrtho, and XpandOrtho is now a
22 subsidiary of Exactech. At the time of acquisition, neither Exactech nor
23 XpandOrtho was aware of Zimmer's misappropriation, because Zimmer's patent
24 applications had not yet published. Exactech believed that it was acquiring a
25 company with intellectual property assets that had not been misappropriated.
26 Thus, both XpandOrtho and Exactech have been harmed by Zimmer's wrongful
27 conduct.

28

1 13. On information and belief, Defendant Zimmer, Inc. is a Delaware
2 corporation and is a subsidiary of Zimmer Biomet Holdings, Inc. On information
3 and belief, Zimmer, Inc. maintains its principal place of business at 345 East
4 Main Street, Warsaw, Indiana 46580.

5 14. On information and belief, Zimmer, Inc. regularly conducts business
6 in the State of California and this District including as described herein.

7 15. On information and belief, Defendant Zimmer US, Inc. is a
8 Delaware corporation and is a subsidiary of Zimmer Biomet Holdings, Inc. On
9 information and belief, Zimmer US, Inc. maintains its principal place of business
10 at 1800 West Center Street, Warsaw, Indiana 46581.

11 16. On information and belief, Zimmer US, Inc. does business as
12 Zimmer Biomet Southern California.

13 17. On information and belief, Zimmer US, Inc. regularly conducts
14 business in the State of California and this District including as described herein.

15 18. On information and belief, Defendant ORTHOsoft ULC d/b/a
16 Zimmer CAS is a Canadian corporation and is a subsidiary of Zimmer Biomet
17 Holdings, Inc. ORTHOsoft ULC maintains its principal place of business at 75
18 Queen Street, Suite 3300, Montreal, Quebec, Canada H3C 2N6.

19 19. On information and belief, ORTHOsoft ULC regularly conducts
20 business in the State of California and this District including as described herein.

21 20. On information and belief, Zimmer Biomet Holdings, Inc., Zimmer,
22 Inc., Zimmer US, Inc., and ORTHOsoft ULC are, and were during all times
23 relevant to this Complaint, alter egos of and agents of each other.

24 21. On information and belief, all subsidiaries of Zimmer Biomet
25 Holdings, Inc., including Zimmer, Inc., Zimmer US, Inc., and ORTHOsoft ULC
26 are, and were during all times relevant to this Complaint, directed and controlled
27 by Zimmer Biomet Holdings, Inc.
28

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