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Prof Wins \$8M IP Trial Against Health Cos., Convicted Ex-Atty

By **Melissa Angell**

Law360 (November 18, 2020, 10:58 PM EST) -- A California federal judge handed an \$8 million bench trial win to a retired University of California, Davis, professor Tuesday, finding that a medical devices company, a health clinic operator and a convicted, disbarred attorney are liable for infringing the professor's patented insulin delivery technology.

In an opinion outlining his findings, U.S. District Judge Troy L. Nunley ruled in favor of emeritus professor Thomas T. Aoki and his California nonprofit, Aoki Diabetes Research Institute, finding that treatments administered by Trina Health LLC clinics infringe Aoki's pulsed insulin diabetes treatment covered by six patents dubbed the RQ patents. He also awarded Aoki's counsel attorneys' fees.

Judge Nunley found that Aoki is entitled to an injunction that bars defendants Gregory Ford Gilbert, Bionica Inc. and Trina Health from using the patented technology, pointing saying Aoki is "entitled to possess the right to exclude others from using his property."

"An injunction would no doubt largely impact Mr. Gilbert and Trina Health to the extent any active clinics would cease to operate," the opinion said. "Nonetheless, the court finds the hardships tip in favor of Dr. Aoki. [The treatment] is the result of Dr. Aoki's life's work."

Aoki's counsel, Frank Sommers of Sommers & Schwartz LLP, told Law360 Wednesday that the opinion vindicates Aoki's claims and is also significant since it awards attorney fees, which are not automatically required in patent litigation.

"[The opinion] is an underscoring of the egregiousness of Gilbert's conduct," Sommers said.

David Barrett, an attorney for Trina Health and Bionica, told Law360 that he disagreed with the ruling and the calculation of damages.

"The plaintiff was using the patents for many years for profit prior to applying for the patents," Barrett said. "In all likelihood there will be an appeal."

Barrett added that it "was truly malicious" that more than 10 of his clients involved in the suit were dragged through eight years of litigation and not found liable on any claims.

Gilbert did not immediately respond Wednesday to a request for comment.

Aoki launched his complaint in October 2011 against multiple defendants and Gilbert, an attorney. Gilbert was suspended last year and disbarred in March after he pled guilty to a bribery charge. The suit accuses the defendants of patent infringement, copyright infringement, violations of the Lanham Act and breaches of both fiduciary duty and confidential relationship.

The six patents at issue encompass the "respiratory quotient," a measure of carbon dioxide output as it relates to the amount of oxygen absorbed by a patient during respiration. Aoki's focus was the respiratory quotient and how it can assess liver function, affect glucose levels and, ultimately, measure how patients respond to the pulsatile insulin treatment.

Gilbert, who also founded Trina Health, faces accusations that he opened at least 33 diabetes treatment clinics that used Aoki's patented "MAT treatment" as their own "APT" treatment, according to the opinion.

Aoki and Gilbert first met in the late 1980s through a referral and agreed to set up the nonprofit Aoki Diabetes Research Institute together. In his work with Aoki, according to court documents, Gilbert executed a confidentiality agreement that assigned Aoki any inventions made during the time the two worked together.

Meanwhile, Gilbert worked as an attorney for ADRI and helped license Aoki's technology to a corporation known as Diabetex, an entity interested in commercializing Aoki's technology and setting up clinics, according to the opinion. Diabetex received the license in 1999, but ran out of money two years later and subsequently relinquished the technology in a settlement agreement, the opinion says.

In 2005, Bionica, a medical devices company, entered into an agreement under which it purchased the rights that the investment company Connecticut Innovations held from a previous agreement related to Aoki's technology.

Judge Nunley handed Aoki a win after a 19-day bench trial last year.

In his opinion, Judge Nunley determined that none of the defendants held any legitimate rights to Aoki's patented treatment through any license agreements.

The opinion also says that Aoki never received written notice of the sale to Bionica and that CI could not sell or transfer any license to Gilbert or Bionica without Aoki's written consent, according to the opinion.

The judge also said Gilbert was not credible as a witness and discarded many of his previous statements, such as Gilbert's claim that Trina's treatments differ from Aoki's treatment and that Gilbert's treatments are his own invention.

"Mr. Gilbert's claim that APT is different from MAT and was his own invention — and specifically to the extent he claims an epiphany in 2002 led to the development of APT and use of APT at MTC clinics — is therefore contradicted by his own prior sworn declaration and is not credible or believable," the opinion said.

In his opinion, the judge requested that Aoki's counsel file a proposed order that identifies the terms of the permanent injunction and a motion for attorney fees.

Gilbert pled guilty in January 2019 to conspiring to bribe an Alabama legislator to sway legislation in Gilbert's favor related to his diabetes treatment, according to court documents. As a result, he served six months in federal prison and another six months of home detention.

The patents in suit are U.S. Patent No. 6,579, 531; 6,582,716; 6,613,342; 6,613,736; 6,821,527; and 6,967,191.

Aoki is represented by Frank Feldher Sommers of Sommers & Schwartz LLP and Duyen Nguyen of DTN Law Group.

Bionica Inc and Trina Health are represented by David S. Barrett of Law Office of David Barrett.

Gilbert is represented pro se.

The case is Thomas T. Aoki et al. v. Gregory Ford Gilbert et al., case number 2:11-cv-02797, in the U.S. District Court for the Eastern District of California.

--Editing by Peter Rozovsky.

