

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

VAPOTHERM, INC.,

Plaintiff,

v.

VERO BIOTECH, LLC and
CLAYTON SANTIAGO

Defendants.

Civil Case No. _____

VERIFIED COMPLAINT

Plaintiff Vapotherm, Inc. (“Vapotherm”), by and through its undersigned counsel, brings this action for injunctive relief, declaratory relief, and monetary damages resulting from actions taken by Defendants Vero Biotech, LLC (“Vero”) and Clayton Santiago (“Santiago”) in breach of duties arising out of tort and contract law. In support of its requests for relief, Vapotherm states as follows:

1. This action arises out of Santiago’s breach of his contractual obligations to Vapotherm by soliciting Vapotherm’s employees to terminate their relationships with Vapotherm and to enter into employment relationships working with Santiago at Vero. Vero encouraged and induced Santiago to breach his contract with Vapotherm and intentionally and improperly interfered with Vapotherm’s contractual and economic relationships with its employees.

2. Following Santiago’s voluntary termination of his four-year employment relationship with Vapotherm, Vapotherm alleges that he joined Vero and proceeded to solicit at least three (3) Vapotherm employees, Benjamin Lonsway, Kurt Wong, and Ryan Philpot, to terminate their employment with Vapotherm and to join and work with Santiago at Vero. This conduct breached Santiago’s Confidentiality, Non-Compete, and Assignment of Inventions

Agreement with VapoTherm, which prohibits solicitation of VapoTherm employees to join any organization with whom Santiago is affiliated and which was an agreement entered into in consideration of Santiago's employment with VapoTherm, pursuant to which he was paid substantial sums in exchange for a series of concrete commitments, including commitments not to undermine VapoTherm after having been provided access to VapoTherm and to the benefits this access provided.

3. Vero, in encouraging and enabling Santiago to solicit the three (3) former VapoTherm employees (and potentially others) intentionally and improperly interfered with VapoTherm's contractual and economic relations with third parties by, among other things, causing Santiago to breach his employment agreement with VapoTherm and soliciting and causing employees to terminate their employment relationships with VapoTherm and commence employment relationships with Vero.

4. As a result of Santiago and Vero's actions, VapoTherm's staff has been depleted and its ability to make, sell and distribute life-saving equipment to treat symptoms related to COVID-19 has been harmed in the middle of a pandemic caused by the novel coronavirus.

5. VapoTherm seeks injunctive relief, declaratory relief, and monetary damages against Santiago and Vero for Santiago's breach of contract and Santiago's and Vero's intentional interference with VapoTherm's contractual relationships.

PARTIES

6. VapoTherm is a Delaware corporation with a principal place of business at 100 Domain Drive, Exeter, New Hampshire 03833. The transactions and events described in this Complaint pertain to VapoTherm's operations based in Exeter, New Hampshire, where it operates its headquarters and oversees the sale and distribution of its products nationwide.

7. VapoTherm is a publicly traded medical device manufacturing company whose primary product, since 2008, has been the Precision Flow® system, a product which delivers heated, oxygen-rich, humidified breathing gasses at a high velocity to hospital patients who are in respiratory distress, including often premature and neonatal infants.

8. Since the inception of the global pandemic caused by the novel coronavirus in or around March 2020, VapoTherm's products and technology have been used to treat respiratory-related symptoms of COVID-19.

9. Upon information and belief, Defendant Vero Biotech LLC is a Delaware limited liability company with a principal place of business of 387 Technology Circle NW, STE 125, Atlanta, GA, 30319.

10. Upon information and belief, Defendant Clayton Santiago is an individual residing at 4051 Highway 136 E, Dawsonville, GA 30534 and is currently employed by Vero as a Regional Sales Director.

JURISDICTION AND VENUE

11. This Court has subject matter jurisdiction over this case pursuant to 28 USC § 1332 because there is a justiciable controversy between the parties, who are citizens of different states, and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

12. This Court has personal jurisdiction over the Defendants by virtue of their contacts with New Hampshire which directly relate to the causes of action and factual support pled by VapoTherm in this Complaint. *See State v. North Atlantic Refining Ltd.*, 160 N.H. 275, 281 (2010) (specific jurisdiction over the parties exists where contacts relate to the cause of action).

13. During the period of Santiago's employment in various sales positions with Vapotherm, the company was, at all times, based and headquartered in New Hampshire. In Santiago's Confidentiality, Non-Compete, and Assignment of Inventions Agreement which Santiago executed at the commencement of his employment with Vapotherm, Vapotherm's principal place of business is identified as 22 Industrial Drive in Exeter, New Hampshire. *See Exhibit A*, p. 1. Upon review of this contract, Santiago understood that he was establishing an ongoing employment relationship with a New Hampshire-based company.

14. Santiago travelled to Vapotherm's headquarters in New Hampshire multiple times during the course of his employment, including for training and sales meetings. In August of each year during his employment, Santiago travelled to New Hampshire for attendance at and participation in Vapotherm's Global Development Week at or around its New Hampshire headquarters.

15. Santiago continuously communicated with Vapotherm's New Hampshire headquarters throughout his employment, ran all invoices for the work he performed through Vapotherm's New Hampshire headquarters, and was paid by Vapotherm from its New Hampshire headquarters. The products which Santiago sold were manufactured or assembled and delivered from Vapotherm's New Hampshire headquarters.

16. Santiago further contacted Vapotherm's New Hampshire headquarters to resolve any and all payroll, benefits, or other issues that arose during the course of his employment. All of Vapotherm's "back office" services, including employee benefits, customer billing, timekeeping, and email accounts are administered from New Hampshire. Vapotherm paid Santiago from its payroll accounts which are maintained in New Hampshire.

17. VapoTherm's claims asserted in this Complaint against Santiago, including for breach of his employment contract with a New Hampshire-based company, arise out of and relate to Santiago's contacts with New Hampshire. Accordingly, this Court has personal jurisdiction over Santiago. *See Numeric Analytics, LLC v. McCabe*, 161 F. Supp. 3d 348, 355 (E.D. Pa. 2016) (finding personal jurisdiction over remote out-of-state employees for breach of contracts with forum state company); *Opus Fund Servs. (USA) LLC v. Theorem Fund Servs., LLC*, No. 17 C 923, 2017 WL 4340123, at *4 (N.D. Ill. Sept. 29, 2017) (finding jurisdiction over remote worker in employer's forum state).

18. VapoTherm's claims against Vero, including for intentional interference with VapoTherm's contractual relationships, result from Vero's actions which were directed at VapoTherm in New Hampshire and which harmed VapoTherm in New Hampshire.

19. Soon after Vero hired Santiago in February of 2020, VapoTherm communicated with Vero and sent Vero a copy of Santiago's employment contract. Accordingly, Vero was aware, not later than March 2020, that VapoTherm is based in New Hampshire and that any harm to VapoTherm as a result of any breach of the Santiago contract would be felt in New Hampshire.

20. Vero's intentional interference with VapoTherm's contractual relationships caused, among other things, the breach of Santiago's employment contract with a New Hampshire-based company. Accordingly, Vero's misconduct in this case was expressly aimed at New Hampshire, VapoTherm's principal place of business.

21. The brunt of VapoTherm's injuries caused by Vero and Santiago, including, but not limited to, financial harm incurred in order to replace poached employees, is felt in New Hampshire, and the Defendants knew that would be the case. Vero and Santiago thus should reasonably anticipate being hailed to court in New Hampshire Court to answer for their actions.

See Calder v. Jones, 465 U.S. 783, 784 (1984) (finding jurisdiction over out-of-state tortfeasors who directed their actions at the forum state); *Astro-Med, Inc. v. Nihon Kohden Am., Inc.*, 591 F.3d 1, 10 (1st Cir. 2009) (out of state company is subject to jurisdiction for tortious interference claim where it knew that employee it was hiring had been employed by a company based in the forum state); *CE Distribution, LLC v. New Sensor Corp.*, 380 F.3d 1107 (9th Cir. 2004) (holding *Calder* applies to business torts); *Lyme Tymber Co. v. DSF Investors, LLC*, 150 N.H. 557, 559 (2004) (construing state's long-arm statute as permitting jurisdiction over foreign companies in a manner that is co-extensive with the federal constitution).

22. Furthermore, upon information and belief, Vero is a company which distributes its product nationally, including into New Hampshire. The Court thus has general personal jurisdiction over Vero. *See Steir v. Girl Scouts of the USA*, 218 F. Supp. 2d 58, 64-65 (D.N.H. 2002) (continuous course of conduct in New Hampshire by New York corporation subjected New York corporation to personal jurisdiction in New Hampshire).

23. Venue is proper in this district pursuant to 28 USC § 1391(b) because the events or omissions giving rise to Vapotherm's claims substantially occurred in New Hampshire.

24. In summary, Santiago entered into his employment contract with Vapotherm in New Hampshire, the district in which Vapotherm is headquartered. That contract contained the non-solicitation provision at issue in this case. With full knowledge of that contract and the non-solicitation provision, Defendants solicited and hired away three (3) former Vapotherm employees, improperly interfering with Vapotherm's contractual relationships. Since New Hampshire is "one of the places where the tortious interference . . . occurred and where the harms from these torts were felt," venue is proper in this district. *See Astro-Med, Inc.*, 591 F.3d at 12.

FACTS COMMON TO ALL COUNTS

25. VapoTherm hereby realleges and incorporates by reference the facts and allegations contained in the preceding paragraphs as if fully set forth therein.

26. On or around January 1, 2016, Santiago commenced his employment with VapoTherm.

27. In connection with and in consideration of his employment with VapoTherm, Santiago executed a Confidentiality, Non-Compete, and Assignment of Inventions Agreement dated as of December 6, 2015 (the “Agreement”). A copy of the Agreement is attached to this Complaint as Exhibit A.

28. The Agreement provides, among other things, that, during the period of his employment with VapoTherm and “for a period of one year thereafter, Employee [Santiago] will not solicit or encourage any employee of the Company [VapoTherm] to terminate his or her employment with the Company or to accept employment with any subsequent employer with whom Employee is affiliated in any way.”

29. The Agreement further provides that “Employee acknowledges that any violation of this Agreement by Employee will cause irreparable injury to the Company, and the Company shall be entitled to extraordinary relief in court. Employee agrees that if court proceedings are required to enforce any provision of this Agreement, the prevailing party shall be entitled to an award of reasonable and necessary expenses of litigation.”

30. During his employment with VapoTherm, Santiago began as an Area Sales Manager and held roles as a Principal Sales Manager, Area Sales Director, and Regional Business Director. In or around October of 2019 Santiago transitioned to the position of Executive Accounts Manager.

31. As a Regional Business Director with VapoTherm from approximately January 2019 through October 2019, Santiago's duties included, among other things, the development and leadership of Sales Managers and Clinical Managers. In this role, Santiago hired, coached, and developed Sales Managers and Clinical Managers in his assigned geographic area, which was based in Atlanta and covered the southeastern United States. He also managed the day-to-day activities of Sales Managers and Clinical Managers in his area.

32. Benjamin Lonsway and Kurt Wong each joined VapoTherm in June of 2019 and were employed by VapoTherm as Clinical Managers in VapoTherm's southeastern region. During their employment with VapoTherm, Mr. Lonsway was based in Atlanta, Georgia and Mr. Wong was based in Miami, Florida.

33. Ryan Philpot joined VapoTherm in or around January of 2020 and was also employed by VapoTherm as a Clinical Manager in VapoTherm's Southeast region. During his employment with VapoTherm, Mr. Philpot was based in Tampa, Florida.

34. As VapoTherm Clinical Managers, Mr. Lonsway, Mr. Wong, and Mr. Philpot performed duties including supporting the growth and correct usage of VapoTherm products by, among other things, interfacing with health care providers in hospitals and institutions where VapoTherm may be utilized in the respiratory care process.

35. Santiago, in his role as a Regional Business Director with, VapoTherm, hired, coached, trained, and directly supervised and worked closely with Mr. Lonsway and Mr. Wong as Clinical Managers within Santiago's territory.

36. Mr. Lonsway and Mr. Wong reported directly to Santiago from June 2019 through approximately October of 2019.

37. In his role as an Executive Accounts Manager, Santiago continued to work in an oversight role with Mr. Lonsway, Mr. Wong, and Mr. Philpot.

38. On February 28, 2020, Santiago voluntarily resigned his employment with Vapotherm to accept a position as a Regional Sales Director with Vero.

39. On March 3, 2020, Vapotherm sent a letter to Vero regarding Santiago and his role as Regional Sales Director with Vero (the “March 3 Letter”).

40. In the March 3 Letter, Vapotherm expressed concern respecting Santiago’s position with Vero and whether Santiago’s acceptance of the position would cause him to breach certain non-compete and non-disclosure provisions of the Agreement.

41. In the March 3 Letter, Vapotherm specifically referred to, and enclosed a copy of, the Agreement.

42. As of March 3, 2020, Vero had a copy of the Agreement and knew that Santiago had a continuing contractual relationship with Vapotherm pursuant to the terms of the Agreement. Vero was further fully aware of the terms and provisions of the Agreement including, but not limited to, the non-solicitation provision of the Agreement.

43. In connection with and in consideration of their employment with Vapotherm, Benjamin Lonsway, Kurt Wong and Ryan Philpot each executed agreements with Vapotherm which contained, among other things, a non-solicitation provision identical to those in the Agreement as set forth above.

44. On November 24, of 2020, Mr. Lonsway, Mr. Wong, and Mr. Philpot all submitted letters of resignation to Vapotherm. Mr. Lonsway and Mr. Philpot’s last day with Vapotherm was December 11, 2020 and Mr. Wong’s last day with Vapotherm was December 9, 2020.

45. Contemporaneous with their resignations from Vapotherm, or very nearly so, Mr. Lonsway, Mr. Wong, and Mr. Philpot commenced employment at Vero as Clinical Educators.

46. Santiago and Vero knew that, prior to their joining Vero, Mr. Lonsway, Mr. Wong, and Mr. Philpot were employed by Vapotherm and were under agreement with Vapotherm to, among other things, refrain from solicitation of Vapotherm employees to join Vero.

47. Upon reasonable inference, information and belief, as Clinical Educators at Vero, Mr. Lonsway, Mr. Wong, and Mr. Philpot work directly with Santiago in his role and within his territory as Regional Sales Director at Vero.

48. Upon reasonable inference, information, and belief, Santiago was involved in the process pursuant to which Vero hired Mr. Lonsway, Mr. Wong and Mr. Philpot away from their positions at Vapotherm.

49. Upon reasonable inference, information, and belief, Santiago solicited and/or encouraged Mr. Lonsway, Mr. Wong, and Mr. Philpot to terminate their employment relationships at Vapotherm and enter into employment relationships with Vero, thereby breaching the Agreement.

50. Upon reasonable inference, information and belief, Vero wrongfully induced Santiago to breach the Agreement by encouraging him to solicit individuals to terminate their employment with Vapotherm and commence employment with Vero.

51. Upon reasonable inference information and belief, Vero continues to solicit Vapotherm employees, and its efforts currently appear focused on Vapotherm employees based in California and the west coast of the United States. Upon information and belief, Santiago,

Benjamin Lonsway, Kurt Wong and Ryan Philpot are familiar with the Vapotherm employees whom Vero continues to solicit and recruit to join Vero.

52. Upon reasonable inference, information, and belief, Vero and Santiago are wrongfully inducing Mr. Lonsway, Mr. Wong, and/or Mr. Philpot to breach their non-solicitation agreements with Vapotherm by soliciting Vapotherm employees based on the west coast to terminate their employment with Vapotherm and join Vero.

CAUSES OF ACTION

53. For all counts that follow, Vapotherm hereby realleges and incorporates by reference the facts and allegations contained in the preceding paragraphs as if fully set forth therein.

COUNT I Injunctive Relief (Against Santiago and Vero)

54. Vapotherm and Santiago are parties to a valid and enforceable written contract, the Agreement, as more fully set forth above.

55. Vapotherm has performed all conditions precedent and/or other obligations under the Agreement.

56. Santiago breached the Agreement by, among other things, soliciting Benjamin Lonsway, Kurt Wong, and Ryan Philpot, prior to December of 2020, to simultaneously terminate their employment relationships with Vapotherm and commence employment with Vero.

57. Vero has intentionally interfered with Vapotherm's existing contractual relations by, among other things, encouraging and inducing Santiago to breach the Agreement by soliciting Mr. Lonsway, Mr. Wong and Mr. Philpot to simultaneously terminate their employment relationships with Vapotherm and commence employment with Vero.

58. VapoTherm and Mr. Lonsway, Mr. Wong and Mr. Philpot are parties to valid and enforceable written contracts pursuant to which Mr. Lonsway, Mr. Wong, and Mr. Philpot have agreed, among other things, not to solicit VapoTherm employees to join Vero.

59. Vero's continued efforts to solicit VapoTherm's employees in California and elsewhere – employees who are familiar to Santiago, Mr. Lonsway, Mr. Wong and Mr. Philpot – lead to a reasonable inference that Vero and Santiago continue to encourage former VapoTherm employees to breach their contracts with VapoTherm.

60. Santiago's and Vero's misconduct has caused and will continue to cause damages to VapoTherm and injury to VapoTherm for which there is no adequate remedy at law.

61. Among other things, upon information and belief, the continued improper conduct by Santiago and Vero in soliciting and hiring VapoTherm employees has and will continue to hinder VapoTherm's ability to make, sell, and distribute life-saving equipment which is used to treat symptoms related to COVID-19 in the middle of a pandemic caused by the novel coronavirus.

62. The Agreement provides that any breach by Santiago entitles VapoTherm to equitable and extraordinary relief. *See* Exhibit A at ¶ 5.

63. Accordingly, VapoTherm is entitled to injunctive relief directing Vero and Santiago to immediately cease all improper solicitation and/or hiring of VapoTherm employees.

COUNT II
Specific Performance
(Against Santiago)

64. VapoTherm and Santiago are parties to a valid and enforceable written contract, the Agreement, as more fully set forth above.

65. Santiago's contractual obligations require him to refrain from soliciting VapoTherm employees. *See* Exhibit A at ¶ 3(b).

66. Santiago breached the Agreement by, among other things, soliciting Benjamin Lonsway, Kurt Wong, and Ryan Philpot, prior to December of 2020, to simultaneously terminate their employment relationships with Vapotherm and commence employment with Vero.

67. Santiago's misconduct has caused and will continue to cause damages to Vapotherm and injury to Vapotherm for which there is no adequate remedy at law.

68. Santiago acknowledged that a violation of the Agreement would cause Vapotherm irreparable injury and entitle Vapotherm to extraordinary and equitable relief. *See* Exhibit A at ¶ 5.

69. Justice and equity require that the non-solicitation provision of the Agreement be enforced against Santiago to require him to refrain from soliciting Vapotherm employees.

COUNT III
Breach of Contract
(Against Santiago)

70. Vapotherm and Santiago are parties to a valid and enforceable written contract, the Agreement, as more fully set forth above.

71. Vapotherm has performed all conditions precedent and/or other obligations under the Agreement.

72. Santiago breached his contractual obligations to Vapotherm.

73. Such breaches include, without limitation, soliciting Benjamin Lonsway, Kurt Wong, and Ryan Philpot, prior to December of 2020, to simultaneously terminate their employment relationships with Vapotherm and commence employment with Vero.

74. As a direct and proximate result of Santiago's breach of the Agreement, and as acknowledged in the Agreement, Vapotherm has suffered and will continue to suffer irreparable harm and monetary damages. *See* Exhibit A at ¶ 5.

75. Santiago's breach of the Agreement depleted VapoTherm's work force in the southeast region in the middle of a pandemic caused by the novel coronavirus and hindered VapoTherm's ability to make, sell, and distribute VapoTherm's life-saving equipment which is used to treat symptoms related to COVID-19 to an area hit particularly hard by the pandemic.

76. Santiago's breach of the Agreement has caused VapoTherm damages in an amount to be determined at trial, not less than \$75,000 including, without limitation, lost profits sustained by VapoTherm as a result of Mr. Lonsway, Mr. Wong and Mr. Philpot terminating their employment with VapoTherm and costs incurred or to be incurred by VapoTherm to replace these employees.

77. VapoTherm is entitled to attorney's fees arising from Santiago's breaching conduct and VapoTherm's actions taken to enforce the Agreement, as provided for by the Agreement. See Exhibit A at ¶ 5.

COUNT IV
Intentional Interference with Existing Contractual Relations
(Against Santiago and Vero)

78. VapoTherm and Santiago are parties to a valid and enforceable written contract, the Agreement, as more fully set forth above.

79. From at least March 3, 2020 through present, Vero was and continues to be aware of the contractual relationship between VapoTherm and Santiago.

80. Vero intentionally, maliciously, and in bad faith interfered with the contractual relationship between VapoTherm and Santiago by, among other things, causing Santiago to breach the Agreement.

81. Upon reasonable inference, information, and belief, Vero, among other things, encouraged and induced Santiago to solicit VapoTherm employees Benjamin Lonsway, Kurt

Wong, and Ryan Philpot to simultaneously terminate their employment with VapoTherm and commence employment with Vero, which was a material breach of the Agreement by Santiago.

82. As a direct and proximate result of Vero's misconduct, and as acknowledged in the Agreement, VapoTherm has suffered and will continue to suffer irreparable harm and monetary damages. *See* Exhibit A at ¶5.

83. VapoTherm and Mr. Lonsway, Mr. Wong and Mr. Philpot are parties to valid and enforceable written contracts pursuant to which Mr. Lonsway, Mr. Wong, and Mr. Philpot have agreed, among other things, not to solicit VapoTherm employees to join Vero.

84. Vero and Santiago knew of the contractual relationships between VapoTherm and Benjamin Lonsway, Kurt Wong, and Ryan Philpot at all relevant times.

85. Upon reasonable inference, information and belief, Vero and Santiago are actively interfering with the contractual relationships between VapoTherm and Mr. Lonsway, Mr. Wong and Mr. Philpot by, among other things, causing or inducing Mr. Lonsway, Mr. Wong and/or Mr. Philpot to solicit VapoTherm employees based on the west coast to terminate their employment with VapoTherm and join Vero.

86. Vero's and Santiago's misconduct has caused VapoTherm damages in an amount to be determined at trial, not less than \$75,000 and including, without limitation, lost profits sustained by VapoTherm as a result of Mr. Lonsway, Mr. Wong and Mr. Philpot terminating their employment with VapoTherm and costs incurred or to be incurred by VapoTherm to replace these employees.

87. Moreover, Vero's and Santiago's improper interference has depleted VapoTherm's work force in the southeast region in the middle of a pandemic caused by the novel coronavirus and hindered VapoTherm's ability to make, sell and distribute VapoTherm's life-saving equipment

which is used to treat symptoms related to COVID-19 to an area hit particularly hard by the pandemic.

COUNT V
Intentional Interference with Prospective Contractual Relations
(Against Santiago and Vero)

88. Vapotherm and Santiago are parties to a valid and enforceable written contract, the Agreement, as more fully set forth above.

89. Vapotherm and Benjamin Lonsway, Kurt Wong, and Ryan Philpot are parties to valid and enforceable written contracts pursuant to which Mr. Lonsway, Mr. Wong, and Mr. Philpot have agreed, among other things, not to solicit Vapotherm employees to join Vero.

90. Vapotherm has contractual and economic relationships with each of its current employees.

91. Vapotherm's relationship with its employees, including current employees and Santiago, Mr. Lonsway, Mr. Wong and Mr. Philpot during the terms of their employment, gives rise to a reasonable expectation of economic advantage in favor of Vapotherm.

92. Vero knew of the economic and contractual relationship by and between Vapotherm and Santiago.

93. Vero and Santiago knew of the economic and contractual relationship by and between Vapotherm and its employees, including Mr. Lonsway, Mr. Wong and Mr. Philpot.

94. Vero, without privilege to do so, intentionally and improperly interfered with Vapotherm's contractual and economic relationships with Santiago, Mr. Lonsway, Mr. Wong and Mr. Philpot by, among other things, causing Santiago, Mr. Lonsway, Mr. Wong, and Mr. Philpot to terminate their employment relationships with Vapotherm and enter into employment relationships with Vero.

95. Vero and Santiago, without privilege to do so, intentionally and improperly interfered with Vapotherm's contractual and economic relationships with Mr. Lonsway, Mr. Wong and Mr. Philpot by, among other things, causing or inducing Mr. Lonsway, Mr. Wong and Mr. Philpot to terminate their employment with Vapotherm and accept employment with Vero.

96. Vero and Santiago continue to intentionally and improperly interfere with Vapotherm's contractual and economic relationships with its employees by, among other things, attempting to cause or induce Vapotherm employees to terminate their employment with Vapotherm and accept employment with Vero.

97. Vero and Santiago's interference with the employment relationships between Vapotherm and its employees, including Mr. Lonsway, Mr. Wong and Mr. Philpot, is improper and without privilege or justification because, among other reasons, Vero and Santiago know that such interference (i) breaches the Agreement and (ii) depletes Vapotherm's work force in the target regions (the southeast and west coast) in the middle of a pandemic caused by the novel coronavirus, hindering Vapotherm's ability to make, sell and distribute Vapotherm's life-saving equipment which is used treat symptoms related to COVID-19 to an area hit particularly hard by the pandemic.

98. Vero's and Santiago's misconduct has caused Vapotherm damages in an amount to be determined at trial, not less than \$75,000 and including, without limitation, lost profits sustained by Vapotherm as a result of Mr. Lonsway, Mr. Wong and Mr. Philpot terminating their employment with Vapotherm and costs incurred or to be incurred by Vapotherm to replace these employees.

COUNT VI
Unjust Enrichment
(Against Santiago)

99. Vapotherm and Santiago are parties to a valid and enforceable written contract, the Agreement, as more fully set forth above.

100. Vapotherm paid all wages and other monies due to Santiago in connection with his employment with Vapotherm.

101. Part of Santiago's obligations in connection with his employment included abiding by the terms of Agreement.

102. Santiago breached the Agreement by, among other things, soliciting Vapotherm employees, as set forth more fully above.

103. In spite of violating his obligations, Santiago collected all wages and other monies in connection with his employment with Vapotherm, thereby receiving overpayment.

104. Santiago's receipt of overpayments is a result of, and caused by, his unjust and inequitable conduct, including wrongful solicitation of Vapotherm employees in knowing violation of the Agreement.

105. Vapotherm is entitled to the return of any overpayment by Vapotherm to Santiago as a matter of equity and to ensure that Santiago does not obtain an unjustified and wrongly obtained windfall.

COUNT VII
Declaratory Judgment That Santiago Breached the Agreement
(Against Santiago)

106. Vapotherm and Santiago are parties to a valid and enforceable written contract, the Agreement, as more fully set forth above.

107. Santiago breached the Agreement by soliciting Vapotherm employees, as described more fully above.

108. As a result of the facts described in the foregoing paragraphs, an actual controversy of sufficient immediacy exists between Vapotherm and Santiago as to whether Santiago has breached the Agreement.

COUNT VIII
Declaratory Judgment That Santiago and Vero Have
Intentionally Interfered With Vapotherm's Contractual Relations
(Against Santiago and Vero)

109. Vapotherm and Santiago are parties to a valid and enforceable written contract, the Agreement, as more fully set forth above.

110. From at least March 3, 2020 through present, Vero was and continues to be aware of the contractual relationship between Vapotherm and Santiago.

111. Vero intentionally, maliciously, and in bad faith interfered with the contractual relationship between Vapotherm and Santiago by, among other things, causing Santiago to breach the Agreement, as set forth more fully above.

112. Vapotherm and Mr. Lonsway, Mr. Wong and Mr. Philpot are parties to valid and enforceable written contracts pursuant to which Mr. Lonsway, Mr. Wong, and Mr. Philpot have agreed, among other things, not to solicit Vapotherm employees to join Vero.

113. Vero and Santiago knew of the contractual relationships between Vapotherm and Benjamin Lonsway, Kurt Wong, and Ryan Philpot at all relevant times.

114. Upon reasonable inference, information and belief, Vero and Santiago are actively interfering with the contractual relationships between Vapotherm and Mr. Lonsway, Mr. Wong and Mr. Philpot by, among other things, causing or inducing Mr. Lonsway, Mr. Wong and/or Mr. Philpot to solicit Vapotherm employees based on the west coast to terminate their employment with Vapotherm and join Vero, as set forth more fully above.

115. As a result of the facts described in the foregoing paragraphs, an actual controversy of sufficient immediacy exists between VapoTherm, Santiago, and Vero as to whether Santiago and Vero have intentionally interfered with VapoTherm's contractual relations.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests the following relief from this Honorable Court:

- (i) Grant injunctive relief directing Vero and Santiago to immediately cease all solicitation and/or hiring of VapoTherm employees during the remaining term of the Agreement;
- (ii) Enter a declaratory judgment finding Santiago in breach of the Agreement;
- (iii) Enter a declaratory judgment finding Vero and Santiago's solicitation of VapoTherm employees constitutes intentional interference with contractual relations;
- (iv) Award VapoTherm damages in an amount to be proven at trial;
- (v) Award VapoTherm pre- and post-judgment interest on all damages awarded;
- (vi) Award VapoTherm its costs of bringing this suit;
- (vii) Award VapoTherm reasonable and necessary attorneys' fees; and
- (viii) Award all other relief, at law or in equity, as the Court determines to be necessary and appropriate.

Respectfully submitted by:

VAPOTHERM, INC.

By and through its attorneys:

RATH YOUNG AND PIGNATELLI, PC

/s/ Michael K. O'Neil

Michael S. Lewis (NH Bar No. 16466)
Michael K. O'Neil (NH Bar No. 21198)
Kevin P. Scura (NH Bar No. 270199)
Rath, Young and Pignatelli, PC
One Capital Plaza
Concord, New Hampshire 03302
(603) 226-2600
msl@rathlaw.com
mko@rathlaw.com
kps@rathlaw.com

Dated: January 21, 2021

VERIFICATION

I, James Lightman, Esq., Senior Vice President and General Counsel of Vapotherm, Inc. verify under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on January 21, 2021

/s/ James Lightman *
James Lightman, Esq.
Senior Vice President, General Counsel
Vapotherm, Inc.

*Signed in accordance with Supplemental Rule for Electronic Filing 2.7(c). The paper document bears an original signature.