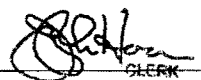


**FILED**

JUN 04 2013

  
CLERK

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA

APEX MEDICAL CORPORATION,  
a South Dakota Corporation d/b/a  
CAREX HEALTH BRANDS,

Plaintiff,

vs.

SUNNY MARKETING SYSTEMS, INC.  
a New York Corporation d/b/a  
EARTH THERAPEUTICS, LTD.

Defendant.

Case No. 13-4063

JURY TRIAL DEMANDED

**COMPLAINT**

Plaintiff, Apex Medical Corporation d/b/a Carex Health Brands (“Plaintiff” or “Carex”), for its complaint of patent infringement against Defendant, Sunny Marketing Systems, Inc. d/b/a Earth Therapeutics, Ltd. (“Defendant” or “Earth Therapeutics”), states and alleges as follows:

**JURISDICTION, VENUE AND PARTIES**

1. This is an action for infringement of United States patents pursuant to title 35 of the United States Code, 35 U.S.C. § 271 *et seq.*

2. This Court has subject matter jurisdiction over the causes of action asserted in the Complaint pursuant to 28 U.S.C. §§ 1331 and 1338(a).

3. Carex is a corporation organized and existing under the laws of the State of South Dakota, having a principal place of business at 921 E. Amidon Street, Sioux Falls, Minnehaha County, South Dakota 57104.

4. Carex is a leading manufacturer and distributor of in-home, self-care medical and personal care products. For over 25 years Carex has conducted operations at its principal

place of business in Sioux Falls, including distribution, light manufacturing, and warehouse operations. Carex currently employs over 90 people at its Sioux Falls facility.

5. Carex products are sold and distributed within this district and throughout the United States through national, regional, and independent food, drug, and mass retailers, as well as through mail-order and electronic retail outlets.

6. Carex is informed and believes, and thereon alleges, that Defendant Sunny Marketing Systems, Inc., is a corporation organized and existing under the laws of the State of New York, and doing business under the assumed name Earth Therapeutics, Ltd. Carex further alleges, on information and belief, that Defendant has its principal place of business at 163 E. Bethpage Rd., Plainview, NY 11803.

7. Carex is informed and believes, and thereon alleges, that Defendant directly distributes, offers for sale, sells, and advertises infringing products under the Earth Therapeutics brand within this judicial district, including, without limitation, at retail stores within Minnehaha County.

8. Therefore, Carex is informed and believes, and on that basis alleges, that venue in this district is proper pursuant to 28 U.S.C. §§ 1391(c) and 1400(b), in that Defendant has committed acts of infringement within this district and is deemed to reside in this district.

9. This Court has personal jurisdiction over Defendant by virtue of Defendant's continuous and systematic activities within this district, because Defendant has committed, and continues to commit, acts of infringement within this district.

#### **CAREX PATENT RIGHTS**

10. Carex is the owner, by assignment, of all right, title, and interest in U.S. Patent No. 5,375,278 (the "'278 Patent"), entitled "Therapeutic Pillow and Method." The '278

patent was duly and legally issued December 27, 1994, upon a patent application filed February 18, 1994. A copy of the '278 patent is attached as Exhibit A.

11. Carex is the owner, by assignment, of all right, title, and interest in U.S. Patent No. 5,584,086 (the "'086 Patent"), entitled "Therapeutic Pillow and Method." The '086 patent was duly and legally issued December 17, 1996, upon a patent application filed December 14, 1994. A copy of the '086 patent is attached as Exhibit B.

12. Carex is the owner, by assignment, of all right, title, and interest in U.S. Patent No. D380,050 (the "'050 Patent"), entitled "Heat Pack." The '050 patent was duly and legally issued June 17, 1997, upon a patent application filed February 4, 1994. A copy of the '050 patent is attached as Exhibit C.

#### **BACKGROUND FACTS RELATED TO PATENT INFRINGEMENT**

13. Carex incorporates by reference the allegations of paragraphs 1-12 above.

14. Carex, as the owner of all right, title, and interest in the three patents identified in paragraphs 10-12, has the right to enforce said patents and to sue infringers for the remedies provided by Title 35 of the United States Code.

15. The '278 and '086 patents are generally directed to a therapeutic pillow filled with a natural granular material having water content in the specified range, as well as to methods for treating pain with the therapeutic pillow. The '050 patent is directed to an ornamental design for a Heat Pack. Carex makes or has made, sells, and distributes products within the scope of claims of these patents; a photograph showing an example of one such Carex product, the "Bed Buddy Hot & Cold Pack," is attached as Exhibit D. Carex has given notice to the public, including the Defendant, of Carex's patent rights by marking the "Bed Buddy Hot & Cold Pack" in accordance with 35 U.S.C. § 287(a).

16. Defendant imports from China, and sells and distributes within the United States, products comprising therapeutic pillows filled with a natural granular material, the granular material having a water content. These products include at least the “Earth Therapeutics Relaxing Microwaveable Comfort Wrap,” the “Earth Therapeutics Anti-Stress Comfort Wrap,” the “Earth Therapeutics Anti-Stress Microwaveable Sinus Pillow,” the “Earth Therapeutics Mind/Body Therapy Anti-Stress Sinus Pillow,” the “Earth Therapeutics Mind/Body Therapy Anti-Stress Eye Pillow,” and the “Earth Therapeutics Anti-Stress Microwaveable Thera-Belt.”

17. Defendant sells its “Earth Therapeutics Relaxing Microwaveable Comfort Wrap,” “Earth Therapeutics Anti-Stress Microwaveable Sinus Pillow” and “Earth Therapeutics Anti-Stress Microwaveable Thera-Belt,” along with numerous other products, through its web-based electronic commerce outlet at [www.earththerapeutics.net](http://www.earththerapeutics.net).

18. Photographs showing the “Earth Therapeutics Relaxing Microwaveable Comfort Wrap” alongside the Carex Bed Buddy product are attached as Exhibit E.

19. Defendant sells various therapeutic pillow products including without limitation its “Earth Therapeutics Mind/Body Therapy Anti-Stress Eye Pillow,” its “Earth Therapeutics Mind/Body Therapy Anti-Stress Sinus Pillow,” its “Earth Therapeutics Anti-Stress Microwaveable Comfort Wrap,” and its “Earth Therapeutics Mind/Body Therapy Anti-Stress Comfort Wrap” through third-party electronic commerce outlets including [www.amazon.com](http://www.amazon.com), [www.ulta.com](http://www.ulta.com), [www.sears.com](http://www.sears.com) and others.

20. Defendant sells its products, including at least its “Earth Therapeutics Relaxing Microwaveable Comfort Wrap,” “Earth Therapeutics Anti-Stress Microwaveable Sinus Pillow” and “Earth Therapeutics Anti-Stress Microwaveable Thera-Belt,” at brick-and-mortar retail outlets throughout the United States and within this judicial district.

**COUNT I: DIRECT INFRINGEMENT OF THE '278 PATENT**

21. Carex incorporates by reference the allegations of paragraphs 1-20 above.

22. Carex has never licensed or otherwise authorized Defendant to import, distribute, offer for sale, or sell products that embody the invention of the '278 patent.

23. Defendant's actions in importing, offering for sale, and selling the Earth Therapeutics therapeutic pillow products identified herein, within the United States, constitute direct infringement of one or more claims of the '278 patent.

24. Carex is informed and believes, and on that basis alleges, that Defendant imports, offers for sale, and sells, within the United States, additional therapeutic pillow products that infringe one or more claims of the '278 patent.

25. Defendant's direct infringement has caused monetary damage to Carex, for which Defendant is liable to Carex pursuant to 35 U.S.C. §§271 and 284.

**COUNT II: INDIRECT INFRINGEMENT OF THE '278 PATENT**

26. Carex incorporates the allegations of paragraphs 1-25 above.

27. Defendant instructs users of its therapeutic pillow products to use the products for the treatment of pain, either by heating said products in a microwave oven or chilling said products in a freezer, then applying the heated or cooled products to affected parts of the body.

28. These instructions for use accompany Defendant's product packaging and are provided elsewhere, including, without limitation, on internet sites offering Defendant's products for sale.

29. Defendant imports, offers to sell, and sells within the United States therapeutic pillow products constituting a material part of the process claimed in the method claims of the '278 patent, and these products are sold in combination with the instructions for use as

described in the foregoing paragraphs. Carex is informed and believes, and on that basis alleges, that Defendant is actively inducing infringement of, and contributing to infringement of, one or more claims of the '278 patent in violation of 35 U.S.C. §271(b) and (c).

30. Defendant's indirect infringement has caused monetary damage to Carex, for which Defendant is liable to Carex pursuant to 35 U.S.C. §§271 and 284.

**COUNT III: DIRECT INFRINGEMENT OF THE '086 PATENT**

31. Carex incorporates by reference the allegations of paragraphs 1-30 above.

32. Carex has never licensed or otherwise authorized Defendant to import, distribute, offer for sale, or sell products that embody the invention of the '086 patent.

33. Defendant's actions in importing, offering for sale, and selling the Earth Therapeutics therapeutic pillow products identified herein, within the United States, constitute direct infringement of the '086 patent.

34. Carex is informed and believes, and on that basis alleges, that Defendant imports, offers for sale, and sells, within the United States, additional therapeutic pillow products that infringe the '086 patent.

35. Defendant's direct infringement has caused monetary damage to Carex, for which Defendant is liable to Carex pursuant to 35 U.S.C. §§271 and 284.

**COUNT IV: INFRINGEMENT OF THE '050 PATENT**

36. Carex incorporates by reference the allegations of paragraphs 1-35 above.

37. Carex has never licensed or otherwise authorized Defendant to import, distribute, offer for sale, or sell products that embody the invention of the '050 patent.

38. Defendant's actions in importing into the United States, and in offering for sale and selling within the United States, the "Earth Therapeutics Relaxing Microwaveable Comfort Wrap," constitute infringement of the '050 patent.

39. Carex is informed and believes, and on that basis alleges, that Defendant imports, offers for sale and sells, within the United States, additional products that infringe the '050 patent.

40. Defendant's infringement has caused monetary damage to Carex, for which Defendant is liable to Carex pursuant to 35 U.S.C. §§271 and 284. Furthermore, Defendant is liable to Carex for all remedies provided by 35 U.S.C. §289.

**PRAYER FOR RELIEF**

WHEREFORE, Carex prays the court for the following relief:

- A. Judgment in favor of Carex, holding Defendant liable for direct infringement of the '278 patent and the '086 patent; indirect infringement of the '278 patent; and infringement of the '050 patent;
- B. an award of damages caused by Defendant's infringement in accordance with 35 U.S.C. §284;
- C. an award of Defendant's total profits on its sales of products infringing the '050 patent, in accordance with 35 U.S.C. §289;
- D. an order awarding enhanced damages in view of Defendant's willful infringement of Carex' patent rights;
- E. an order awarding Carex its attorneys fees pursuant to 35 U.S.C. §285;
- F. an order awarding Carex its costs, expert witness fees, and interest as provided by statute; and
- G. such other and further relief as the Court finds just and equitable.

Dated this 4<sup>th</sup> day of June, 2013.

WOODS, FULLER, SHULTZ, & SMITH P.C.

By

  
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*ATTORNEYS FOR PLAINTIFF*

**PLAINTIFF REQUESTS A JURY TRIAL ON ALL  
TRIABLE ISSUES OF FACT**