

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

WESTERN HOLDINGS, LLC, a Nevada
limited liability company

Plaintiff,

VS.

AIKON HOLDINGS, INC., a Nevada corporation,
NATURES INSTINCTS, INC., a
Texas corporation, and DAVID P. SUMMERS
an individual,

Defendants.

Civil Action No. _____

JURY TRIAL DEMANDED

PLAINTIFF'S ORIGINAL COMPLAINT

Plaintiff WESTERN HOLDINGS, LLC (“Western” or “Plaintiff”) for its Complaint against defendants NATURE’S INSTINCTS, INC. (hereinafter “Nature’s Instincts”), AIKON HOLDINGS, INC. (hereinafter “Aikon Holdings”), and DAVID P. SUMMERS (hereinafter “Mr. Summers”) (collectively “Defendants”), alleges and avers as follows:

INTRODUCTION

This is a dispute regarding Defendants’ infringement on patent rights licensed to Plaintiff. In 2003, Nutraceutical Development Corporation (hereinafter “NDC”) and Western entered into an Exclusive License Agreement (“Agreement”) to license NDC’s patented methodology for creating a dietary supplement ingredient, as set forth in US Patent No. 7,074,812 (the “Patent”). The technology embodied in the Patent is administering nicotine or nicotine acetylcholine receptor agonist in combination with exercise to stimulate muscle mass. In 2003, when Western entered into the Agreement with NDC, Mr. Summers was the CEO of NDC and signed the Agreement on behalf of NDC.

Pursuant to the Agreement, Western sublicensed the rights to develop a dietary supplement using NDC's patented methodology to Novex BioTech, LLC ("Novex"). Novex developed a product called Endothil®-CR utilizing the technology embodied in the Patent. Endothil®-CR is a dietary supplement product that is designed to assist muscle growth, increase body strength, and increase muscle mass. A key ingredient in Endothil®-CR is green tomato extract which naturally contains nicotine. Novex began to sell Endothil®-CR in 2005. In reliance upon the protection provided by the Patent, Novex has invested significant sums of money developing, marketing, and selling Endothil®-CR.

At some point after executing the Agreement on behalf of NDC, Mr. Summers was ousted from NDC and became an officer and director of Metabolic Research, Inc. ("Metabolic"). Mr. Summers developed a nutritional supplement product called Stemulite, which he licensed to Metabolic. Stemulite utilizes the technology embodied in the Patent and therefore infringes the Patent. Stemulite was and is marketed as a product to increase muscle mass. One of Stemulite's ingredients is eggplant extract, which naturally contains nicotine. Neither Mr. Summers nor Metabolic received a license from NDC or Plaintiff to produce a product based on the methodology embodied in the Patent. The Stemulite product is the subject of a patent infringement lawsuit currently pending in Nevada federal court.

In 2008 or 2009, Mr. Summers was ousted from Metabolic. He subsequently developed another product called ProFormax-CR, which was marketed and sold by Aikon Holdings. ProFormax-CR utilizes the technology embodied in the Patent and was marketed as a product to increase muscle mass when combined with exercise. One of ProFormax-CR's ingredients is eggplant extract, which naturally contains nicotine. Neither Mr. Summers nor Aikon Holdings received a license from NDC or Western to market a product based on the methodology embodied

in the Patent. Mr. Summers developed other products which contained eggplant extract which were marketed as muscle mass supplements by Aikon Holdings. These other products were called Stamniac AM and Somniac PM.

After developing products for Aikon Holdings, Mr. Summers developed even more products which utilize the technology embodied in the Patent. These products are Stemulite II (morning and evening formulas for men and women), ProStem II, AlertNRG, and Somina PM. These latest products have been marketed by Nature's Instincts for consumers to use in conjunction with exercise to increase muscle mass. Mr. Summers is the President and CEO of Nature's Instincts.

Recently in the lawsuit pending in Nevada federal court, Western Holdings has learned that the original Stemulite product may have been severely underdosed. If that is the case, the original Stemulite product was completely worthless to increase muscle mass as was advertise. The products produced and marketed by Defendants have nearly identical ingredients as the original Stemulite product and if they are worthless to increase muscle mass, Defendants have falsely advertised those products. Moreover, Defendants have stated in advertisements that Mr. Summers was the inventor of Endothil®-CR, which is false.

The Agreement explicitly gave both NDC and Western the right to prosecute infringement claims. Pursuant to the Agreement, Western had to notify NDC of the infringement. In the event NDC elected to not prosecute the infringement claim, Western could then prosecute the infringement claim on its own behalf. In June 2014, Western notified NDC of Defendants' infringement of the Patent. NDC did not exercise its right to prosecute the infringement claim against Defendants. Therefore, Western has elected to exercise its right to prosecute the

infringement claim against Defendants. In the alternative, Western brings a false advertising claim if Defendants' products do not contain enough nicotine to infringe the Patent.

PARTIES

1. Plaintiff Western Holdings, LLC ("Western") is a limited liability company organized and existing under the laws of the State of Nevada, with its principal place of business located in Carson City, Nevada.

2. Defendant Aikon Holdings, Inc. ("Aikon") is, upon information and belief, a corporation organized and existing under the laws of the State of Nevada, with its principal place of business located in Sugar Land, Texas.

3. Defendant Nature's Instincts, Inc. ("Nature's Instincts") is, upon information and belief, a corporation organized and existing under the laws of the State of Texas, with its principal place of business located in Rosenberg, Texas. On information and belief, Defendant David P. Summers treated Nature's Instinct's as his "alter ego," rather than a separate entity, and that upholding the corporate entity and allowing Mr. Summers to escape personal liability would sanction a fraud or promote an injustice.

4. Defendant David P. Summers is, upon information and belief, an individual residing in Texas.

JURISDICTION AND VENUE

5. This action arises under the United States patent laws, 35 U.S.C. § 1, et seq. and the Lanham Act, 15 U.S.C. § 1125.

6. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1338(a).

7. This Court has personal jurisdiction over Defendant Aikon Holdings because its principal place of business is in Texas. Thus, this Court has both general and specific personal jurisdiction over Aikon.

8. This Court has personal jurisdiction over Defendant Natures Instincts because it is a Texas entity and its principal place of business is in Texas. Thus, this Court has both general and specific personal jurisdiction over Natures Instincts.

9. The Court has personal jurisdiction over Defendant David P. Summers because he is a resident of Texas. Thus, this Court has both general and specific personal jurisdiction over Mr. Summers.

10. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391 and 1400 because all Defendants reside in Texas.

FACTUAL ALLEGATIONS
THE AGREEMENT

11. Effective July 1, 2003, Plaintiff Western entered into an Exclusive License Agreement (“Agreement”) with NDC to license NDC’s patented methodology for creating a dietary supplement ingredient, as set forth in US Patent No. 7,074,812 (the “Patent”). A true and correct copy of the Agreement is attached as Exhibit 1.

12. At the time the Agreement was signed, NDC had not filed the Patent. On or about August 2, 2003, as required by Section 2.5 of the Agreement, NDC filed a provisional patent application, Application No. 10633325.

13. On or about July 11, 2006 the United States Patent and Trademark Office issued the Patent. A true and correct copy of the Patent is attached as Exhibit 2.

DEVELOPMENT, MARKETING AND SALE OF ENDOTHIL-CR

14. Pursuant to Section 3.5 of the Agreement, Western sublicensed the right to develop and manufacture a dietary supplement utilizing the technology embodied in the Patent to Novex.

15. The technology covered under the Patent includes the administration of nicotine in combination with exercise to develop muscle mass.

16. Novex spent significant sums of money developing a dietary supplement product called Endothil®-CR utilizing the technology embodied in the Patent. Endothil®-CR is a dietary supplement product that is designed to assist muscle growth, body strength, and increase muscle mass.

17. Endothil®-CR contains green tomato extract as a primary ingredient. Green tomato extract naturally contains nicotine.

18. Novex began to market and sell Endothil®-CR in 2005. Novex has spent significant sums marketing Endothil®-CR.

19. Western negotiated and relied upon NDC's promise in the Agreement to obtain and maintain the Patent. Western obtained NDC's promise of exclusivity to protect its investment in Endothil®-CR. Western understood that no competitor could utilize the technology embodied in the Patent to create competing products. Without NDC's promises of exclusivity, Western would not have entered into the Agreement and Western would not have invested significant sums developing and marketing Endothil®-CR.

DEFENDANTS' INFRINGING PRODUCTS

20. From December 2003 to March 2009, Mr. Summers was not actively involved in the management of NDC, but instead was involved in other businesses, including but not limited to, Aikon Holdings and Nature's Instincts.

21. On information and belief, in approximately 2009, Mr. Summers licensed multiple product formulas to Aikon Holdings, Inc. based on intellectual property Mr. Summers claimed to own. Aikon subsequently marketed and sold products which violate the Patent, marketed and sold under the name ProFormax-CR.

22. On information and belief, Mr. Summers developed other products for Aikon Holdings. These products were named Stamniac AM and Somniac PM.

23. Mr. Summers also developed at least four other product lines—Stemulite II, ProStem, AlertNRG, and Somina PM. On information and belief, Mr. Summers licensed to Nature's Instincts, the rights to market and sell these products based on intellectual property Mr. Summers claimed to own. Nature's Instincts, under Mr. Summers' management and direction, subsequently developed and marketed these products which violate the Patent. Mr. Summers is President and CEO of Nature's Instincts.

24. These product lines, including but not limited to, ProFormax-CR, Stamniac AM, Somniac PM, Stemulite II, ProStem, AlertNRG, and Somina PM, have been marketed as products to accelerate muscle mass development. They all contain eggplant extract as a primary ingredient. Eggplant extract naturally contains nicotine.

25. Defendants' development and marketing of ProFormax-CR, Stamniac AM, Somniac PM, Stemulite II, ProStem II, AlertNRG, and Somina PM as a muscle building products violates Western's rights under the Agreement with NDC.

26. Defendants' marketing of ProFormax-CR, Somniac PM, Stamniac AM, Stemulite II, ProStem II, AlertNRG, and Somina PM as muscle building and fitness products encouraged consumers to use the products in conjunction with exercise. Defendants' marketing of these products claimed that the eggplant extract could accelerate muscle development due to its ability to act as a nicotinic acetylcholine receptor agonist, which is the same technology embodied in the Patent.

RIGHTS TO PROSECUTE INFRINGEMENT UNDER THE AGREEMENT

27. The Agreement granted rights to prosecute infringement claims to both NDC and Defendant.

28. The Agreement requires Western to notify NDC if Western is aware of infringement of the Patent. In the event NDC elects to not prosecute the infringement claim, Western can prosecute the infringement claim on Westerns own behalf.

29. Western notified NDC of Defendant's infringement in June 2014. NDC has elected to not prosecute the infringement claim against Defendant. Therefore Western has elected to exercise its rights under the Agreement and sues Defendant for infringing the Patent.

FALSE ADVERTISING

30. In multiple advertisements, Mr. Summers has held himself out as the inventor of Endothil®-CR. This statement is false because Mr. Summers did not formulate Endothil®-CR. He also did not choose green tomato extract for the Endothil®-CR product and did not develop the technology to create the green tomato extract which is the key ingredient to Endothil®-CR. Therefore, Mr. Summers, Aikon Holdings, and Natures Instincts have made false statements in their advertising relating to Endothil®-CR.

31. Moreover, in the case pending in Nevada federal court, Mr. Summers recently produced a study which found the Stemulite product to be ineffective as a muscle mass supplement. The eggplant extract may not have contained enough nicotine to have any effect on increasing muscle mass. If this is indeed the case, Stemulite was falsely advertised as a muscle mass dietary supplement

32. On information and belief, the products Mr. Summers developed for Aikon Holdings and Natures Instincts have similar if not identical formulations as the Stemulite product ,which is the subject of the Nevada federal court litigation.

33. Defendants' products have been advertised that they can be used to increase muscle mass due to eggplant extract's natural nicotine content. To the extent Defendants' products do not contain nicotine in an amount sufficient to increase muscle mass, Defendants have falsely advertised their products.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION
DIRECT INFRINGEMENT OF PATENT RIGHTS
(Against all Defendants)

34. Western reasserts the allegations of paragraphs 1-33, as if set forth in full herein.

35. Plaintiff acquired exclusive rights to the Patent via the Agreement between Western and NDC.

36. Western and Novex invested significant sums of money developing Endothil®-CR, a product based on the technology embodied in the Patent.

37. On information and belief, Defendants developed ProFormax-CR, Stamniac, AM, Somniac PM, Stemulite II, ProStem II, AlertNRG, and Somina PM, all product lines which are

based on the same technology embodied in the Patent because they contains nicotine and are marketed as muscle building dietary supplements.

38. Defendants instructed to use these products in conjunction with exercise, thereby inducing those consumers to infringe the Patent.

39. As a result of Defendants' infringement on Plaintiff's exclusive rights to the Patent, Plaintiff has been and continues to be injured. Plaintiff's injuries include, but are not limited to, lost revenue and profits, a diminishing of Plaintiff's goodwill and reputation, lost sales, and damage to Plaintiff's existing and potential business relations. Plaintiff is entitled to a full recovery of patent infringement damages against Defendants, including special, indirect, incidental, and consequential damages.

40. As a result of Defendants' infringement on the Patent, Plaintiff has been damaged and is entitled to be compensated for such damages, pursuant to 35 U.S.C. § 284, in an amount to be determined at trial.

41. Plaintiff is entitled to its attorney fees and costs as a result of Defendants' infringement on Plaintiff's rights to the Patent because this is an exceptional case under 35 U.S.C. § 285.

SECOND CAUSE OF ACTION
INDIRECT INFRINGEMENT OF PATENT RIGHTS
(Against Defendant David P. Summers)

42. Western reasserts the allegations of paragraphs 1-41, as if set forth in full herein.

43. Plaintiff acquired exclusive rights to the Patent via the Agreement between Western and NDC.

44. Mr. Summers is aware of the Patent and the assignment of exclusive rights to the Patent from NDC to Western because Mr. Summers is one of the named inventors of the Patent and signed the Agreement between NDC and Western.

45. Mr. Summers has caused multiple parties, including but not limited to Aikon Holdings and Nature's Instincts, to infringe the Patent by developing and licensing to those parties multiple products that utilize the technology embodied in the Patent.

46. Mr. Summers knowingly induced multiple parties, including but not limited to Aikon Holdings and Nature's Instincts, to infringe the Patent by licensing infringing product formulas to these companies and/or controlling the actions of these companies in a management role.

47. On information and belief, Defendants developed ProFormax-CR, Somniac, PM, Stamniac AM, Stemulite II, ProStem II, AlertNRG, and Somina PM, all product lines which are based on the same technology embodied in the Patent because they contain nicotine and are marketed as Muscle building dietary supplements.

48. After developing the products listed above, Mr. Summers actively marketed the infringing products by allowing his name to be used in marketing materials, appearing in advertisements for the products, and promoting the products on the internet, including via his personal Facebook page.

49. Included in the marketing of the products listed above were images of people conducting various types of exercise, encouraging the consumers to use the products along with exercise to increase muscle mass, thereby inducing the consumers to infringe the Patent.

50. On information and belief, Mr. Summers benefited from the indirect infringement by receiving monetary compensation from Aikon Holdings and Nature's Instincts, including but not limited to, royalty payments based on the sales of the infringing products.

51. As a result of Mr. Summers' indirect infringement on Plaintiff's exclusive rights to the Patent, Plaintiff has been and continues to be injured. Plaintiff's injuries include, but are not limited to, lost revenue and profits, a diminishing of Plaintiff's goodwill and reputation, lost sales, and damage to Plaintiff's existing and potential business relations. Plaintiff is entitled to a full recovery of patent infringement damages against Mr. Summers, including special, indirect, incidental, and consequential damages.

52. As a result of Defendants' infringement on the Patent, Plaintiff has been damaged and is entitled to be compensated for such damages, pursuant to 35 U.S.C. § 284, in an amount to be determined at trial.

53. Plaintiff is entitled to its attorney fees and costs as a result of Defendants' infringement on Plaintiff's rights to the Patent because this is an exceptional case under 35 U.S.C. § 285.

THIRD CAUSE OF ACTION

UNFAIR COMPETITION BASED ON FALSE REPRESENTATIONS IN VIOLATION OF LANHAM ACT 15 U.S.C. § 1125(a)(1)(B) (Against all Defendants)

54. Western re-asserts the allegations of paragraphs 1 - 53 as if set forth herein.

55. Defendants have without authorization, on or in connection with the promotion and sale of their products in interstate commerce, made or contributed to the making of representations of fact that are likely to cause confusion, or to cause mistake, or to deceive purchasers and potential purchasers into believing that Mr. Summers invented the Endothil®-CR product.

56. Defendants have marketed ProFormax-CR, Somniac, PM, Stamniac AM, Stemulite II, ProStem II, AlertNRG, and Somina PM as products that can increase muscle development and muscle mass. If these products are indeed under dosed and do not contain enough eggplant extract and/or nicotine to be effective in developing muscle mass, they have been falsely advertised by Defendants. Defendants' acts constitute unfair competition and are misleading representations of fact.

57. Upon information and belief, Defendants' acts of unfair competition and misrepresentations have led to, among other things, initial interest confusion in consumers stemming from Defendants false statements that Mr. Summers is the inventor of Endothil®-CR.

58. If the products mentioned herein are under dosed or do not contain enough nicotine to be effective in developing muscle mass, Defendants' acts of unfair competition and misrepresentations have led to, among other things, confusion in consumers stemming from Defendants false statements that ProFormax-CR, Somniac PM, Stamniac AM, Stemulite II, ProStem II, AlertNRG, and Somina PM are effective muscle mass dietary supplements.

59. Upon information and belief, Defendants' acts of unfair competition and misrepresentations have led to, among other things, initial interest confusion in consumers stemming from Defendants false statements that their products are effective muscle mass dietary supplements.

60. Upon information and belief, Defendants' acts of unfair competition and misrepresentation have deceived and, unless restrained, will continue to deceive consumers, and have injured and unless constrained will continue to injure Western and the Endothil product line, causing injury to the goodwill and reputation of Western in an amount to be determined at trial.

61. Upon information and belief, Defendants acts of unfair competition are willful, intentional, and egregious and make this an exceptional case within the meaning of 15 U.S.C. § 1117(a), entitling Western to attorney's fees.

Jury Demand

62. Pursuant to Federal Rule of Civil Procedure 38, Plaintiff demands a trial by jury on all issues.

Prayer

WHEREFORE, Plaintiff requests the following relief from the Court:

63. A judgment that all Defendants have infringed the Patent pursuant to 35 U.S.C. § 271.

64. A judgment that Defendant David P. Summers has indirectly infringed the Patent.

65. A judgment that Defendant David P. Summers induced and contributed to the infringement of the Patent.

66. A judgment that Defendants be permanently enjoined, pursuant to 35 U.S.C. § 283, from conduct that infringes the Patent.

67. A judgment that Defendant David P. Summers be permanently enjoined, pursuant to 35 U.S.C. § 283, from conduct induces and contributes to the infringement of the Patent and/or indirectly infringes the Patent.

68. A judgment and order requiring Defendants to pay damages resulting from Defendants' infringement on Plaintiff's rights to the Patent including, but not limited to, lost revenue and profits, the diminishment of Plaintiff's goodwill and reputation, lost sales, damage to Plaintiff's existing and potential business relations, and reimbursement for the sums spent by

Western and Novex developing, marketing, and selling Endothil-CR® in reliance upon the Agreement and the protections bargained for and promised by NDC.

69. A judgment that Defendants' infringement has been willful.

70. A judgment and order requiring Defendants to pay treble damages to Plaintiff to compensate for Defendants' willful and deliberate infringing acts in accordance with 35 U.S.C. § 284.

71. A judgment and order that this is an exceptional case requiring Defendants to pay Plaintiff's costs and attorney fees in bringing this action under 35 U.S.C. § 285.

72. A judgment on all claims for damages suffered by Western as a result of Defendants' unfair competition and deceptive acts and practices under 15 U.S.C. § 1125, in an amount to be determined at trial.

73. A judgment on the Third Claim for Relief awarding Western reasonable attorney's fees in this actions, pursuant to 15 U.S.C. § 1117.

74. For pre-judgment and post judgment interest as allowed by law.

75. For such other and further relief as the Court deems necessary.

THE BAYKO LAW FIRM

/s/Keith C. Bayko

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