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DISTRICT OF UTAH
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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

AMERICAN PHYTOTHERAPY)
RESEARCH LABORATORY, INC.,)
a Utah corporation, and BASIC)
RESEARCH, LLC, a Utah limited)
liability company,)
)
Plaintiffs,)
)
v.)
)
SCIENTIFICALLY ADVANCED)
NUTRITION, INC., a California corporation,)
)
Defendant.)
)
)
)

Civil Action No.

2:01CV-981ST

COMPLAINT FOR PATENT
INFRINGEMENT, DAMAGES,
AND INJUNCTIVE RELIEF

JURY DEMANDED

Plaintiffs, American Phytotherapy Research Laboratory, Inc. and Basic Research, LLC
(hereinafter collectively "Plaintiffs"), by and through their attorneys, complaining of Defendant

Scientifically Advanced Nutrition, Inc. (hereinafter "SAN"), for infringing U.S. Patent No. 4,525,359 and U.S. Patent No. 4,588,724, demands a jury trial, and alleges as follows:

JURISDICTION AND VENUE

1. This action arises under the patent laws of the United States, 35 U.S.C. §100 *et seq.* This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§§ 1331, 1338(a) and 1338(b).

2. Venue is proper in this District under 28 U.S.C. §§ 1391(c) and 1400(b) inasmuch as Plaintiffs reside in this district and the claims raised in this lawsuit arose in this district.

PARTIES

3. Plaintiff American Phytotherapy Research Laboratory, Inc. is a corporation duly organized and existing under the laws of the state of Utah and having a principle place of business at 402 West 5050 North, Provo, Utah. American Phytotherapy has granted an exclusive license to Basic Research, LLC doing business as NutraSport, Urban Biologics, and Klein-Becker usa, thereby allowing Basic Research, LLC to manufacture, market, distribute and sell a wide range of health related products throughout the United States, including the State of Utah and this judicial District. Plaintiff Basic Research, LLC is a limited liability company duly organized and existing under the laws of the state of Utah and having a principle place of business at 402 West 5050 North, Provo, Utah.

4. Upon information and belief, Scientifically Advanced Nutrition, Inc. is a corporation organized and existing under the laws of the state of California having a principal place of business at 4230 Del Rey Ave., Suite 458, Marina Del Rey, California. SAN is, and was

at all times pertaining to this Complaint, transacting business in the state of Utah and in this judicial District.

GENERAL ALLEGATIONS

5. On June 25, 1985, the United States Patent and Trademark Office issued U.S. Patent No. 4,525,359, entitled "TREATMENT FOR SELECTIVE WEIGHT CONTROL" (the "'359 patent") to the inventors -- Frank L. Greenway, III and George A. Bray. A copy of the '359 patent is attached hereto as Exhibit A and incorporated herein by reference.

6. The invention disclosed and claimed in the '359 patent is directed to a process for achieving a selective reduction in body weight, comprising the steps of: (1) delivering specifically to a portion of the body where weight reduction is sought a therapeutically effective amount of a beta adrenergic stimulator (*e.g.*, theophylline, isoproterenol, forskolin, and/or epinephrine) and (2) accomplishing a general weight loss program whereby an acceleration of weight loss is achieved from the portion of the body to which the beta adrenergic stimulator was selectively delivered. (*See*, Exhibit A – the '359 patent at column 3, lines 51-59 and column 5, line 50 through column 6, line 2.)

7. On May 13, 1986, the United States Patent and Trademark Office issued U.S. Patent No. 4,588,724, entitled "TREATMENT FOR SELECTIVE REDUCTION OF REGIONAL FAT DEPOSITS" (the "'724 patent") to the inventors -- Frank L. Greenway, III and George A. Bray. A copy of the '724 patent is attached hereto as Exhibit B and incorporated herein by reference.

8. The invention disclosed and claimed in the '724 patent is directed to a process for achieving a selective reduction in body weight, comprising the steps of: (1) delivering specifically to the portion of the body where weight reduction is sought a therapeutically effective amount of an alpha-2 adrenergic inhibitor (*e.g.*, yohimbine, rauwolscine, piperoxane, phentholamine, and/or dihydroergotamine) and (2) accomplishing a general weight loss program, whereby an acceleration of weight loss is achieved from the portion of the body to which the active ingredient was selectively delivered. (*See*, Exhibit B – the '724 patent at column 5, line 53 through column 6, line 8.)

9. Consistent with the terms of an exclusive license agreement executed on July 13, 2000, American Phytotherapy Research Laboratory, Inc., through its licensee, Basic Research, LLC doing business as NutraSport, Urban Biologics, and Klein-Becker usa, began manufacturing, marketing, selling, and distributing products designed to stimulate, promote, and/or enhance weight loss and fat reduction in human beings including, but not limited to, its products known as CUTTING GEL™, RIPPING GEL™, and DERMALIN™.

10. CUTTING GEL™, RIPPING GEL™, and DERMALIN™ are gels applied to a specific portion of the body that accelerate reduction of regional body weight.

11. Plaintiffs nationally advertises their CUTTING GEL™, RIPPING GEL™, and DERMALIN™ products and direct those advertisements to men and women who desire to stimulate, promote and/or enhance weight loss and fat reduction. Plaintiffs actively sell their products CUTTING GEL™, RIPPING GEL™, and DERMALIN™ nationwide in retail stores and on the Internet.

12. All labels, product packaging, literature and advertisements for CUTTING GEL™, RIPPING GEL™, and DERMALIN™ are marked by Plaintiffs with a notice that each product is protected under U.S. Patent Nos. 4,525,359 and 4,588,724, so that the consuming public and Plaintiffs' competitors know that these products are covered and protected by valid U.S. patents. A copy of a product label and an advertisement for CUTTING GEL™ is attached hereto as Exhibits C and D and incorporated herein by reference. A copy of an advertisement for RIPPING GEL™ is attached hereto as Exhibit E and incorporated herein by reference. A copy of a product label and a sample of the product packaging for "DERMALIN" are attached hereto as Exhibits F and G, respectively.

13. Plaintiffs have engaged in extensive research, development, advertising, and promotion of their CUTTING GEL™, RIPPING GEL™, and DERMALIN™ products, and Plaintiffs have, at considerable expense, developed a wide and valuable public recognition of their products in the marketplace. As a result of the aforesaid research, development, advertising, and promotion by Plaintiffs, a valuable goodwill and a reputation for safety, effectiveness, and quality have been developed which Plaintiffs now own and which distinguish Plaintiffs' goods and services in the marketplace.

14. Plaintiffs have also been engaged, at considerable expense, in extensive research and development in preparation to launch second-generation products comparable to CUTTING GEL™, RIPPING GEL™, and DERMALIN™. These second-generation products incorporate the patented processes described and claimed in both the '359 patent and the '724 patent, that are exclusively licensed to Plaintiffs. Plaintiffs are intending to rely on the goodwill and reputation

they have developed in the marketplace for safety, effectiveness, and quality as a result of their marketing and promotional efforts relative their CUTTING GEL™, RIPPING GEL™, and DERMALIN™ products, when introducing their new second-generation gel products.

15. Plaintiffs' pecuniary stake in the sale of CUTTING GEL™, RIPPING GEL™, and DERMALIN™ make Plaintiffs genuine competitors and leaders in the weight control and fat loss product market. Furthermore, Plaintiffs' financial and market stake in launching their new second-generation gel products will further solidify Plaintiffs' position as leaders in the weight control and fat loss industry and as product innovators in the industry.

16. Upon information and belief, SAN has for a time past and still is making, using, selling, and/or offering for sale a gel product applied to a specific portion of the body that accelerates reduction of regional body weight. SAN's "fat loss accelerator" gel product is advertised and sold under the product name "LIPOBURN GEL™." This ongoing and continuous infringing activity is occurring, directly and/or through intermediaries, throughout the United States, including this judicial District.

17. SAN advertises LIPOBURN GEL™, and directs those advertisements nationally to men and women who desire to stimulate, promote, and/or enhance weight loss and fat reduction. SAN sells LIPOBURN GEL™ nationally through the same and/or similar channels of distribution as those used by Plaintiffs to sell their CUTTING GEL™, RIPPING GEL™, and DERMALIN™ products.

18. The primary active ingredients in LIPOBURN GEL™ include three beta adrenergic stimulators (*i.e.*, forskolin, theophylline and aminophylline) and an alpha-2 adrenergic

inhibitor (e.g., yohimbine). Beta adrenergic stimulators are protected by the '359 patent and alpha-2 adrenergic inhibitors are protected by the '724 patent. A copy of an advertisement for LIPOBURN GEL™ is attached hereto as Exhibit H and incorporated herein by reference.

19. Upon information and belief, Nutripeak is one of SAN's authorized distributors of LIPOBURN GEL™. A copy of an advertisement for SAN's LIPOBURN GEL™ product that is posted on Nutripeak's website www.nutripeak.com is attached hereto as Exhibit I and incorporated herein by reference.

20. Upon information and belief, Nutripeak received the content for its advertisements for LIPOBURN GEL™ from SAN and also receives its supply of LIPOBURN GEL™ product which Nutripeak sells to the consuming public directly from SAN.

21. SAN has launched a massive advertising campaign for LIPOBURN GEL™ and in its advertisements claim that LIPOBURN GEL™ "does the dirty work on the 'hard to burn' fat." SAN's advertisements also claim LIPOBURN GEL™ "is the only fat burning gel in the world that combines the 4 most cutting edge fat burning compounds in the world." As support for their efficacy claims, SAN cites to the scientific study entitled "*Regional Fat Loss from the Thigh in Obese Women after Adrenergic Modulation*," Clin. Ther., 1987, 9:6, 663-9, which is a clinical study that was conducted and published by the inventors of the '359 and '724 patents. Specifically, products that fall within the scope of the scientific study relied upon by SAN in its advertisement for LIPOBURN GEL™ clearly must fall within the scope of one or more of the claims of the '359 patent and/or the '724 patent. Thus, SAN effectively admits that its

LIPOBURN™ product infringes both patents. A copy of SAN's advertisement citing the scientific study is attached hereto as Exhibit J and incorporated herein by reference.

22. Despite SAN's awareness that LIPOBURN GEL™ infringes the '359 patent and the '724 patent, SAN continues to intentionally and willfully manufacture, market, sell, and/or offer for sale a gel applied to a specific portion of the body that accelerates reduction of regional body weight, which product infringes the '359 patent and/or the '724 patent.

23. The goods manufactured, marketed, sold, and/or offered for sale by SAN and the goods manufactured, marketed, sold, and/or offered for sale by Plaintiffs are goods of the same general class or type, and are sold through substantially the same channels of trade to substantially the same class of purchasers.

24. Unless enjoined by this Court, the foregoing conduct of SAN will continue, and SAN will continue to cause substantial damage, including lost revenues and market share, to Plaintiffs and irreparable harm and injury for which Plaintiffs have no adequate remedy at law. Plaintiffs derive substantial revenue from sales of their products CUTTING GEL™, RIPPING GEL™, and DERMALIN™ in the marketplace. In order to prevent further irreparable harm and injury to Plaintiffs from SAN's literal infringement of the '359 patent and the '724 patent and for engaging in such acts of unfair competition, Plaintiffs seek a permanent injunction and requests that the Court promptly schedule a trial on the merits.

COUNT I
PATENT INFRINGEMENT

25. Plaintiffs reallege and incorporate by reference paragraphs 1 through 24 of this Complaint as though set forth here in full.

26. Plaintiffs are the exclusive licensees of the '359 patent and the '724 patent.

27. SAN has for a time past and still is infringing, inducing infringement, and/or contributing to the infringement of the '359 patent and/or the '724 patent by making, using, selling, and/or offering for sale weight loss products, including the product known as LIPOBURN GEL™, that literally infringes one or more claims of the '359 patent and/or the '724 patent. This infringement has occurred and continues to occur, directly or through intermediaries, throughout the United States, including customers in this judicial District, and will continue to occur unless enjoined by this Court.

28. SAN's infringement is willful, wanton, and deliberate.

29. SAN has been, and is continuing to, cause Plaintiffs foreseeable tortious injury by willfully infringing the '359 patent and/or the '724 patent by making, using, selling, and/or offering for sale weight loss and fat reduction products embodying the invention claimed in the '359 patent and/or the '724 patent, and will continue to do so unless enjoined by this Court.

30. Plaintiffs are being damaged and irreparably injured as a direct and proximate result of SAN's infringing activities.

COUNT II
INDUCED INFRINGEMENT

31. Plaintiffs reallege and incorporate by reference paragraphs 1 through 30 of this Complaint as though set forth here in full.

32. Section 271(b) of the Patent Act provides that “whoever actively induces infringement of a patent shall be liable as an infringer . . .”

33. SAN has induced others to infringe the '359 patent and/or the '724 patent by, *inter alia*, inducing others to sell LIPOBURN GEL™ which literally infringes the '359 patent and/or the '724 patent and by inducing customers to use LIPOBURN GEL™ in a manner which infringes the '359 patent and/or the '724 patent.

34. At the time SAN induced others to infringe the '359 patent and/or the '724 patent, SAN was aware of the '359 patent and/or the '724 patent.

35. SAN's induced infringement has been willful and deliberate, without any good faith belief that the '359 patent and/or the '724 patent are invalid or not infringed.

36. As a result of SAN's induced infringement, Plaintiffs have suffered substantial damage in an amount which will be proven at trial;

37. As a result of SAN's induced infringement (unless voluntarily stopped), Plaintiffs have suffered and continue to suffer severe and irreparable harm unless the induced infringement is immediately and permanently enjoined by this Court.

38. Because SAN's induced infringement has been willful and deliberate, Plaintiffs ask the Court to increase the damages up to three times the amount found or assessed by the jury

under 35 U.S.C. § 284.

39. SAN's induced infringement has been intentional, willful and deliberate. Thus, this case is an exceptional case and Plaintiffs request that the Court award reasonable attorneys' fees to Plaintiffs under 35 U.S.C. § 385.

COUNT III
CONTRIBUTORY INFRINGEMENT

40. Plaintiffs reallege and incorporate by reference paragraphs 1 through 39 of this Complaint as though set forth here in full.

41. 35 U.S.C. § 271(c) provides, in relevant part, that contributory infringement occurs through

selling a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial non infringing use.

42. Use of LIPOBURN GEL™ in the manner recommended by SAN constitutes an infringement of the '359 patent and/or the '724 patent.

43. SAN is aware of the '359 patent and/or the '724 patent, and has contributorily infringed the '359 patent and/or the '724 patent.

44. SAN's contributory infringement has been willful and deliberate, without any good faith that the '359 patent and/or the '724 patent are invalid or not infringed by SAN.

45. As a result of SAN's contributory infringement, Plaintiffs have suffered substantial damage in an amount which will be proven at trial.

46. As a result of SAN's contributory infringement (unless voluntarily stopped), Plaintiffs have suffered and continue to suffer severe and irreparable harm unless the infringement is immediately and permanently enjoined by this Court.

47. Because SAN's contributory infringement has been willful and deliberate, Plaintiffs ask the Court to increase the damages up to three times the amount found or assessed by the jury under 35 U.S.C. § 284.

48. SAN's contributory infringement has been intentional, willful, and deliberate. Thus, this case is an exceptional case and Plaintiffs request that the Court award reasonable attorneys' fees to Plaintiffs under 35 U.S.C. § 385.

COUNT IV
ADVERTISING INJURY THROUGH PATENT INFRINGEMENT

49. Plaintiffs reallege and incorporate by reference paragraphs 1 through 48 of this Complaint as though set forth here in full.

50. Plaintiffs have made a substantial investment of time, effort, and money into the exclusive license of the '359 patent and the '724 patent. Plaintiffs have also engaged in extensive research, development, advertising, and promotion of their CUTTING GEL™, RIPPING GEL™, and DERMALIN™ products, and Plaintiffs have, at considerable expense, developed a wide and valuable public recognition of their products in the marketplace. As a result of the aforesaid research, development, advertising, and promotion by Plaintiffs, a valuable goodwill and a reputation for safety, effectiveness, and quality have been developed which Plaintiffs now own and which distinguish Plaintiffs' goods and services in the marketplace. In

addition, Plaintiffs have also been engaged, at considerable expense, in extensive research and development in preparation to launch second-generation products comparable to CUTTING GEL™, RIPPING GEL™, and DERMALIN™. These second-generation products incorporate the patented processes described and claimed in both the '359 patent and the '724 patent.

51. SAN has infringed Plaintiffs' rights in the '359 patent and/or the '724 patent by, among other things, offering for sale LIPOBURN GEL™, a product which clearly falls within the scope of one or more claims of the '359 patent and/or the '724 patent.

52. By offering its infringing LIPOBURN GEL™ product for sale through its advertising, SAN has misappropriated Plaintiffs' advertising idea and style of doing business. Specifically, SAN offers for sale a product which includes the patented process and formula that only Plaintiffs can lawfully offer for sale.

53. By offering its infringing LIPOBURN GEL™ product for sale through commercial advertisements, SAN has misappropriated Plaintiffs' advertising idea and style of doing business.

54. By offering for sale its infringing LIPOBURN GEL™ product, through solicitation of customers seeking weight loss and fat reduction products, SAN has misappropriated Plaintiffs' advertising idea and style of doing business.

55. Through its advertising, promotions, and solicitations, SAN has represented to the consuming public that SAN sells products covered by the claims of the '359 patent and/or the '724 patent, when only Plaintiffs can provide or authorize others to provide products employing this patented technology. Through this infringing conduct, SAN has misappropriated Plaintiffs'

advertising ideas and style of doing business. Representative copies of SAN's advertisements which constitute acts of infringement by offering for sale its LIPOBURN GEL™ product which infringes the '359 patent and/or the '724 patent are attached hereto as Exhibits H and I.

56. As a result of SAN's misconduct, Plaintiffs have suffered substantial damages in amounts which will be proven at trial.

57. As a result of SAN's misconduct, Plaintiffs have suffered irreparable harm, and will continue to suffer irreparable harm unless SAN's misconduct is voluntarily or preliminarily and permanently enjoined by this Court.

58. The injury and damage alleged above was caused by SAN in the course of its advertising. That is, among other ways, the injury was committed in the course of SAN's offering for sale its infringing LIPOBURN GEL™ product, advertising its infringing LIPOBURN GEL™ product, promoting its infringing LIPOBURN GEL™ product, soliciting customers for its infringing LIPOBURN GEL™ product, and marketing its infringing LIPOBURN GEL™ product. Where Plaintiffs are direct competitors in the weight loss and fat reduction industry, this injury committed in the course of advertising of LIPOBURN GEL™, has damaged and continues to damage Plaintiffs.

59. SAN's patent infringement has been willful and deliberate, without any good faith belief that the '359 patent and the '724 patent are invalid or not infringed by SAN.

60. Because SAN's infringement has been willful and deliberate, Plaintiffs ask this Court to increase the damages up to three times the amount found or assessed by the jury under 35 U.S.C. § 284.

61. SAN's patent infringement has been intentional, willful, and deliberate, thus this case is an exceptional case and Plaintiffs request that the Court award reasonable attorneys' fees to Plaintiffs under 35 U.S.C. § 385.

PRAAYER FOR RELIEF

WHEREFORE, based upon the foregoing allegations, Plaintiffs pray for judgement against SAN, as follows:

A. That the Court decree and adjudge that U.S. Patent No. 4,525,359, entitled "TREATMENT FOR SELECTIVE WEIGHT CONTROL" and U.S. Patent No. 4,588,724, entitled "TREATMENT FOR SELECTIVE REDUCTION OF REGIONAL FAT DEPOSITS," are valid, enforceable, and infringed by SAN's activities of making, using, selling, and/or offering for sale, accused weight loss products;

B. That the Court enter a preliminary and permanent injunction against SAN and its officers, agents, employees, and all persons or entities acting in concert with any of them, from further infringement of the '359 patent and/or the '724 patent;

C. That the Court decree and adjudge that SAN has willfully infringed, induced infringement of, and contributorily infringed the '359 patent and/or the '724 patent;

D. That the Court order an accounting of SAN based upon its infringement, induced infringement, and contributory infringement of the '359 patent and/or the '724 patent, assess damages as appropriate, and treble all awards and damages because SAN willfully infringed the '359 patent and/or the '724 patent;

E. That the Court order SAN to account for and pay Plaintiffs all gains, profits, and advantages derived by or from SAN's infringement, induced infringement, and contributory infringement of the '359 patent and/or the '724 patent;

F. That the Court decree and adjudge that the offer for sale of SAN's LIPOBURN GEL™ product has resulted in injury committed in the course of advertising LIPOBURN GEL™;

G. That the Court award Plaintiffs prejudgment interest, costs, expenses, and reasonable attorneys' fees because SAN's patent infringement has been intentional, willful, and deliberate, thus this case is an exceptional case under 35 U.S.C. § 385; and

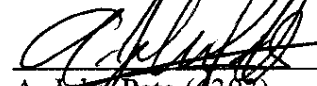
H. That the Court award Plaintiffs such further relief as this Court deems equitable, just, and proper.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a jury trial on all claims for relief.

DATED this 10th day of December, 2001.

Respectfully submitted,



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**Exhibits/
Attachments
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**Please see the
case file.**