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8
 9 **UNITED STATES DISTRICT COURT**
 10 **NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION**

11 DSM DYNEEMA,

12 Plaintiff,

13 v.

14 BAE SYSTEMS TENSYLON H.P.
 15 MATERIAL, INC.,

16 Defendant.

Case No. CV 10-5466 (RS)

**FIRST AMENDED COMPLAINT;
 DEMAND FOR JURY TRIAL**

17 Plaintiff DSM Dyneema (“DSM”), for its First Amended Complaint against Defendant
 18 BAE Systems Tensylon H.P. Material, Inc. (“BAE”), alleges as follows:

19 **PARTIES**

20 1. Plaintiff DSM is a corporation organized and existing under the laws of the State of
 21 Delaware having a place of business at 1101 Highway 27 South, Stanley, North Carolina 28164.
 22 DSM is a leading manufacturer of innovative products and services in the life sciences and
 23 materials sciences areas. DSM’s products and services are used globally in a wide range of
 24 applications, including life protection and housing, pharmaceuticals, and human and animal
 25 nutrition and health.

1 from a novel, proprietary ballistic UHMWPE tape technology. BT10 is the first in a new range of
2 ballistic UHMWPE tape products designed to provide vehicles with optimum protection.

3 10. Since its introduction, DSM has marketed and sold BT10 continuously in the
4 United States, including the State of California. DSM's customers incorporate BT10 into a variety
5 of finished products used for ballistic protection, including vests, shields, and vehicle armor.

6 11. BAE is a direct competitor of DSM in the United States, including in California.

7 12. BAE is the owner of United States Patent No. 7,348,053 ("the '053 patent"),
8 entitled "Ultra High Molecular Weight Polyethylene Ballistic Structures." The '053 patent issued
9 on March 25, 2008 to BAE as the assignee of the inventors named therein. A copy of the '053
10 patent is attached hereto as Exhibit A.

11 13. BAE is also the owner of United States Patent No. 7,470,459 ("the '459 patent"),
12 entitled "Ultra High Molecular Weight Polyethylene Ballistic Structures." The '459 patent issued
13 on December 30, 2008 to BAE as the assignee of the inventors named therein. A copy of the '459
14 patent is attached hereto as Exhibit B.

15 14. On November 5, 2010, DSM received a letter from The Jackson Patent Group ("the
16 Jackson Letter") (attached hereto as Exhibit C). Upon information and belief, the Jackson Letter
17 was sent on behalf of BAE. The Jackson Letter stated:

18 It is understood that you are supplying BT 10 material to Converters in
19 the United States from your facility in Switzerland. Our review
20 indicates that you are probably infringing at least Claim 1 of the '459
as a contributory infringer.

21 The Jackson Letter also enclosed copies of both the '459 and '053 patents.

22 15. On or about November 9, 2010, DSM was advised by a customer that the customer
23 had received a phone call from a BAE employee, followed by a letter from BAE's representative,
24 accusing the customer of infringing the '459 patent by virtue of using DSM's product; that letter
25 also made mention of the '053 patent. DSM was further advised that a BAE sales representative
26 told that same customer that all of DSM's customers would receive letters stating that DSM's
27 BT10 product infringes BAE's patents.

1 16. On or about November 12, 2010, Mr. Michael Reynolds, BAE's Vice President of
2 Advanced Materials and Chief Technology Officer for Security & Survivability, held a
3 teleconference with a DSM sales representative. During that call, Mr. Reynolds stated that DSM's
4 customers in the United States were infringing BAE's patents by virtue of using DSM's BT10
5 product. Mr. Reynolds also stated that letters similar to the Jackson Letter had been sent to other
6 customers in the United States.

7 17. On or about November 15, 2010, DSM was advised by a second customer that it
8 had received a letter from the Jackson Patent Group stating that the use of BT10 would infringe
9 the '459 patent. The letter also made mention of the '053 patent.

10 18. During this same time period, DSM has been advised that at least two other
11 customers have received the same or similar letters from the Jackson Patent Group, accusing the
12 customers of infringing the '459 patent, and also mentioning the '053 patent, by virtue of using
13 DSM's BT10 product. One of these customers is Ten Cate, located in Morgan Hill, California.

14 19. BAE's letters and verbal threats to DSM and its customers regarding infringement
15 are an unfair business practice that is meant to undermine DSM's business development efforts
16 and chill competition.

17 **COUNT I**
18 **LANHAM ACT 15 U.S.C. § 1125(a)**

19 20. DSM incorporates by reference the averments of Paragraphs 1-19 as if fully set
20 forth herein.

21 21. As described above, BAE made false statements of fact about BT10 in commercial
22 advertising or promotion in interstate commerce. The false statements deceived or were likely to
23 deceive a substantial segment of the intended audience, and the deception was material because it
24 was likely to influence purchasing decisions. Moreover, BAE's false statements have resulted in
25 actual and probable injury to DSM.

26 22. BAE made its infringement accusations in bad faith because it knew or should have
27 known its infringement accusations were false. BAE lacked a reasonable, good faith basis for
28 accusing BT10 and DSM of infringing its patents.

1 23. BAE’s accusations were made in bad faith for at least the following reasons:
2 Among other things, BT10 is commercially available and BAE could easily have determined both
3 by examining BT10 that it does not meet the limitations of at least claim 1 of the ‘459 patent
4 because it does not have smooth edges. Further, on information and belief, BAE also was familiar
5 with the process by which BT10 has been made and knew or should have known that, unlike its
6 own UHMWPE materials, the manufacture of BT10 does not involve other requirements of the
7 patents asserted in the letters to DSM and its customers, such as using a heated knife. Nor did
8 BAE take any steps to inquire about the process by which BT10 is made or to otherwise discuss
9 the matter with DSM.

10 24. BAE further demonstrated its bad faith by failing to respond to the requests by
11 DSM and its customers for information regarding the basis for its allegations of infringement or to
12 otherwise discuss the matter.

13 25. Taken together, these facts show BAE’s accusations were made in bad faith. DSM
14 specifically incorporates these allegations of bad faith into each of the other Counts of this
15 Complaint, below.

16 **COUNT II**
17 **DEFAMATION**

18 26. DSM incorporates by reference the averments of Paragraphs 1-25 as if fully set
19 forth herein.

20 27. BAE’s conduct described above constitutes defamation.

21 28. Because BAE’s statements impute conduct, characteristics, or a condition
22 incompatible with the proper exercise of DSM’s lawful business, they are defamatory *per se*, and,
23 therefore, damage to DSM may be presumed.

24 29. In addition, DSM also suffered special damages, including but not limited to
25 pecuniary loss in the form of expenditures related to its business that were necessary to respond to
26 the defamatory statements and the need to provide financial assurances to customers to continue
27 doing business with them.

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COUNT III
CAL. BUS. & PROF. CODE §17200:
UNLAWFUL ACTS

30. DSM incorporates by reference the averments of Paragraphs 1-29 as if fully set forth herein.

31. BAE's business acts or practices violate the Lanham Act and constitute defamation.

32. As a result, BAE's actions violate the unlawfulness prong of Section 17200.

33. By reason of BAE's unfair competition, DSM has been injured in its business or property, including the loss of past, present, and future profits, the loss of customers and potential customers, the loss of goodwill and product image, and the prospective harm to its business. DSM also has lost money by virtue of its costs in responding to BAE's untrue allegations, including but not limited to time and resources spent responding to industry concerns and attorneys' fees and costs.

34. DSM has suffered irreparable injury by reason of the acts, practices, and conduct of BAE described above and will continue to suffer such injury unless and until the Court enjoins such acts, practices, and conduct. DSM has no adequate remedy at law.

COUNT IV
CAL. BUS. & PROF. CODE §17200:
UNFAIR ACTS

35. DSM incorporates by reference the averments of Paragraphs 1-34 as if fully set forth herein.

36. BAE's business acts or practices were and are intended to restrain trade in California by preventing DSM from marketing and selling BT10 in this state.

37. BAE's actions thus violate the unfair prong of Section 17200.

COUNT V
CAL. BUS. & PROF. CODE §17200:
DECEPTIVE ACTS

38. DSM incorporates by reference the averments of Paragraphs 1-37 as if fully set forth herein.

1 39. BAE's statements that DSM and its customers are infringing are untrue and
2 misleading.

3 40. Upon information and belief, BAE knew, or by the exercise of reasonable care
4 should have known, that the statements were untrue or misleading.

5 41. BAE's statements and misrepresentations are such that a significant portion of the
6 general consuming public or targeted consumers, acting reasonably under the circumstances, will
7 be misled.

8 42. DSM has suffered irreparable injury by reason of the acts, practices, and conduct of
9 BAE described above and will continue to suffer such injury unless and until the Court enjoins
10 such acts, practices, and conduct. DSM has no adequate remedy at law.

11 **COUNT VI**
12 **DECLARATORY JUDGMENT OF NONINFRINGEMENT**

13 43. DSM incorporates by reference the averments of Paragraphs 1-42 as if fully set
14 forth herein.

15 44. An actual and justiciable controversy exists between DSM and BAE, parties having
16 adverse legal interests, concerning the alleged infringement of the '053 and '459 patents by
17 DSM's manufacture and sale of BT10. This controversy is of sufficient immediacy and reality to
18 warrant the issuance of a declaratory judgment.

19 45. DSM's BT10 product does not infringe, either directly or indirectly, any valid
20 claim of the '053 or '459 patents.

21 46. DSM is entitled to a judgment declaring that it has never infringed and is not
22 infringing any valid claim of the '053 or '459 patents.

23 **COUNT VII**
24 **DECLARATORY JUDGMENT OF INVALIDITY**

25 47. DSM incorporates by reference the averments of Paragraphs 1-46 as if fully set
26 forth herein.

27 48. An actual and justiciable controversy exists between DSM and BAE, parties having
28 adverse legal interests, concerning the invalidity of the '053 and '459 patents. This controversy is
of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

1 49. The '053 and '459 patents are invalid under 35 U.S.C. §§102, 103, and/or 112.

2 50. DSM is entitled to a judgment declaring that the '053 and '459 patents are invalid.

3 **PRAYER FOR RELIEF**

4 **WHEREFORE**, DSM respectfully requests that judgment be entered:

5 a. Declaring that DSM has not infringed and is not infringing the '053 and
6 '459 patents, either directly or indirectly;

7 b. Declaring that the '053 and '459 patents are invalid;

8 c. Finding that BAE's conduct violates the Lanham Act;

9 d. Finding that BAE's conduct constitutes defamation;

10 e. Finding that BAE has violated section 17200 of the California Business and
11 Professions Code;

12 f. Finding this to be an exceptional case entitling DSM to an award of
13 reasonable attorneys' fees, costs, and expenses as provided by at least 15 U.S.C. §1117(a) and 35
14 U.S.C. §285;

15 g. Enjoining BAE's continued violations of the California Business and
16 Professions Code as provided by at least California Business and Professions Code §17203;

17 h. Ordering such restitutionary relief as DSM proves at trial;

18 i. Pre-judgment and post-judgment interest at the maximum legal rate; and

19 j. Such other relief as the Court may deem just and proper.
20

21 DATED: January 7, 2011

By: /s/ David Bilsker

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DEMAND FOR JURY TRIAL

Plaintiff DSM Dyneema hereby demands a jury trial on all issues properly tried to a jury.

DATED: Janaury 7, 2011

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CERTIFICATION OF INTERESTED PARTIES

Pursuant to Federal Rule of Civil Procedure 7.1, DSM, through its counsel, hereby states that the parent company of DSM is DSM Pharmaceuticals Inc. No publicly held corporation owns 10% or more of DSM's stock.

Pursuant to Civil L.R. 3-16, the undersigned certifies that the following listed persons, associations of persons, firms, partnerships, corporations (including parent corporations) or other entities (i) have a financial interest in the subject matter in controversy or in a party to the proceeding, or (ii) have a non-financial interest in that subject matter or in a party that could be substantially affected by the outcome of this proceeding:

DSM Pharmaceuticals Inc., the parent company of DSM Dyneema.

DATED: January 7, 2011

By: /s/ David Bilsker
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