

[ FILED ]

RECEIVED  
2002 JUL 24 P 12:13

IN THE UNITED STATES DISTRICT COURT  
OF THE MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION

JUL 24 2002  
CLERK  
U. S. DISTRICT COURT  
MIDDLE DIST. OF ALA.

CUTLER AT ABBEVILLE, L.L.C., )  
)  
Plaintiff, )  
)  
v. )  
)  
MICHAEL FOODS, INC. and )  
NORTH CAROLINA STATE UNIVERSITY, )  
)  
Defendants. )  
)

COMPLAINT AND  
JURY DEMAND

CV-02-A-832-S

**COMPLAINT SEEKING DECLARATION OF NON-INFRINGEMENT, INVALIDITY  
AND UNENFORCEABILITY OF U.S. PATENT NOS. 4,808,425; 4,994,291;  
4,957,759, ALL REEXAMINATION CERTIFICATES THERETO and  
REISSUE PATENT NO. RE37,225E (formerly U.S. Patent No. 5,019,408)**

Plaintiff, Cutler at Abbeville, L.L.C., ("Cutler") for its complaint against Defendants,  
Michael Foods, Inc. ("Michael Foods") and North Carolina State University ("NCSU") alleges  
as follows:

**THE PARTIES**

1. Cutler is a limited liability corporation organized under the laws of the State of  
Missouri, having a principal place of business at Abbeville, Alabama and is registered to do  
business in the State of Alabama by the Office of the Secretary of State.

1

2. Upon information and belief, Michael Foods is a corporation organized under the laws of the State of Minnesota, and having its principal place of business at Minnetoka, Minnesota.

3. Upon information and belief, NCSU is a constituent institution of the University of North Carolina, has its principal place of business at Raleigh, North Carolina, and is an arm of the State of North Carolina.

### **JURISDICTION AND VENUE**

4. This Court has subject matter jurisdiction of this action pursuant to 28 U.S.C. §§1331 and 1338 (a).

5. This Court is empowered to provide Declaratory Judgment as a remedy in this action pursuant to 28 U.S.C. §2201 and §2202.

6. Michael Foods and NCSU have purposefully directed activities against residents of this District of Alabama, such activities in Alabama providing basis for the present claims.

7. Upon information and belief, Michael Foods and NCSU, either separately or in cooperation, engage in conduct as follows: i) do business in Alabama generally; ii) employ and/or engage agents and/or representatives in Alabama to perform services on its (their) behalf; iii) have substantial sales of egg products; iv) advertise in trade journals directed to residents and companies in Alabama; v) advertise on an interactive web page or web pages available to private

and corporate residents of Alabama thereby offering products for sale in Alabama; vi) have made patent-based threats and undertaken patent-based action against Alabama corporation(s) and manufacturing concerns.

8. Upon information and belief, Michael Foods and NCSU, either separately or in cooperation, have sufficient contacts with Alabama, as defined by Alabama's Long Arm Statute, Rule 4.2 of the Alabama Rules of Civil Procedure, such that the assertion of *in personam* jurisdiction over them satisfies the requirements of due process and fundamental fairness.

9. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b), 1391(c) and 1400(b).

### **SUBSTANTIVE ALLEGATIONS**

10. Cutler is in the business of making and selling food products including, among other things liquid, whole egg products. Cutler competes with Michael Foods for sales of liquid whole egg products.

11. Cutler has established its manufacturing operations in Alabama based on, among other things, processing equipment and a physical plant purchased from an Alabama company, Abbeville Egg Products, Inc., (AEP), *formerly* Cutler Egg Products, Inc.

12. Cutler also currently employs many former employees of AEP, and makes liquid whole egg products using the same basic process as AEP.

13. Upon information and belief, Michael Foods and NCSU have brought a suit against AEP, and has personally serviced AEP in the District, alleging, *inter alia*, patent infringement of U.S. Patent Nos. 4,808,425 (Reex. Cert. Issued 5/30/00); 4,994,291 (Reex. Cert. Issued 3/21/00); 4,957,759 (Reex. Cert. Issued 2/29/00) and Reissue Patent No. RE37,225E (“the ’425 patent”, “the ’291 patent”, “the ’759 patent”, and “the ’225 patent” collectively referred to as “patents in suit,” copies of which are provided as Exhibits A-G).

14. Upon information and belief, Michael Foods is an exclusive licensee of NCSU to rights under the patent in suit.

15. Upon information and belief, NCSU and Michael Foods have alleged that AEP, among other things, makes, uses, sells, and/or offers for sale certain liquid whole egg products within the United States that are covered by one or more claims of the patents in suit.

16. On further information and belief, Michael Foods and/or NCSU have sued and/or threatened suit against at least six (6) other parties in the United States (in New Jersey, Florida, Minnesota, and California) based on the patents in suit, such conduct placing all competitors in the liquid whole egg market in fear of facing an infringement suit by Michael Foods and NCSU.

17. Based on the conduct described above and in view of the geographical and product proximity to AEP, Cutler is certain (and at least reasonably apprehensive) that it will be sued by Michael Foods and NCSU on a claim of infringement of the patents in suit.

18. Cutler does not infringe the patents in suit because it does not make, use, sell, offer for sale or import any product nor engage in any process which infringes the patents in suit.

19. The patents in suit are invalid because they fail to comply with one or more of the requirements of the patent statute, including, but not limited to 35 U.S.C. §102, 103, 112, 251, et al., and/or are rendered unenforceable because of inequitable conduct during prosecution of the patents in suit.

20. Cutler brings this claim under the patent laws of the United States, Title 35, United States Code, for a Declaratory Judgment under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, seeking a judgment of non-infringement of the patents in suit. Cutler further seeks a declaration that the patents in suit are invalid because the patents in suit fail to comply with one or more of the requirements of the U.S. Patent Statute, 35 U.S.C.

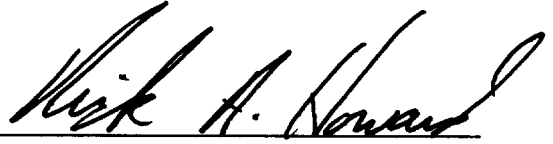
20. This is an exceptional case within the meaning of 35 U.S.C. § 285.

**WHEREFORE**, Plaintiff, Cutler, prays:

- a. That this Court declare the patents in suit not infringed by Cutler; and/or
  
- b. That this Court enjoin Michael Foods and NCSU from bringing or maintaining an action or threatening to bring an action to enforce the patents in suit against Cutler or from charging infringement thereof against Cutler, or buyers, users, sellers or manufacturers of Cutler's products; and/or
  
- c. That this Court adjudge the patents in suit invalid under one or more the provisions of 35 U.S.C.; and/or
  
- d. That this Court declare the patents in suit unenforceable because of NCSU's inequitable conduct during prosecution of the patents in suit; and/or
  
- e. That this Court award Cutler its attorneys' fees, costs and expenses incurred in this action; and/or
  
- f. That this Court award Cutler such other and further relief as the Court may deem just, proper and equitable.

This the 24<sup>th</sup> day of July, 2002.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Rick A. Howard". The signature is written in a cursive style and is positioned above a horizontal line.

Rick A. Howard, Esq. (HOW045)  
Nix Holtsford Gilliland  
Higgins & Hitson, P.C.  
Carmichael Center  
4001 Carmichael Road  
P.O. Box 4128  
Montgomery, Alabama 36106  
Telephone: (334) 215-8585  
Attorneys for Plaintiff  
Cutler at Abbeville, L.L.C.

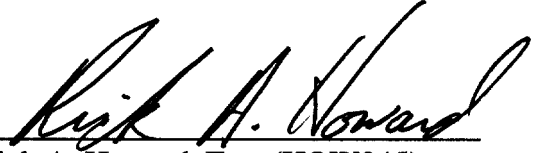
OF COUNSEL:

Ronald J. Baron, Esq.  
Hoffmann & Baron, LLP  
6900 Jericho Turnpike  
Syosset, New York 11791  
Telephone: (516) 822-3550  
Facsimile: (516) 822-3582

**JURY DEMAND**

Cutler requests a trial by jury.

Respectfully submitted,



Rick A. Howard, Esq. (HOW045)  
Nix Holtsford Gilliland  
Higgins & Hitson, P.C.  
Carmichael Center  
4001 Carmichael Road  
P.O. Box 4128  
Montgomery, Alabama 36106  
Telephone: (334) 215-8585  
Attorneys for Plaintiff  
Cutler at Abbeville, L.L.C.

**OF COUNSEL:**

Ronald J. Baron, Esq.  
Hoffmann & Baron, LLP  
6900 Jericho Turnpike  
Syosset, New York 11791  
Telephone: (516) 822-3550  
Facsimile: (516) 822-3582

**Please serve Defendants via certified mail at the following locations:**

Michael Foods, Inc.  
401 Carlson Parkway  
Suite 300  
Minnetonka, MN 55305

North Carolina State University  
Ms. Mary Elizabeth King  
Vice Chancellor and General Counsel  
Office of Legal Affairs  
301 Holaday Hall  
P.O. Box 7008  
Raleigh, North Carolina 27695



**EXHIBITS  
NOT SCANNED**