

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNIVERSAL BUSINESS	:	
SOLUTIONS, INC. d/b/a	:	
UBS AESTHETICS	:	
Plaintiff	:	Civil Action No.
v.	:	
	:	JURY TRIAL DEMANDED
D.M. SPECIALTIES, INC. and	:	
FREDERICK W. DE JACMA, a/k/a	:	
FRED DE JACMA, individually, and	:	
t/a D.M. SPECIALTIES, INC.	:	
Defendants	:	

COMPLAINT

Plaintiff, Universal Business Solutions, Inc. d/b/a UBS Aesthetics (“UBSI”), by and through its undersigned counsel, Fitzpatrick Lentz & Bubba, P.C., by way of Complaint against Defendants, D.M. Specialties, Inc. (“DMSI”) and Frederick W. De Jacma, a/k/a Fred De Jacma, individually, and t/a D.M. Specialties, Inc. (“De Jacma”), pursuant to 28 U.S.C. § 2201, *et seq.*, avers as follows:

A. PARTIES

1. Plaintiff, Universal Business Solutions, Inc. d/b/a UBS Aesthetics, is a Pennsylvania corporation with a principal place of business at 60 West Broad Street, Bethlehem, Pennsylvania 18018.

2. Defendant, D.M. Specialties, Inc., is a Maryland corporation with a principal place of business at 530 College Parkway, Suite D, Annapolis, Maryland 21401.

3. Defendant, D.M. Specialties, Inc., conducts business within the Commonwealth of Pennsylvania.

4. Defendant, Frederick W. De Jacma, a/k/a Fred De Jacma, individually and t/a D.M. Specialties, Inc., is a resident of the State of Maryland, serves as President of D.M. Specialties, Inc., and conducts business at 530 College Parkway, Suite D, Annapolis, Maryland 21401.

5. Defendant, Frederick W. De Jacma, a/k/a Fred De Jacma, individually and t/a D.M. Specialties, Inc., conducts business in the Commonwealth of Pennsylvania.

B. JURISDICTION

6. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 and § 1338 because the district courts have original jurisdiction over civil matters arising under the laws of the United States, which includes any Act of Congress related to patents and trademarks, which are at issue in this matter.

7. This Court also has jurisdiction over this matter pursuant to 28 U.S.C. § 1332 because the matter exceeds the sum or value of \$75,000.00, exclusive of interest and costs, and is between citizens of different states.

C. VENUE

8. Pursuant to 28 U.S.C. § 1391, venue before this Court is proper because Defendants, D.M. Specialties, Inc., and Fred De Jacma, individually and t/a D.M. Specialties, Inc., conduct business within the Commonwealth of Pennsylvania, which is sufficient to establish personal jurisdiction, and the dispute arises from a breach of contract, which substantially occurred in Pennsylvania.

D. STATEMENT OF FACTS

The UBSI/DMSI Distributor Agreement

9. On or about August 15, 2004, UBSI and DMSI executed a “Distributor Agreement” (“Agreement”) relating to the distribution by UBSI of certain products manufactured by DMSI.

10. The product at issue, called Power Peel™, is a microdermabrasion device used to remove facial skin cells from patients and clients.

11. On or about September 29, 1998, De Jacma registered with the United States Patent and Trademark Office for DMSI’s exclusive right to use the name Power Peel™ in association with a “medical apparatus, namely, a tissue abrasion device for dislodging tissue through the forced projection of particles.” DMSI received registration number 2192693 for Power Peel™.

12. Through the Agreement, DMSI granted UBSI the exclusive right to sell, exchange, transfer, solicit order for, or distribute the microdermabrasion device called Power Peel™ and related equipment and products.

13. DMSI granted UBSI exclusive distributor status rights during the term of the Agreement under DMSI’s name, logotypes, and trademarks throughout the geographic territory specified in the Agreement, namely the United States and Canada.

14. The Agreement permits either party to terminate the Agreement.

15. The Agreement also specifically provides:

[DMSI] hereby agrees to indemnify, defend, and hold [UBSI] harmless from any against all claims, demands, liabilities, judgments, and expenses incurred or suffered by [UBSI] arising out of any allegation by any person, business, or entity that any Product of [DMSI] infringes on any patent or trademark right, See Rider 10 provided that: (i) [UBSI] shall have given [DMSI] notice

within a reasonable time period after [UBSI] shall have knowledge of any claim, demand or suit in which such an allegation is made; (ii) [DMSI] shall have the right to control the defense of any such claim, demand or suit through attorneys' of its choice, and to settle or compromise and such claim at its sole cost and expense on such terms and conditions as it sees fit; and, (iii) [UBSI] agrees to reasonably cooperate with [DMSI] in the defense of any such claim, demand or suit. Any costs incurred in that cooperation to be the responsibility of [DMSI]. The indemnity set forth herein does not relate to any Product that has been altered or changed by [UBSI].

16. The Agreement provides "[UBSI] may terminate the Agreement upon ninety (90) days notice to [DMSI] in the event of [DMSI's] breach or violation of any of the terms and conditions hereof."

17. The Agreement further provides: "In the event [DMSI] does not cure breach of violation [of the Agreement within ninety days], this Agreement may be terminated by [UBSI], in its sole discretion, by written notice to [DMSI]."

18. Upon termination, the Agreement requires De Jacma and/or DMSI to pay UBSI "an amount equal to twenty-four (24) times the Termination Amount." The "Termination Amount" is "equal to the monthly average of thirty percent (30%) of [UBSI's] gross sales of the Products for the three months immediately preceding the Effective Date of such termination."

19. Additionally, the Agreement specifically provides that upon termination for "close of business" of DMSI, De Jacma will provide UBSI the exclusive use of the Power Peel™ trademark for a period of three years.

20. The Agreement provides that all written notices shall be delivered to DMSI's address, which is also as set forth in this Complaint.

Alleged Patent Infringement Under U.S. Patent Number 5,037,432 and Demand for Indemnification

21. On April 24, 2006, UBSI notified DMSI and De Jacma, at the address specified in the Agreement, that UBSI learned that Paolo Giaccherio (“Giaccherio”) holds the rights under U.S. Patent Number 5,037,432 (“‘432 Patent”), which relates to an adjustable apparatus for removing surface portions of human tissue in a procedure known as microdermabrasion.

22. The device covered by the ‘432 Patent is the hand piece on the microdermabrasion products, which UBSI agreed to distribute on behalf of DMSI under the name Power Peel™ pursuant to the Agreement.

23. In accordance with the Agreement, on April 24, 2006, UBSI gave notification to DMSI and De Jacma that it received notice of a potential patent infringement claim or demand received from Giaccherio.

24. Accordingly, UBSI requested that DMSI indemnify, defend and hold UBSI harmless regarding Giaccherio’s claim.

25. On May 21, 2006, De Jacma notified UBSI of DMSI’s purported termination of the Agreement, effective on that same date, related to “close of business.”

26. At that time, De Jacma also demanded that UBSI stop using the Power Peel™ trademark, contrary to the express terms of the Agreement.

27. On June 1, 2006, UBSI advised DMSI that pursuant to the Agreement, termination of the Agreement provides UBSI with the exclusive right to use the trademark Power Peel™ for a period of three years.

28. UBSI also requested that De Jacma and/or DMSI pay UBSI the Termination Amount as set forth in the Agreement.

29. The Termination Amount totals \$ 1,799,899.00.

30. Additionally, UBSI again requested that DMSI indemnify, defend, and hold UBSI harmless pursuant to the Agreement terms and UBSI's letter dated April 24, 2006.

31. Neither DMSI nor De Jacma responded to the June 1, 2006 demands.

32. As a result of Defendants' failure to honor their obligation to indemnify, defend, and hold UBSI harmless, UBSI was forced to respond to Giacchero's contentions as a result of which UBSI incurred costs and expenses, including attorneys' fees.

The UBSI/Giacchero Settlement

33. Subsequently, on June 23, 2006, Plaintiff executed a Settlement Agreement with Paolo Giacchero and Fine Gold Investment, S.A. ("FGI").

a. The Settlement Agreement acknowledges Giacchero as the holder of the rights under the '432 Patent, which rights were assigned to or were under the control of FGI.

b. The Settlement Agreement acknowledges that UBSI distributed certain products throughout the United States and Canada, including products in the microdermabrasion field.

c. The Settlement Agreement sets forth that, pursuant to UBSI's Distributor Agreement with DMSI and De Jacma, UBSI acted as exclusive distributor for certain products which DMSI and/or De Jacma represented and warranted that they had the right to sell.

d. Moreover, the Settlement Agreement establishes that DMSI and/or De Jacma represented and warranted to UBSI that the DMSI's production, and sale/distribution of the Power Peel™ device and hand piece attached thereto did not infringe on any patent or trademark rights.

e. The Settlement Agreement confirms that Giacchero informed UBSI that DMSI and/or De Jacma did not have rights to sell the Power Peel™ hand piece for a period of time dating back to January 1, 2002.

f. In full settlement of any claims of infringement of the '432 Patent, UBSI agreed to pay and FGI/Giacchero agreed to accept, the sum of \$60,000.00 to be paid in accordance with the terms of the Settlement Agreement.

g. On June 23, 2006, UBSI paid FGI/Giacchero \$15,000.00 and signed a promissory note to pay \$2,500.00 per month for eighteen (18) months in satisfaction of the Settlement Agreement terms.

The UBSI/Crystal Free Settlement

34. Prior to the infringement claim asserted by Giacchero, UBSI informed DMSI of another, similar claim asserted against UBSI regarding a related product known as the Crystal Free machine.

35. In connection with the Crystal Free claims, UBSI incurred costs, which included:

- | | |
|--|------------|
| a. 5 Crystal Free machines returned @ \$1,850 each | \$9,250.00 |
| b. Assorted unopened Crystal Free tips | \$2,265.00 |
| c. Settlement of Crystal Free lawsuit | \$5,000.00 |

TOTAL	\$16,515.00
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36. UBSI requested indemnification from DMSI/De Jacma for costs it was required to pay to resolve its potential liability with respect to the Crystal Free claims, as summarized above.

37. DMSI/De Jacma failed to respond to UBSI's demand for indemnification.

38. On or about October 5, 2006, Paolo Giaccherio filed a Complaint for patent infringement against Power Peel™, Inc., DMSI, and Fred De Jacma in the United States District Court for the Southern District of New York, alleging infringement of the '432 Patent.

COUNT ONE: DECLARATORY JUDGMENT

39. Plaintiff incorporates by reference the averments in Paragraphs 1 through 38 above, as if set forth at length.

40. Pursuant to the terms of the Agreement, De Jacma agreed to provide UBSI with the exclusive use of the Power Peel™ trademark in the event of a termination of the Agreement.

41. Pursuant to the terms of the Agreement, Defendants must indemnify, defend, and hold Plaintiff harmless for any claims of patent infringement regarding the Power Peel™ Product.

42. Pursuant to the terms of the Agreement, De Jacma and/or DMSI must pay UBSI the Termination Amount, which is \$ 1,799,899.00.

43. Defendants must also pay Plaintiff \$16,515.00 for defending and settling a similar infringement claim relating to the Crystal Free machine for which Plaintiff distributed on behalf of Defendants.

44. It is necessary that the Court determine and declare the parties' respective rights, status, and legal relations under the Distributor Agreement dated August 15, 2004, and, in particular, determine that 1) Plaintiff maintains the exclusive use of the Power Peel™ trademark; 2) Defendants shall provide Plaintiff with indemnification regarding any and all infringement claims related to the device patented under U.S. Patent Number 5,037,432; 3) De Jacma and/or DMSI must pay UBSI the Termination Amount as set forth in the Agreement; and 4) Defendants

shall provide Plaintiff with indemnification regarding any and all infringement claims related to the Crystal Free claims previously asserted against Defendants.

WHEREFORE, Plaintiff, Universal Business Solutions, Inc., d/b/a UBS Aesthetics, demands judgment in its favor and against Defendants, D.M. Specialties, Inc., and Frederick W. De Jacma, a/k/a Fred De Jacma, individually and t/a D.M. Specialties, Inc., jointly and severally:

1. Declaring Plaintiff as the exclusive user of the Power Peel™ trademark;
2. Declaring Plaintiff's right to indemnification by Defendants regarding any and all claims of infringement related to the device patented under U.S. Patent Number 5,037,432, and any costs incurred by Plaintiff herewith;
3. Declaring that Defendants are obligated to pay Plaintiff \$1,799,899.00 in satisfaction of the Termination Amount, as set forth in the Agreement;
4. Declaring that Defendants pay Plaintiff \$16,515.00 for Plaintiff's costs spent to defend and settle a related infringement matter regarding the "Crystal Free" products for which Plaintiff distributed on behalf of Defendants; and
5. Granting such other and further relief as is appropriate including awarding Plaintiff its costs, including attorneys' fees, of this suit.

COUNT TWO: INJUNCTION

45. Plaintiff incorporates by reference the averments in Paragraphs 1 through 44 above, as if set forth at length.

46. Pursuant to the terms of the Agreement dated August 15, 2004, termination of the Agreement by Fred De Jacma and/or DMSI provides UBSI with the exclusive right to use the trademark Power Peel™ for a period of three years.

47. Because Fred De Jacma and/or DMSI terminated the Agreement, Plaintiff is entitled to the exclusive right to use the trademark Power Peel™ for a period of three years.

48. Plaintiff believes, and therefore avers, that De Jacma and/or DMSI continue to manufacture and/or sell the device and related products under the Power Peel™ trademark in violation of the Agreement and in derogation of Plaintiff's rights.

49. An injunction is necessary to restrain and enjoin De Jacma and/or DMSI from the continued use of the Power Peel™ trademark. Plaintiff has no adequate remedy at law.

WHEREFORE, Plaintiff, Universal Business Solutions, Inc., d/b/a UBS Aesthetics, demands judgment in its favor and against Defendants, D.M. Specialties, Inc., and Frederick W. De Jacma, a/k/a Fred De Jacma, individually and t/a D.M. Specialties, Inc., jointly and severally, restraining and enjoining De Jacma and/or DMSI from using the Power Peel™ trademark in violation of Plaintiff's rights, and granting such other and further relief as is just and equitable.

COUNT THREE: BREACH OF CONTRACT (TERMINATION PAYMENT)

50. Plaintiff incorporates by reference the averments in Paragraphs 1 through 49 above, as if set forth at length.

51. In or about May 21, 2004, De Jacma notified UBSI of the purported termination of the Agreement, effective on that same date, stating that DMSI had "stopped doing business."

52. Accordingly, UBSI requested that De Jacma and/or DMSI pay UBSI the Termination Amount as set forth in the Agreement, which totals \$ 1,799,899.00.

53. UBSI has not received the Termination Amount from De Jacma and/or DMSI, although the first installment payment under the Agreement was due on June 1, 2006.

54. Defendants breached the Agreement dated August 15, 2004, by failing to pay UBSI the Termination Amount, or any portion thereof.

WHEREFORE, Plaintiff, Universal Business Solutions, Inc., d/b/a UBS Aesthetics, respectfully demands judgment in its favor and against Defendants, D.M. Specialties, Inc., and Frederick W. De Jacma, a/k/a Fred De Jacma, individually and t/a D.M. Specialties, Inc., jointly and severally in an amount in excess of \$75,000.00, plus costs, and other such relief as is just and equitable.

COUNT FOUR: BREACH OF CONTRACT (REPRESENTATIONS AND WARRANTIES)

55. Plaintiff incorporates by reference the averments in Paragraphs 1 through 54 above, as if set forth at length.

56. By entering into and executing the Agreement dated August 15, 2004, Defendants represented and warranted, inter alia, that they maintained the right to produce and/or sell the Power Peel™ device and related products at issue.

57. Subsequently, Giacchero notified UBSI that he maintained the patent rights to the hand piece to the Power Peel™ device.

58. Defendants breached the Agreement by representing and warranting to UBSI that they maintained the right to produce and/or sell the hand piece when in fact they did not.

59. Defendant De Jacma, upon learning of Giacchero's patent rights, admitted that Defendants did not have the right to produce and/or sell the device at issue.

60. Additionally, Defendants misrepresented to UBSI that they had the right to produce, sell and/or distribute the "Crystal Free" products.

61. In full settlement of any claims of infringement of the '432 Patent, UBSI paid FGI/Giacchero \$60,000.00.

62. Plaintiff also paid \$16,515.00 to settle a similar infringement claim relating to the Crystal Free machine, which Plaintiff distributed on behalf of Defendants.

63. As a result of the foregoing, Plaintiff incurred, and will continue to incur, costs, including, but not limited to attorneys' fees and expenses in excess of \$75,000.00, for which DMSI and/or De Jacma are liable, to defend and settle contentions of patent infringement regarding the Power Peel™ device and related products Plaintiff distributed on behalf of Defendants.

WHEREFORE, Plaintiff, Universal Business Solutions, Inc., d/b/a UBS Aesthetics, demands judgment in its favor and against Defendants, D.M. Specialties, Inc., and Frederick W. De Jacma, a/k/a Fred De Jacma, individually and t/a D.M. Specialties, Inc., jointly and severally, for Plaintiff's costs, expenses, attorneys' fees incurred as a result of Defendants' breaches of the representations and warranties in the Agreement, and such other and further relief as is just and equitable.

COUNT FIVE: BREACH OF CONTRACT (INDEMNIFICATION)

64. Plaintiff incorporates by reference the averments in Paragraphs 1 through 63 above, as if set forth at length.

65. The Agreement provided that DMSI shall indemnify, defend, and hold UBSI harmless against all claims related to patent infringement, provided that UBSI notifies DMSI within a reasonable time regarding knowledge of such claim.

66. UBSI properly notified DMSI within a reasonable time with regard to patent infringement claims asserted against UBSI regarding the Power Peel™ device and related products.

67. Defendants breached the Agreement dated August 15, 2004, by failing and refusing to indemnify, defend, and hold UBSI harmless pursuant to the Agreement terms and after UBSI's repeated requests that Defendants do so.

68. As a direct result of the foregoing, UBSI has incurred and will continue to incur damages in excess of \$75,000.00 for which DMSI and/or De Jacma are liable.

WHEREFORE, Plaintiff, Universal Business Solutions, Inc., d/b/a UBS Aesthetics, demands judgment in its favor and against Defendants, D.M. Specialties, Inc., and Frederick W. De Jacma, a/k/a Fred De Jacma, individually and t/a D.M. Specialties, Inc., jointly and severally for an amount in excess of \$75,000.00, together with such other and further relief as is just and equitable.

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Date: October 25, 2006

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