

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

TRISTRATA TECHNOLOGY, INC.,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No.
)	
VIVANT PHARMACEUTICALS, LLC AND)	
BETTERHEALTHYSKIN.COM, LLC,)	
)	
)	
Defendants.)	JURY DEMAND
)	

COMPLAINT

Plaintiff, TriStrata Technology, Inc. (“TTP”), by its attorneys, Perkins Coie LLP and Connolly Bove Lodge & Hutz LLP, alleges for its Complaint against Defendants on knowledge as to itself and its own acts and upon information and belief as to all other matters, as follows:

SUMMARY OF COMPLAINT

1. This is an action for patent infringement pursuant to the patent laws of the United States, 35 U.S.C. §100, *et seq.* arising out of Defendants’ willful and deliberate infringement of the patents described below.

2. The patents were issued to Drs. Eugene J. Van Scott and Ruey J. Yu, who are pioneers in the field of the use of alpha hydroxyacids for the treatment of conditions associated with the skin. Each of the patents describes and claims a method of using a composition containing an alpha hydroxyacid to treat and/or reduce skin conditions including but not limited to wrinkles, fine lines and other conditions affecting human skin. (The eight patents at issue in this suit are collectively referred to as the “TTI Patents.”)

3. TTI provided notice of the TTI Patents to manufacturers, sellers and/or distributors of cosmetic products both in the United States and abroad, including Defendants. The notice explicitly informed the recipients, among other things, that: (i) the TTI Patents had been issued and assigned to TTI; and (ii) TTI was willing to enter into a licensing agreement. To date, several of the largest manufacturers and/or marketers in the cosmetics industry have entered into such license agreements with TTI, including, without limitation, Avon, Johnson and Johnson, Chesebrough Pond's, Elizabeth Arden, Allergan, Beiersdorf, Inc., L'Oreal, Chanel, Neoteric Cosmetics, Inc., Erno Laszlo, and Dermalogica, Inc., and TTI has received substantial royalty payments in return for granting such licenses.

4. However, Defendants have continued to refuse to recognize the TTI Patents and have willfully and deliberately infringed the TTI Patents by, among other things, promoting the use of their products through national advertisements and websites and otherwise in a manner designed to induce infringement of the TTI Patents.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§1331 and 1338(a), and 10 Del. C. § 3104(c).

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

THE PARTIES

The Plaintiff

7. Plaintiff TTI is a Delaware corporation with its principal place of business at 1105 North Market Street, Suite 1300, P.O. Box 8985, Wilmington, Delaware 19899. TTI is in the business of developing and licensing novel dermatological, pharmaceutical and skin care product

technology. TTI is the assignee of certain patents issued to Drs. Van Scott and Yu (“the Inventors”).

The Defendants

8. On information and belief, Defendant Vivant Pharmaceuticals, LLC (hereinafter “Vivant”) is a Florida corporation with its principal place of business in Florida. Vivant is in the business of manufacturing, distributing, and/or selling cosmetic products in this District and elsewhere in the United States.

9. On information and belief, Defendant betterhealthskin.com, LLC (hereinafter “betterhealthskin”) is a Louisiana corporation with its principal place of business in Louisiana. betterhealthskin is in the business of manufacturing, distributing, and/or selling cosmetic products in this District and elsewhere in the United States.

10. On information and belief, the registered agent for betterhealthskin is Dr. James Fulton, and the registered agent for Vivant is the wife of Dr. Fulton, Mrs. Sara Fulton. Dr. James Fulton is also the founder of and Chief Formulator for Vivant.

11. On information and belief, betterhealthskin.com is an authorized retailer for Vivant products.

THE PATENTS

12. On February 25, 1992, United States Letters Patent No. 5,091,171 entitled “Amphoteric Composition and Polymeric Forms of Alpha Hydroxyacids and Their Therapeutic Use” was duly and legally issued to the Inventors and assigned to TTI. On September 26, 1995, the PTO completed a re-examination of U.S. Patent No. 5,091,171. Thereafter, on July 15, 1997, the PTO completed a second re-examination of U.S. Patent No. 5,091,171 and issued Re-examination Certificate B2 5,091,171. A copy of this patent and its two Re-examination Certificates (collectively “the ‘171 Patent”) are annexed hereto as Exhibit A. The ‘171 Patent

describes and claims a method for treating wrinkles by topically applying a composition comprising an alpha hydroxyacid.

13. On August 20, 1996, United States Letters Patent No. 5,547,988 entitled "Alleviating Signs of Dermatological Aging with Glycolic Acid, Lactic Acid or Citric Acid" was duly and legally issued to the Inventors and assigned to TTI. On July 15, 1997, the PTO completed a re-examination of U.S. Patent No. 5,547,988 and issued Re-examination Certificate B1 5,547,988, in which all of the original claims were confirmed without change. A copy of this patent and its Re-examination Certificate (collectively "the '988 Patent") are annexed hereto as Exhibit B. The '988 Patent describes and claims a method for reducing the appearance of skin changes associated with aging by topically applying a composition comprising a glycolic acid, lactic acid or citric acid or a topically effective salt thereof, to the area of skin exhibiting the sign of aging.

14. On June 6, 1995, United States Patent No. 5,422,370 entitled "Method of Using 2-Hydroxypropanoic Acid (Lactic Acid) for the Treatment of Wrinkles" was duly and legally issued to the Inventors and assigned to TTI. On July 15, 1997, the PTO completed a re-examination of U.S. Patent No. 5,422,370 and issued Re-examination Certificate B1 5,422,370. A copy of this patent and its Re-examination Certificate (collectively "the '370 Patent") are annexed hereto as Exhibit C. The '370 Patent describes and claims a method for reducing a skin wrinkle by topically applying to the wrinkle lactic acid or a topically effective salt thereof.

15. On January 31, 1995, United States Patent No. 5,385,938 entitled "Method of Using Glycolic Acid for Treating Wrinkles" was duly and legally issued to the Inventors and assigned to TTI. On July 15, 1997, the U.S. Patent and Trademark Office ("PTO") completed a re-examination of U.S. Patent No. 5,385,938 and issued Re-examination Certificate B1

5,385,938, in which all of the original claims were confirmed without change. A copy of this patent and its re-examination certificate (collectively “the ‘938 Patent”) are annexed hereto as Exhibit D. The ‘938 Patent describes and claims a method for visibly reducing a human facial wrinkle by topically applying a composition comprising glycolic acid and/or a topically effective salt thereof, to the wrinkle.

16. On February 14, 1995, United States Letters Patent No. 5,389,677 entitled “Method of Treating Wrinkles Using Glycolic Acid” was duly and legally issued to the Inventors and assigned to TTI. On July 15, 1997, the PTO completed a re-examination of U.S. Patent No. 5,389,677 and issued Re-examination Certificate B1 5,389,677, in which all of the original claims were confirmed without change. A copy of this patent and its re-examination certificate (collectively “the ‘677 Patent”) are annexed hereto as Exhibit E. The ‘677 Patent describes and claims a method for visibly reducing any type of human skin wrinkle by topically applying a composition comprising glycolic acid and /or a topically effective salt thereof, to the wrinkle.

17. On May 9, 2000, United States Patent No. 6,060,512 entitled “Method of Using Hydroxycarboxylic Acids or Related Compounds for Treating Skin Changes Associated With Intrinsic and Extrinsic Aging” was duly and legally issued to the Inventors and assigned to TTI. A copy of this patent is annexed hereto as Exhibit F. The ‘512 Patent describes and claims a method for treating skin changes associated with intrinsic and/or extrinsic aging comprising topically applying to the skin an alpha hydroxyacid.

18. On November 5, 1996, United States Patent No. 5,571,841 entitled “Method of Treating Wrinkles Using Mandelic Acid” was duly and legally issued to the Inventors and assigned to TTI. A copy of this patent is annexed hereto as Exhibit G. The ‘841 patent describes

and claims a method for visibly reducing any type of human skin wrinkle by topically applying a composition comprising mandelic acid and /or a topically effective salt thereof, to the wrinkle.

19. On October 14, 1997, United States Patent No. 5,677,339 entitled "Method of Using Mandelic Acid for Treating Wrinkles" was duly and legally issued to the Inventors and assigned to TTI. A copy of this patent is annexed hereto as Exhibit H. The '339 patent describes and claims a method for visibly reducing any type of human skin wrinkle by topically applying a composition comprising mandelic acid and /or a topically effective salt thereof, to the wrinkle.

20. TTI is the assignee of the '171, '988, '370, '938, '677, '512, '841, and '339 Patents.

21. TTI's methods for reducing wrinkles and other skin conditions associated with aging, as described and claimed in the annexed patents, have enjoyed excellent commercial success since their introduction. Indeed, TTI's methods have become the methods of choice for the consuming public for reducing wrinkles, fine lines and other visible effects of aging on the human skin.

22. On July 27, 1999, a Markman Order was entered by Judge Joseph J. Farnan in Civil Action Nos. 96-227 and 96-346, in which the '171, '938, '677, '370, and '988 Patents were at issue. The terms "wrinkle", "skin changes associated with aging", "topically applying", "visibly reduce", "reduce the appearance of", "in an amount and for a period of time" and "in an effective amount and for a period of time" were interpreted. The '512, '841, and '339 Patents rely on identical or nearly identical claim language. This Order has been in force for over 10 years.

FIRST CLAIM FOR RELIEF
(Infringement of the '171 Patent)

23. TTI repeats and realleges the allegations of paragraphs 1 through 22 as if fully set forth herein.

24. Defendants are engaged in the manufacture, distribution and/or sale of cosmetic products comprising alpha hydroxyacids, and/or a topically effective salt thereof. These products are sold and promoted over the Internet, through national advertisements, websites and/or through other marketing materials that encourage prospective customers to apply such products to their skin for the purpose of visibly reducing a human skin wrinkle and/or fine lines on the human skin.

25. By virtue of these promotional activities, Defendants have been contributing, and continue to contribute, to and/or to induce the infringement of the '171 Patent in violation of 35 U.S.C. §271.

26. TTI is informed and believes that Defendants have received express notice of the '171 Patent and/or had knowledge of that patent prior to the filing of this complaint. Despite notice, Defendants have failed to enter into a license agreement with TTI, and continue to contribute and/or induce infringement of the '171 Patent in violation of 35 U.S.C. §271.

27. TTI is informed and believes that Defendants' actions have been willful and deliberate, entitling TTI to increased damages under 35 U.S.C. §284 and making this an exceptional case within the meaning of 35 U.S.C. §285.

SECOND CLAIM FOR RELIEF
(Infringement of the '988 Patent)

28. TTI repeats and realleges the allegations of paragraphs 1 through 27 as if fully set forth herein.

29. Defendants are engaged in the manufacture, distribution and/or sale of cosmetic products comprising alpha hydroxyacids, including but not limited to, lactic acid, glycolic acid and/or a topically effective salt thereof. These products are sold and promoted over the Internet through national advertisements, websites and/or through other marketing materials that encourage prospective customers to apply such products to their skin for the purpose of reducing the appearance of skin changes associated with aging.

30. By virtue of these promotional activities, Defendants have been contributing, and continue to contribute, to and/or to induce the infringement of the '988 Patent in violation of 35 U.S.C. §271.

31. TTI is informed and believes that Defendants have received express notice of the '988 Patent and/or had knowledge of that patent prior to the filing of this complaint. Despite notice, Defendants have failed to enter into a license agreement with TTI, and continue to contribute and/or induce infringement of the '988 Patent in violation of 35 U.S.C. §271.

32. TTI is informed and believes that Defendants' actions have been willful and deliberate, entitling TTI to increased damages under 35 U.S.C. §284 and making this an exceptional case within the meaning of 35 U.S.C. §285.

THIRD CLAIM FOR RELIEF
(Infringement of the '370 Patent)

33. TTI repeats and realleges the allegations of paragraphs 1 through 32 as if fully set forth herein.

34. Defendants are engaged in the manufacture, distribution and/or sale of cosmetic products comprising alpha hydroxyacids, including but not limited to, lactic acid and/or a topically effective salt thereof. These products are sold and promoted over the Internet, through national advertisements, websites and/or through other marketing materials that encourage

prospective customers to apply such products to their skin for the purpose of visibly reducing a human skin wrinkle and/or fine lines on the human skin.

35. By virtue of these promotional activities, Defendants have been contributing, and continue to contribute, to and/or to induce the infringement of the '370 Patent in violation of 35 U.S.C. §271.

36. TTI is informed and believes that Defendants have received express notice of the '370 Patent and/or had knowledge of that patent prior to the filing of this complaint. Despite notice, Defendants have failed to enter into a license agreement with TTI, and continue to contribute and/or induce infringement of the '370 Patent in violation of 35 U.S.C. §271.

37. TTI is informed and believes that Defendants' actions have been willful and deliberate, entitling TTI to increased damages under 35 U.S.C. §284 and making this an exceptional case within the meaning of 35 U.S.C. §285.

FOURTH CLAIM FOR RELIEF
(Infringement of the '938 Patent)

38. TTI repeats and realleges the allegations of paragraphs 1 through 37 as if fully set forth herein.

39. Defendants are engaged in the manufacture, distribution and/or sale of cosmetic products comprising alpha hydroxyacids, including but not limited to, glycolic acid and/or a topically effective salt thereof. These products are sold and promoted over the Internet, through national advertisements, websites and/or through other marketing materials that encourage prospective customers to apply such products to their skin for the purpose of visibly reducing a human skin wrinkle and/or fine lines on the human skin.

40. By virtue of these promotional activities, Defendants have been contributing, and continue to contribute, to and/or to induce the infringement of the '938 Patent in violation of 35 U.S.C. §271.

41. TTI is informed and believes that Defendants have received express notice of the '938 Patent and/or had knowledge of that patent prior to the filing of this complaint. Despite notice, Defendants have failed to enter into a license agreement with TTI, and continue to contribute and/or induce infringement of the '938 Patent in violation of 35 U.S.C. §271.

42. TTI is informed and believes that Defendants' actions have been willful and deliberate, entitling TTI to increased damages under 35 U.S.C. §284 and making this an exceptional case within the meaning of 35 U.S.C. §285.

FIFTH CLAIM FOR RELIEF
(Infringement of the '677 Patent)

43. TTI repeats and realleges the allegations of paragraphs 1 through 42 as if fully set forth herein.

44. Defendants are engaged in the manufacture, distribution and/or sale of cosmetic products comprising alpha hydroxyacids, including but not limited to, glycolic acid and/or a topically effective salt thereof. These products are sold and promoted over the Internet, through national advertisements, websites and/or through other marketing materials that encourage prospective customers to apply such products to their skin for the purpose of visibly reducing a human skin wrinkle and/or fine lines on the human skin.

45. By virtue of these promotional activities, Defendants have been contributing, and continue to contribute, to and/or to induce the infringement of the '677 Patent in violation of 35 U.S.C. §271.

46. TTI is informed and believes that Defendants have received express notice of the '677 Patent and/or had knowledge of that patent prior to the filing of this complaint. Despite notice, Defendants have failed to enter into a license agreement with TTI, and continue to contribute and/or induce infringement of the '677 Patent in violation of 35 U.S.C. §271.

47. TTI is informed and believes that Defendants' actions have been willful and deliberate, entitling TTI to increased damages under 35 U.S.C. §284 and making this an exceptional case within the meaning of 35 U.S.C. §285.

SIXTH CLAIM FOR RELIEF
(Infringement of the '512 Patent)

48. TTI repeats and realleges the allegations of paragraphs 1 through 47 as if fully set forth herein.

49. Defendants are engaged in the manufacture, distribution and/or sale of cosmetic products comprising alpha hydroxyacids, including but not limited to, lactic acid and/or a topically effective salt thereof. These products are sold and promoted over the Internet, through national advertisements, websites and/or through other marketing materials that encourage prospective customers to apply such products to their skin for the purpose of treating skin changes associate with intrinsic and/or extrinsic aging.

50. By virtue of these promotional activities, Defendants have been contributing, and continue to contribute, to and/or to induce the infringement of the '512 Patent in violation of 35 U.S.C. §271.

51. TTI is informed and believes that Defendants have received express notice of the '512 Patent and/or had knowledge of that patent prior to the filing of this complaint. Despite notice, Defendants have failed to enter into a license agreement with TTI, and continue to contribute and/or induce infringement of the '512 Patent in violation of 35 U.S.C. §271.

52. TTI is informed and believes that Defendants' actions have been willful and deliberate, entitling TTI to increased damages under 35 U.S.C. §284 and making this an exceptional case within the meaning of 35 U.S.C. §285.

SEVENTH CLAIM FOR RELIEF
(Infringement of the '841 Patent)

53. TTI repeats and realleges the allegations of paragraphs 1 through 52 as if fully set forth herein.

54. Defendants are engaged in the manufacture, distribution and/or sale of cosmetic products comprising alpha hydroxyacids, including but not limited to, mandelic acid and/or a topically effective salt thereof. These products are sold and promoted over the Internet, through national advertisements, websites and/or through other marketing materials that encourage prospective customers to apply such products to their skin for the purpose of treating skin changes associate with intrinsic and/or extrinsic aging.

55. By virtue of these promotional activities, Defendants have been contributing, and continue to contribute, to and/or to induce the infringement of the '841 Patent in violation of 35 U.S.C. §271.

56. TTI is informed and believes that Defendants have received express notice of the '841 Patent and/or had knowledge of that patent prior to the filing of this complaint. Despite notice, Defendants have failed to enter into a license agreement with TTI, and continue to contribute and/or induce infringement of the '841 Patent in violation of 35 U.S.C. §271.

57. TTI is informed and believes that Defendants' actions have been willful and deliberate, entitling TTI to increased damages under 35 U.S.C. §284 and making this an exceptional case within the meaning of 35 U.S.C. §285.

EIGHTH CLAIM FOR RELIEF
(Infringement of the '339 Patent)

58. TTI repeats and realleges the allegations of paragraphs 1 through 57 as if fully set forth herein.

59. Defendants are engaged in the manufacture, distribution and/or sale of cosmetic products comprising alpha hydroxyacids, including but not limited to, mandelic acid and/or a topically effective salt thereof. These products are sold and promoted over the Internet, through national advertisements, websites and/or through other marketing materials that encourage prospective customers to apply such products to their skin for the purpose of treating skin changes associate with intrinsic and/or extrinsic aging.

60. By virtue of these promotional activities, Defendants have been contributing, and continue to contribute, to and/or to induce the infringement of the '339 Patent in violation of 35 U.S.C. §271.

61. TTI is informed and believes that Defendants have received express notice of the '339 Patent and/or had knowledge of that patent prior to the filing of this complaint. Despite notice, Defendants have failed to enter into a license agreement TTI, and continue to contribute and/or induce infringement of the '339 Patent in violation of 35 U.S.C. §271.

62. TTI is informed and believes that Defendants' actions have been willful and deliberate, entitling TTI to increased damages under 35 U.S.C. §284 and making this an exceptional case within the meaning of 35 U.S.C. §285.

WHEREFORE, TTI prays that this Court:

A. Find that the '171, '988, '370, '938, '677, '512, '841, and '339 Patents have been infringed by the Defendants, as alleged herein;

B. Award damages adequate to compensate TTI for Defendants' infringements, but not less than a reasonable royalty for the use made of the claimed inventions by Defendants, together with interest, including pre-judgment interest, and costs as fixed by the Court;

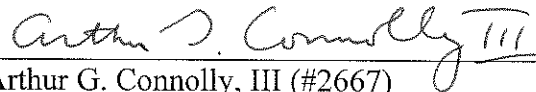
C. Find that Defendants' infringements have been willful and deliberate;

D. Award TTI increased damages and attorneys' fees pursuant to 35 U.S.C. §284 and §285 because of the willful and deliberate nature of Defendants' infringements;

E. Award TTI such other and further relief as this Court may deem just and proper.

Dated: October 15, 2009

Respectfully submitted,



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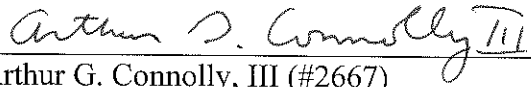
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JURY DEMAND

Plaintiff hereby demands a TRIAL BY JURY as to all issues so triable.

Respectfully submitted,

October 15, 2009


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