

Laurent QC H4T1R3, Canada and a registered office at 680 Ave. Lepine, Dorval QC H9P 2S5, Canada.

4. Zotos and Vernico were involved in prior litigation in this judicial district, *Zotos International, Inc. v. Vernico Products Ltee*, Case No. 00-C-06793 (N.D. Ill., filed Oct. 31, 2000) (Hart, J.) (“First Vernico Litigation”). The First Vernico Litigation involved United States Patent Nos. 5,456,907 (“the ‘907 Patent”), 5,460,809 (“the ‘809 Patent”), and 5,260,054 (“the ‘054 Patent”).

5. On or about June 5, 2001, Vernico executed a settlement agreement with Zotos (“Settlement Agreement”) in which Zotos and Vernico agreed to settle the First Vernico Litigation. A copy of the executed Settlement Agreement is attached hereto as Exhibit A.

6. In the Settlement Agreement, Vernico admitted infringing the ‘907 Patent and the ‘809 Patent. *See Exhibit A, p. 1, ¶ 6.*

7. Vernico also admitted in the Settlement Agreement that the ‘907 Patent and the ‘809 Patent are valid and enforceable. *See id.*

8. On or about June 20, 2001, this Court entered a consent judgment against Vernico (“Consent Judgment”), which, among other provisions, permanently enjoined Vernico from infringing the ‘907 Patent and the ‘809 Patent. A copy of the signed Consent Judgment is attached hereto as Exhibit B.

9. On information and belief, defendant Paul Mitchell is a corporation organized and existing under the laws of California, with its principal place of business located at 9701 Willshire Boulevard, Suite 1205, Beverly Hills, California 90212, and a service of process address at 20705 Centre Pointe Parkway, Santa Clarita, California 91350.

JURISDICTION AND VENUE

10. The patent infringement claims of this case arise under the patent laws of the United States of America. This Court has jurisdiction over the subject matter of the patent infringement claims pursuant to 28 U.S.C. §§ 1331 and 1338(a).

11. The breach of contract claims of this case arise under the laws of the State of Illinois. Zotos' damages from Vernico's breach of the Settlement Agreement exceed \$75,000. Therefore, this Court has jurisdiction over the subject matter of the breach of contract claims pursuant to 28 U.S.C. § 1332(a). Moreover, the breach of contract claims form part of the same case or controversy as the patent infringement claims. Therefore, this Court also has jurisdiction over the subject matter of the breach of contract claims pursuant to 28 U.S.C. § 1367(a).

12. In the Settlement Agreement, Zotos and Vernico agreed that "any suit, action, or other proceeding for breach of, enforcement of, arising out of, or otherwise in connection with, [the Settlement Agreement] shall be brought in the United States District Court for the Northern District of Illinois, and each party hereby submits itself to, and acknowledges the jurisdiction and proper venue of the United States District Court for the Northern District of Illinois for any such suit, action or other proceeding." *See* Exhibit A, p. 5, ¶ 15.

13. Personal jurisdiction over Vernico in Illinois is proper under 735 ILCS 5/2-209 because Vernico has submitted to personal jurisdiction in Illinois for any legal action arising out of or otherwise in connection with the Settlement Agreement. *See id.*

14. Venue is proper with respect to Vernico in this judicial district pursuant to 28 U.S.C. §§ 1391(b) and (c) and § 1400(b), and because Vernico has agreed that venue is proper in the Northern District of Illinois for any legal action arising out of or otherwise in connection with the Settlement Agreement. *See id.*

15. In the Consent Judgment, this Court retained jurisdiction for purposes of enforcing the Consent Judgment. *See* Exhibit B, ¶ 10.

16. Personal jurisdiction over Paul Mitchell in Illinois is proper under 735 ILCS 5/2-209 because Paul Mitchell is doing business in Illinois by supplying hair care products to hair salons within Illinois. On information and belief, this includes the unauthorized sale and distribution of products which embody the claims of the '907 Patent and the '809 Patent.

17. Venue is proper with respect to Paul Mitchell within this judicial district pursuant to 28 U.S.C. §§ 1391(b) and (c) and § 1400(b).

ZOTOS AND ITS PRODUCTS

18. Zotos is a leading manufacturer and supplier of hair and beauty products. Zotos' current product lines include "Quantum", "Naturelle", "ISO", "Nucleic-A", and "Zotos".

19. Zotos has obtained and acquired patent rights to protect its substantial investment in these product lines.

ZOTOS AND UNITED STATES PATENT NO. 5,456,907

20. On October 10, 1995, the United States Patent and Trademark Office duly and legally issued the '907 Patent, entitled "CYSTEAMINE PERMANENT WAVE COMPOSITION AND METHOD". A true and correct copy of the '907 Patent is attached hereto as Exhibit C.

21. Zotos is the current owner of all right, title and interest in and to the '907 Patent. Zotos has standing to sue for all past and present infringement of the '907 Patent.

22. By virtue of the '907 Patent, Zotos has exclusive rights in the United States to exclude others from making, using, offering to sell or selling the inventions claimed in the '907 Patent.

ZOTOS AND UNITED STATES PATENT NO. 5,460,809

23. On October 24, 1995, the United States Patent and Trademark Office duly and legally issued the '809 Patent, entitled "CYSTEAMINE PERMANENT WAVE COMPOSITION AND METHOD". A true and correct copy of the '809 Patent is attached hereto as Exhibit D.

24. Zotos is the current owner of all right, title and interest in and to the '809 Patent. Zotos has standing to sue for all past and present infringement of the '809 Patent.

25. By virtue of the '809 Patent, Zotos has exclusive rights in the United States to exclude others from making, using, offering to sell or selling the inventions claimed in the '809 Patent.

**VERNICO'S PREVIOUS INFRINGEMENT OF
UNITED STATES PATENT NOS. 5,456,907 and 5,460,809**

26. On October 31, 2000, Zotos filed the First Vernico Litigation in this Court against Vernico and Premier Beauty Supply, Inc., alleging infringement of the '907 Patent, the '809 Patent, and the '054 Patent.

Settlement Agreement between Zotos and Vernico

27. On or about June 5, 2001, Vernico executed the Settlement Agreement. *See* Exhibit A, p. 6.

28. On or about June 6, 2001, Zotos executed the Settlement Agreement. *See id.*

29. In the Settlement Agreement, Vernico agreed not to make, use, sell, or offer to sell any products which, when used by the customer, have both a pH level between 7.6 and 8.9 and cysteamine levels between 7.6% and 12.5% (weight by weight) in the United States at any time prior to August 8, 2012. *See* Exhibit A, p. 3, ¶ 4.

30. In the Settlement Agreement, Vernico agreed that if it sold products in the United States which, when used by the customer, had both a pH level between 7.6 and 8.9 and cysteamine levels between 7.6% and 12.5% (weight by weight), such conduct would infringe one or more of the '907 Patent, the '809 Patent, and the '054 Patent. *See* Exhibit A, p. 1, ¶ 7.

31. In the Settlement Agreement, Vernico admitted that the '907 Patent, the '809 Patent, and the '054 Patent are valid and enforceable. *See* Exhibit A, p. 1, ¶ 6.

This Court's Consent Judgment as to Vernico

32. This Court entered the Consent Judgment on or about June 20, 2001. *See* Exhibit B, p. 3.

33. In the Consent Judgment, Vernico again admitted that the '907 Patent, the '809 Patent, and the '054 Patent were valid and enforceable. *See* Exhibit B, ¶ 3.

34. In the Consent Judgment, Vernico admitted that it had infringed the '907 Patent, the '809 Patent, and the '054 Patent by offering for sale and/or selling products containing a cysteamine-reducing compound in the United States. *See* Exhibit B, ¶ 4.

35. In the Consent Judgment, this Court permanently enjoined Vernico and its officers, agents, servants, and employees, and those persons in active concert or participation with them who receive actual notice thereof, from infringing the '907 Patent, the '809 Patent, and/or the '054 Patent. *See* Exhibit B, ¶ 5.

36. In the Consent Judgment, this Court ordered that any violation of the terms of the Consent Judgment by Vernico would entitle Zotos to recover any damages and, in addition to any damages, Zotos' costs and expenses, including reasonable attorneys' fees for Zotos' efforts to enforce the Consent Judgment. *See* Exhibit B, ¶ 7.

VERNICO'S AND PAUL MITCHELL'S PRESENT CONDUCT

37. On information and belief, Vernico is offering to sell and selling products which, when used by a customer, have both a pH level between 7.6 and 8.9 and cysteamine levels between 7.6% and 12.5% (weight by weight). Vernico sells these infringing products under its own brands, and through at least one vendee, John Paul Mitchell Systems, within the United States. Zotos has not authorized this conduct by Vernico.

38. On information and belief, Paul Mitchell is offering to sell and selling products purchased from Vernico which, when used by a customer, have both a pH level between 7.6 and 8.9 and cysteamine levels between 7.6% and 12.5% (weight by weight). Paul Mitchell is selling these products within the United States. Zotos has not authorized this conduct by Paul Mitchell.

39. Products which, when used by a customer, have both a pH level between 7.6 and 8.9 and cysteamine levels between 7.6% and 12.5% (weight by weight) embody the inventions claimed in the '907 Patent and the '809 Patent.

40. Zotos has provided no express or implied waiver of any of its rights under the Settlement Agreement to hold Vernico liable for selling or offering to sell products which, when used by a customer, have both a pH level between 7.6 and 8.9 and cysteamine levels between 7.6% and 12.5% (weight by weight).

COUNT ONE: BREACH OF THE TERMS OF THE SETTLEMENT AGREEMENT AND THE CONSENT JUDGMENT

41. Zotos hereby realleges and incorporates herein by reference the allegations contained in Paragraphs 1 through 40 of this Complaint.

42. On information and belief, by selling and offering to sell products, which, when used by a customer, have both a pH level between 7.6 and 8.9 and cysteamine levels

between 7.6% and 12.5% (weight by weight) in the United States, Vernico has breached the terms of the Settlement Agreement and the Consent Judgment.

43. On information and belief, Vernico's breach has caused Zotos to suffer damages. Zotos is entitled to recover these damages from Vernico in an amount subject to proof at trial. Zotos has also incurred, and continues to incur, expenses and attorneys' fees in its efforts to enforce the terms of the Settlement Agreement and the Consent Judgment.

**COUNT TWO: CLAIM AGAINST VERNICO FOR
INFRINGEMENT OF U.S. PATENT NO. 5,456,907**

44. Zotos hereby realleges and incorporates herein by reference the allegations contained in Paragraphs 1 through 40 of this Complaint.

45. On information and belief, by selling, offering to sell, or importing products, which, when used by a customer, have both a pH level between 7.6 and 8.9 and cysteamine levels between 7.6% and 12.5% (weight by weight), in the United States, Vernico has been, and is, directly or indirectly infringing the '907 Patent, either literally or under the doctrine of equivalents.

46. On information and belief, Vernico's infringement of the '907 Patent has caused Zotos to suffer damages. Zotos is entitled to recover these damages from Vernico in an amount subject to proof at trial.

47. In addition, Vernico's infringement of the '907 Patent has caused Zotos to suffer irreparable injury, for which Zotos has no adequate remedy at law.

48. Zotos will continue to suffer such damage and irreparable injury unless and until Vernico is enjoined from infringing the '907 Patent. On information and belief, Vernico will continue to infringe the '907 Patent unless and until it is enjoined by this Court.

49. Because Vernico was aware of the '907 Patent from the First Vernico Litigation and has previously acknowledged infringement, validity, and enforceability of the '907 Patent, Vernico's ongoing infringement of the '907 Patent is willful.

**COUNT THREE: CLAIM AGAINST VERNICO FOR
INFRINGEMENT OF U.S. PATENT NO. 5,460,809**

50. Zotos hereby realleges and incorporates herein by reference the allegations contained in Paragraphs 1 through 40 of this Complaint.

51. On information and belief, by selling, offering to sell, or importing products, which, when used by a customer, have both a pH level between 7.6 and 8.9 and cysteamine levels between 7.6% and 12.5% (weight by weight), in the United States, Vernico has been, and is, directly or indirectly infringing the '809 Patent, either literally or under the doctrine of equivalents.

52. On information and belief, Vernico's infringement of the '809 Patent has caused Zotos to suffer damages. Zotos is entitled to recover these damages from Vernico in an amount subject to proof at trial.

53. In addition, Vernico's infringement of the '809 Patent has caused Zotos to suffer irreparable injury, for which Zotos has no adequate remedy at law.

54. Zotos will continue to suffer such damage and irreparable injury unless and until Vernico is enjoined from infringing the '809 Patent. On information and belief, Vernico will continue to infringe the '809 Patent unless and until it is enjoined by this Court.

55. Because Vernico was aware of the '809 Patent from the First Vernico Litigation and has previously acknowledged infringement, validity, and enforceability of the '809 Patent, Vernico's ongoing infringement of the '809 Patent is willful.

**COUNT FOUR: CLAIM AGAINST PAUL MITCHELL FOR
INFRINGEMENT OF U.S. PATENT NO. 5,456,907**

56. Zotos hereby realleges and incorporates herein by reference the allegations contained in Paragraphs 1 through 40 of this Complaint.

57. On information and belief, by selling, offering to sell, or importing products, which, when used by a customer, have both a pH level between 7.6 and 8.9 and cysteamine levels between 7.6% and 12.5% (weight by weight), in the United States, Paul Mitchell has been, and is, directly or indirectly infringing the '907 Patent, either literally or under the doctrine of equivalents.

58. On information and belief, Paul Mitchell's infringement of the '907 Patent has caused Zotos to suffer damages. Zotos is entitled to recover these damages from Paul Mitchell in an amount subject to proof at trial.

59. In addition, Paul Mitchell's infringement of the '907 Patent has caused Zotos to suffer irreparable injury, for which Zotos has no adequate remedy at law.

60. Zotos will continue to suffer such damage and irreparable injury unless and until Paul Mitchell is enjoined from infringing the '907 Patent. On information and belief, Paul Mitchell will continue to infringe the '907 Patent unless and until it is enjoined by this Court.

61. Paul Mitchell's ongoing infringement of the '907 Patent is willful.

**COUNT FIVE: CLAIM AGAINST PAUL MITCHELL FOR
INFRINGEMENT OF U.S. PATENT NO. 5,460,809**

62. Zotos hereby realleges and incorporates herein by reference the allegations contained in Paragraphs 1 through 40 of this Complaint.

63. On information and belief, by selling, offering to sell, or importing products, which, when used by a customer, have both a pH level between 7.6 and 8.9 and

cysteamine levels between 7.6% and 12.5% (weight by weight), in the United States, Paul Mitchell has been, and is, directly or indirectly infringing the '809 Patent, either literally or under the doctrine of equivalents.

64. On information and belief, Paul Mitchell's infringement of the '809 Patent has caused Zotos to suffer damages. Zotos is entitled to recover these damages from Paul Mitchell in an amount subject to proof at trial.

65. In addition, Paul Mitchell's infringement of the '809 Patent has caused Zotos to suffer irreparable injury, for which Zotos has no adequate remedy at law.

66. Zotos will continue to suffer such damage and irreparable injury unless and until Paul Mitchell is enjoined from infringing the '809 Patent. On information and belief, Paul Mitchell will continue to infringe the '809 Patent unless and until it is enjoined by this Court.

67. Paul Mitchell's ongoing infringement of the '809 Patent is willful.

PRAYER FOR RELIEF

WHEREFORE, Zotos respectfully requests that this Court:

- (1) enter judgment that Vernico has breached the terms of the Settlement Agreement and the Consent Judgment;
- (2) award Zotos damages in an amount sufficient to compensate Zotos for Vernico's breach of the Settlement Agreement and Consent Judgment;
- (3) enter judgment holding Vernico in contempt of this Court for violating the terms of the Consent Judgment;
- (4) award Zotos attorneys' fees and other costs associated with its efforts to investigate, identify, and enforce Vernico's violation of the Settlement Agreement and the Consent Judgment entered by this Court;

- (5) enter judgment that Vernico's and Paul Mitchell's present conduct infringes the '907 Patent and the '809 Patent;
- (6) award Zotos damages in an amount sufficient to compensate Zotos for Vernico's and Paul Mitchell's infringement of the '907 Patent and the '809 Patent;
- (7) award Zotos pre-judgment and post-judgment interest on the damages caused to it by Vernico's and Paul Mitchell's infringement of the '907 Patent and the '809 Patent;
- (8) treble any damages awarded to Zotos for Vernico's and Paul Mitchell's infringement of Zotos' patents by reason of willful infringement of the '907 Patent and the '809 Patent;
- (9) declare this case to be exceptional under 35 U.S.C. § 285, and award Zotos its reasonable attorneys fees, expenses and costs incurred in this action; and
- (10) award Zotos such other and further relief as this Court deems just and proper.

JURY DEMAND

Zotos hereby demands a jury trial on all issues appropriately triable by a jury.

DATED: March 2, 2009

Respectfully submitted,

s/ Robert S. Dailey
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