

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GIANTCEUTICAL, INC.,

Plaintiff,

-against-

KEN MABLE, INC., VARIOUS JOHN DOES,
JANE DOES and XYZ COMPANIES,

Defendants.

X

X

04 CV 8601
Docket No.

COMPLAINT

Trial By Jury Demanded

JUDGE MARRERO
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U.S.D.C. S.D. N.Y.
CASHIERS

Plaintiff, GIANTCEUTICAL, INC., by and through its attorneys, Yuen & Yuen, Esqs.

and Miranda & Sokoloff, LLP, complaining of the defendants herein, alleges, upon information and belief, as follows:

JURISDICTION AND VENUE

1. This action arises under the patent laws of the United States, Title 35, United States Code, particularly §§ 271 and 281-285.
2. This Court has jurisdiction over this action under 28 U.S.C. §§ 1338 and 1367.
3. Venue is proper in this judicial district pursuant to 28 U.S.C. §§1391 and 1400.

THE PARTIES

4. At all relevant times, plaintiff, GIANTCEUTICAL, INC. (hereinafter referred to as "GIANTCEUTICAL"), was and still is a corporation organized and existing under the laws of the State of California, having an office and principal place of business in the County of Los Angeles, State of California, and is doing business within this judicial district.

5. Upon information and belief, at all relevant times, defendant, KEN MABLE, INC., ("KEN MABLE") is a corporation organized and existing under the laws of the State of New York, having

an office and principal place of business in the County of New York, State of New York, and is doing business within this judicial district.

6. Upon information and belief, at all relevant times, BONEPHARM, INC., (“BONEPHARM”) is a corporation organized and existing under the laws of the State of California, with a principal place of business in California and is doing business within this judicial district.

7. The identities of the VARIOUS JOHN DOES, JANE DOES, and XYZ COMPANIES defendants are not presently known, and plaintiff will seek leave of this Court to amend this Complaint, if appropriate, to include the name or names of said individuals, corporations, or entities when such information becomes available.

FACTUAL BACKGROUND

8. On June 20, 2000, Beijing Juneng Asia Pacific Life Scientific Research Center (“Beijing”) was issued United States Registered Patent Number 6,077,872 (the “872 Patent”) for the “use of Calcium L-Threonate in preventing, inhibiting and curing osteoporosis and rickets.”

9. The 872 Patent was subsequently assigned by Beijing to Juneng Industry Co., Ltd. (“Juneng”) on or about June 26, 2002 and recorded by the U.S. Patent and Trademark Office on or about August 14, 2002.

10. By agreement dated October 2, 2003, Juneng licensed certain rights to the 872 Patent to Giantceutical.

11. Specifically, Giantceutical obtained exclusive use of the 872 Patent in the United States for a term of two years.

12. As such, there is a valid patent on which the instant action is founded and plaintiff, as an exclusive licensee, has standing to commence an action for infringement.

13. Plaintiff is engaged in the business of manufacturing, marketing and distributing food and dietary supplements and vitamin products, including calcium nutritional supplements and vitamin products.

14. Plaintiffs have commenced a lawsuit in the United States District Court for the Central District of California, under Docket Number CV 04-3242, against Bonepharm, Inc and certain individual defendants alleging patent infringement and breach of contract relating to the production and sale of calcium dietary supplements embodying the invention set forth in the 872 Patent. This action deals with separate activity in New York, as to which plaintiff has asked defendants to cease and desist but defendants have refused.

15. Plaintiffs have since been informed and believe, and based thereon allege, that defendant Ken Mable has been and is now purchasing, producing, distributing, offering for sale, selling, vending, storing and/or marketing, a calcium dietary supplement containing Calcium L-Threonate as a primary and main ingredient for preventing, inhibiting and curing osteoporosis and rickets, under the brand name of "BoneFlux" (hereinafter Defendants' Infringing Products"), in and around the New York area. This constitutes direct infringement and/or contributory infringement of the 872 Patent and/or inducement of the infringement of the 872 Patent.

16. Plaintiffs have since been informed and believe that defendant Bonepharm has been and is now purchasing, producing, distributing, offering for sale, selling, vending, storing and/or marketing, BoneFlux in connection with Ken Mable's actions in and around the New York area. This constitutes direct infringement and/or contributory infringement of the 872 Patent and/or inducement of the infringement of the 872 Patent.

17. Plaintiffs have since been informed and believe that Ken Mable is Bonepharm's exclusive

East Coast distributor of BoneFlux.

**AS AND FOR A FIRST CAUSE OF ACTION
FOR PATENT INFRINGEMENT**

18. Plaintiff repeats, reiterates and realleges each and every allegation set forth in paragraphs “1” through “17”, inclusive, as if more fully set forth at length herein.

19. Plaintiffs are informed and believe, and based thereon allege, that defendants have and continue to purchase, produce, distribute, offer for sale, sell, store and/or market Defendants’ Infringing Products which infringe on the 872 Patent.

20. Defendants’ purchase, production, distribution, offer for sale, sale, storage and/or marketing of the Defendants’ Infringing Products constituted direct and/or contributory and/or induced infringement of the 872 Patent.

21. Plaintiffs are informed and believe, and based thereon allege, that defendants had actual knowledge of the 872 Patent, but nevertheless engaged in their infringement activities in wanton disregard of plaintiff’s rights.

22. Defendants intentionally omitted Calcium L-Threonate from the ingredient list on the labels of Defendants’ Infringing Products in order to conceal their willful infringement of the 872 Patent.

23. Knowing of the 872 Patent, defendants have been and are presently engaged in willful and deliberate infringement of the 872 Patent, which is also malicious and oppressive.

24. Plaintiffs have sent notifications to defendants that demanded that defendants cease and desist from their activities with regard to Defendants’ Infringing Products. Defendants have refused to observe said notifications.

25. Accordingly, defendants have engaged in the infringing acts in a deliberate and willful

manner.

26. Plaintiffs are informed and believe, and based thereon allege, that defendants have planned, directed, contributed to and induced the infringement activities with actual knowledge of the 872 Patent by producing, distributing and selling the Defendants' Infringing Products through and under the name of BoneFlux.

27. Plaintiffs are informed and believe, and based thereon allege, that defendants whose names are unknown to plaintiff at this time have contributed to and/or induced the infringement of the 872 Patent by aiding and abetting the infringement activities. As soon as the identities of these individuals are known, plaintiff will amend their complaint and substitute the names of the individuals in places of the defendants sued herein as Various John Does, Jane Does and XYZ Companies.

28. Defendants' use of the Registered Patent in connection with its activities relating to the sale, distribution and/or sale of BoneFlux within the New York area, without plaintiff's permission or consent, infringes, and will continue to infringe, on the Registered Patent.

29. Defendants have profited from the aforementioned acts of infringement.

30. Defendants have caused, and continue to cause, irreparable harm and injury to plaintiff's interests in the Registered Patent.

31. By reason of the foregoing, plaintiff has sustained, and will continue to sustain, substantial injury, loss, and damage to its exclusive interest in the Registered Patent.

32. Plaintiff demands judgment equal to three times the amount of damages sustained, or the profits gained by defendants, as a result of their willful infringement on the Registered Patent, whichever is greater, plus interest, costs and attorneys' fees.

33. Furthermore, in engaging in the deliberate and wrongful conduct alleged herein, Defendants

have acted oppressively, maliciously, and willfully in injuring plaintiff's interests in the Registered Patent.

34. Accordingly, plaintiff demands judgment equal to three times the amount of damages sustained, or the profits gained by defendants as a result of the willful infringement on the Registered Patent, whichever is greater, plus punitive damages in the amount of Five Million Dollars (\$5,000,000.00).

**AS AND FOR A SECOND CAUSE OF ACTION
FOR UNFAIR COMPETITION**

35. Plaintiff repeats, reiterates and realleges all of the allegations contained in paragraphs "1" through "34" of the Complaint as if fully set forth at length herein.

36. Defendants have misappropriated the rights and privileges afforded under the 872 Patent by the aforementioned acts and conduct, and in doing so, have engaged in unfair trade practices and improper and unfair competition.

37. By reason of the foregoing, plaintiffs have sustained, and will continue to sustain, substantial injury, loss, and damage to its interest in the 872 Patent.

38. Defendants have caused a diminution in the economic and commercial value of the Registered Patent and plaintiff's rights thereto.

39. Plaintiff is presently unable to ascertain the full nature and extent of the damages it has suffered as a result of defendants' infringing activities, however, it expects the damages to exceed the sum of One Million Dollars (\$1,000,000.00), and plaintiff seeks relief from defendants in the same amount.

40. Furthermore, in engaging in the deliberate and wrongful conduct alleged herein, defendants

have acted oppressively, maliciously, and willfully in injuring plaintiff's interest in the Registered Patent.

41. Accordingly, plaintiff demands judgment in an amount to be determined at trial, but expected to exceed the sum of One Million Dollars (\$1,000,000.00), plus punitive damages in the amount of Five Million Dollars (\$5,000,000.00).

**AS AND FOR A THIRD CAUSE OF ACTION
FOR AN ACCOUNTING**

42. Plaintiff repeats, reiterates and realleges all of the allegations contained in paragraphs "1" through "41" of the Complaint as if fully set forth at length herein.

43. Defendants' use of the Registered Patent was and is without the permission or consent of plaintiff.

44. Defendants have and continue to profit from the aforementioned acts of infringement.

45. Plaintiff has suffered damages by way of defendants' violation of plaintiff's rights.

46. Plaintiff is unable to ascertain the full nature and extent of the monetary damages it has suffered as a result of defendants' infringing activities.

47. As such, plaintiff is entitled to an accounting of defendants' financial books and records so as to determine the precise amounts that defendants derived from the sale of Defendants' Infringing Products.

48. Plaintiff has no adequate remedy available at law

**AS AND FOR A FOURTH CAUSE OF ACTION
FOR A PERMANENT INJUNCTION**

49. Plaintiff repeats, reiterates and realleges all of the allegations contained in paragraphs "1" through "48" of the Complaint as if fully set forth at length herein.

50. Unless restrained by an Order of this Court, defendants will continue to infringe upon the Registered Patent by purchasing, producing, distributing, offering for sale, selling, vending, storing and/or marketing Defendants' Infringing Products for profit to the detriment of plaintiff.

51. Plaintiff has sustained, and will continue to sustain, substantial injury, loss, and damage to its exclusive interest in the Registered Patent.

52. Unless enjoined by the Court, defendants will continue to infringe the 872 Patent and cause plaintiff further damages.

53. By reason of the foregoing, plaintiff requests that defendants, their agents, servants, employees, and all persons acting in concert and participating with them, be permanently enjoined and restrained from infringing upon the 872 Patent in any manner, including, but not limited to, producing, distributing or calcium dietary supplements containing Calcium L-Threonate as a primary and main ingredient for preventing, inhibiting and curing osteoporosis and rickets, under the brand name of "BoneFlux" or any other name.

54. Plaintiff has no adequate remedy at law.

**AS AND FOR A FIFTH CAUSE OF ACTION
FOR THE DESTRUCTION OF INFRINGING ARTICLES**

55. Plaintiff repeats, reiterates and realleges all of the allegations contained in paragraphs "1" through "54" of the Complaint as if fully set forth at length herein.

56. Defendants have in their possession, custody or control, products which infringe upon the Registered Patent and, unless such items are seized and destroyed, defendants will distribute and sell such products in further damage to plaintiff.

57. Plaintiff therefore respectfully demands judgment directing the seizure and destruction of

any and all products in defendants' possession, custody or control, shown to infringe upon the Registered Patent.

58. Plaintiff has no adequate remedy available at law.

**AS AND FOR A SIXTH CAUSE OF ACTION
FOR ATTORNEYS FEES**

59. Plaintiff repeats, reiterates and realleges all of the allegations contained in paragraphs "1" through "58" of the Complaint as if fully set forth at length herein.

60. Based on the aforementioned infringement, plaintiff is entitled to an award of pursuant to 35 U.S.C. §285 for reasonable attorneys' fees incurred by plaintiff in the prosecution of this action.

WHEREFORE, Plaintiff, GIANTCEUTICAL, INC., respectfully requests judgment as follows:

(i) On the first cause of action, judgment equal to three times the amount of damages sustained, or the profits gained by defendants as a result of the willful infringement on the Registered Patent, whichever is greater, plus punitive damages in the amount of Five Million Dollars (\$5,000,000.00).

(ii) On the second cause of action, judgment in an amount to be determined at trial, but expected to exceed the sum of One Million Dollars (\$1,000,000.00), plus punitive damages in the amount of Five Million Dollars (\$5,000,000.00).

(iii) On the third cause of action, an accounting of defendants' financial books and records so as to determine the precise amounts that defendants derived from the sale of Defendants Infringing Products.

(iv) On the fourth cause of action that defendants, their agents, servants, employees, and all

persons acting in concert and participating with them, be permanently enjoined and restrained from infringing upon the 872 Patent in any manner, including, but not limited to, producing, distributing or calcium dietary supplements containing Calcium L-Threonate as a primary and main ingredient for preventing, inhibiting and curing osteoporosis and rickets, under the brand name of "BoneFlux" or any other name.


(v) On the fifth cause of action, judgment directing the destruction of any and all products in defendants' possession, custody or control, shown to infringe upon the Registered Patent.

(vi) On the sixth cause of action an award of attorneys' fees pursuant to 35 U.S.C. §285; along with

(vii) Interest, costs and attorneys' fees, together with such other and further relief as the Court may deem just, equitable and proper.

Dated: Mineola, New York
October 22, 2004

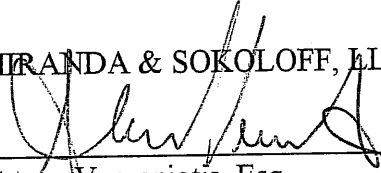
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