

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF KANSAS**

CEVA SANTÉ ANIMALE, S.A.
LaBallastiere BP: 126
33501 Libourne Cedex, FRANCE

Plaintiff,

v.

NUTRI-VET, LLC,
495 N. DuPont Avenue
Boise, ID 83713

Defendant.

CIVIL ACTION NO. 07-2532 CM

COMPLAINT FOR INJUNCTIVE RELIEF AND DAMAGES

Plaintiff Ceva Santé Animale, S.A. ("Ceva"), for its Complaint against Defendant Nutri-Vet, LLC ("Nutri-Vet"), states and alleges as follows based on present knowledge, information, and belief:

INTRODUCTION

1. Plaintiff Ceva and Defendant Nutri-Vet both make behavior modification pheromone products that simulate the natural pheromone secretions of dogs and cats. These products are designed to have a calming effect upon dogs and cats. Ceva and Nutri-Vet compete for the sale of these products.

2. Nutri-Vet has engaged in false and misleading advertising and promotion to stimulate sales of its product, Pet-Ease Pheromone plus™. Nutri-Vet's illegal and improper tactics have caused and will continue to cause irreparable harm to Ceva and have deprived the public of competition based on truthful and honest information.

3. Ceva brings this action both for damages and injunctive relief to stop Nutri-Vet from continuing illegal and deceptive advertising that has caused and continues to cause Ceva

irreparable harm. Additionally, Ceva seeks damages and injunctive relief for Nutri-Vet's infringement of U.S. Patent No. 6,077,867, which has been exclusively licensed to Ceva.

THE PARTIES

4. Ceva is a corporation organized under the laws of France. Ceva's principal place of business is LaBallastiere BP:126, 33501 Libourne Cedex, France.

5. Defendant Nutri-Vet is a limited liability company organized under the laws of the State of Arizona. Based upon information and belief, its principal place of business is 495 N. DuPont Avenue, Boise, Idaho 83713. The address of its registered agent, Steve Twohig, is 495 N. DuPont Avenue, Boise, Idaho 83713.

JURISDICTION AND VENUE

6. This is an action for patent infringement under 35 U.S.C. § 271, and for false advertising and unfair competition under the Lanham Act, 15 U.S.C. § 1125(a).

7. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331, 1338(a) and 1338(b).

8. This Court has personal jurisdiction over Defendant Nutri-Vet because it does business in Kansas by selling its products in this state. Nutri-Vet markets its products in Kansas through its web site, <http://www.Nutri-Vet.com>. Nutri-Vet also sells its products through major drug and pet store chains in this district and throughout the United States. Individuals can purchase Nutri-Vet's products from retailers in this district. Additionally, Nutri-Vet sells its products in this district through third-party web sites, including <http://www.petco.com> and <http://www.petsmart.com>.

9. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b) and 1400(b). Nutri-Vet sells its infringing products and engages in the offending advertising in this district. Ceva is harmed in this district by Nutri-Vet's false and misleading statements.

FACTUAL BACKGROUND

10. Like many animals, cats and dogs secrete pheromones. Certain pheromones can help animals cope with fear and stress-related issues that result in behavior problems. Ceva manufactures the synthetic pheromone products FELIWAY® (for cats) and D.A.P.® (for dogs). FELIWAY® and D.A.P.® are synthetic formulations that mimic natural pheromones to help cats and dogs feel more secure and act more calm.

11. Pheromones—chemicals emitted by animals through their skin and glands—help animals communicate with others of the same species. In mammals, the vomeronasal organ, which is close to the nasal passage, receives these pheromone signals. When animals receive pheromone signals, there is an involuntary behavioral effect on those animals. There are many different types of pheromones which in turn have different effects. For instance, some pheromones affect social behavior among animals, while others affect sexual behavior.

12. Cats, for example, secrete a special facial pheromone to communicate with other cats. Ceva's FELIWAY® product mimics the feline facial pheromone which helps a cat feel at home in its environment. When a cat rubs its face on an object, or even a person, it often releases the feline facial pheromone that marks the area as familiar and safe. When the cat senses this facial pheromone through the nasal passage, the cat recognizes it as familiar and is less likely to mark with urine or to scratch.

13. Dogs also secrete pheromones. Ceva's D.A.P.® (Dog Appeasing Pheromone) product mimics the "appeasing" pheromones secreted by nursing dogs, sending a signal of comfort and safety to their puppies. When a dog or puppy senses the pheromone through its nasal passage, it feels more secure and comfortable, reducing its urge to act out destructively through chewing, excessive barking, or house soiling.

14. Ceva owns federal registrations for the FELIWAY® (U.S. Registration No. 2,189,709) and D.A.P.® (U.S. Registration No. 2,776,511) trademarks. In addition, the FELIWAY® and D.A.P.® products and methods of using them in controlling various behaviors in animals are covered by U.S. and foreign patents that are exclusively licensed to Ceva.

15. Ceva's FELIWAY® and D.A.P.® products are sold under the brand name COMFORT ZONE® in the United States and distributed by Farnam Companies, Inc. The products are sold to customers through various retailers, including retailers in the State of Kansas. In addition, Ceva sells its products on third-party web sites and has them shipped into the State of Kansas.

16. Nutri-Vet is a direct competitor of Ceva in the field of canine and feline behavior modification products, particularly pheromone-based diffusers and sprays.

17. Nutri-Vet markets its pheromone products under the unregistered mark Pet-Ease Pheromone plus™. Nutri-Vet's products are sold through various retailers, including retailers located in the State of Kansas. The products also are sold on third-party web sites and shipped into the State of Kansas.

18. In some cases, the same retailer sells both Ceva's and Nutri-Vet's pheromone products.

19. Nutri-Vet advertises its pheromone products on its web site and in media, including magazines with national circulation, such as Pet Business. See Exh. 1.

NUTRI-VET'S FALSE ADVERTISING AND PROMOTION

20. Nutri-Vet has adopted a competitive strategy in which it falsely compares its “natural” pheromone product with Ceva’s “chemical” pheromone product. Nutri-Vet implements this strategy by making statements in its advertising and promotion that are patently false and misleading.

21. First, Nutri-Vet advertises its canine and feline Pet-Ease Pheromone plus™ products as working to "naturally reduce stress and anxiety" in animals "without the negative effects of chemical calmatives." Exh. 2. These statements appear on Nutri-Vet's web site and on its product labels. These statements are patently false and misleading in at least two ways. First, there is no evidence to support the statement that there are "negative effects" of chemical calmatives. Second, Nutri-Vet clearly is telling the consumer that its products are not chemical, when in fact, Nutri-Vet's products are no less "chemical" or more "natural" than Ceva's products.

22. Second, Nutri-Vet consistently represents that its pheromone products are natural as opposed to chemical. In the Frequently Asked Questions (FAQ) section of its web site, Nutri-Vet makes clear what it means by natural:

Q. Where do the pheromones in your product [Pet-Ease Pheromone Plus] come from?

A. The natural pheromones in our canine product are collected by swabbing the mammary glands of lactating bitches living in shelters or private homes. I collect feline pheromones from the cheeks of cats housed temporarily in a local animal shelter. NO ANIMALS ARE HARMED DURING COLLECTION. In fact, the extra attention they receive [sic] seems to "make their day[.]"

Exh. 3. Nutri-Vet's representation that it collects the pheromones it uses in its products by hand-swabbing dogs and cats is patently false and misleading. Nutri-Vet assures customers and consumers that its products are natural, even though there is no commercially reasonable way to collect and sell commercial quantities of pheromones swabbed from cats and dogs. On information and belief, the pheromones in Nutri-Vet's products are not obtained from animals using this collection method, but instead are made from synthetic or chemical formulations that mimic natural pheromones. Nutri-Vet's claim that its products contain a "natural pheromone" is misleading and unsubstantiated.

23. Third, Nutri-Vet has stated in the FAQ section of its web site that “there have been no placebo controlled studies on pheromones to date.” Exh. 3. In fact, there are at least seven documented, placebo-controlled studies on the use of pheromones in behavior modification treatments for animals, several of which have been published in international journals.¹ Nutri-Vet’s statement denying the existence of placebo-controlled studies is patently false and misleading.

24. Indeed, Nutri-Vet is aware of the false statement on its web site. In approximately March 2007, Nutri-Vet’s Vice President of Research and Development published an article in Pet Business magazine analyzing studies on the use of pheromones in behavior modification treatments for animals. See Exh. 4. Nutri-Vet did not conduct these studies, but Nutri-Vet implied that the studies were its own. Nutri-Vet advertised its products in the same magazine and directly adjacent to this article authored by its Vice-President. See Exh. 4.

25. On the package label for its dog product, Nutri-Vet describes it as containing 5% “Natural Canine Pheromone Extract.” Exh. 5. Nutri-Vet’s statement that its “Active Ingredient” is “Natural Canine Pheromone Extract” is false and misleading. There is no commercially reasonable way to collect and sell commercial quantities of pheromones collected from dogs. On information and belief, the pheromones in Nutri-Vet’s products are not obtained directly from

¹ Cerissa A. Griffith et al., Effects of a Synthetic Facial Pheromone on Behavior of Cats, 217 *Journal of the Am. Veterinary Med. Assoc.* 1154 (2000); D.A. Gunn-Moore & M.E. Cameron, A Pilot Study Using Synthetic Feline Facial Pheromone for the Management of Feline Idiopathic Cystitis, 6 *Journal of Feline Med. & Surgery* 133 (2004); Peter W. Kronen et al., A Synthetic Fraction of Feline Facial Pheromone Calms But Does Not Reduce Struggling in Cats Before Venous Catheterization, 33 *Veterinary Anaesthesia & Analgesia* 258 (2006); Daniel S. Mills et al., A Triple Blind Placebo-Controlled Investigation Into the Assessment of the Effect of Dog Appeasing Pheromone (DAP) on Anxiety Related Behaviour of Problem Dogs in the Veterinary Clinic, 98 *Applied Animal Behav. Sci.* 114 (2006); D.S. Mills & C.B. Mills, Evaluation of a Novel Method for Delivering a Synthetic Analogue of Feline Facial Pheromone to Control Urine Spraying By Cats, 149 *Veterinary Rec.* 197 (2001); Katy Taylor & Daniel S. Mills, A Placebo-Controlled Study to Investigate the Effect of Dog Appeasing Pheromone and Other Environmental and Management Factors on the Reports of Disturbance and House Soiling During the Night in Recently Adopted Puppies, 105 *Applied Animal Behav. Sci.* 358 (2007); Elaine Tod et al., Efficacy of Dog Appeasing Pheromone in Reducing Stress and Fear Related Behaviour in Shelter Dogs, 93 *Applied Animal Behav. Sci.* 295 (2005).

animals, but instead are made from synthetic or chemical formulations that mimic natural pheromones.

26. On the package label for its cat product, Nutri-Vet describes it as containing 3% "Natural Feline Pheromone Extract." Exh. 6. Nutri-Vet's indication that its "Active Ingredient" is "Natural Feline Pheromone Extract" is false and misleading. There is no commercially reasonable way to collect and sell commercial quantities of pheromones collected from cats. On information and belief, the pheromones in Nutri-Vet's products are not obtained directly from animals, but instead are made from synthetic or chemical formulations that mimic natural pheromones.

27. On information and belief, the compounds and concentrations of those compounds are not as advertised on the labeling of the Pet-Ease Pheromone plus™ products.

28. On information and belief, during a trade show, Nutri-Vet representatives made a presentation to representatives of PetCo claiming that Nutri-Vet's pheromone products contain natural canine and feline pheromone extracts. The Nutri-Vet representatives sold this natural source differentiation against Ceva's synthetic pheromones as a significant attraction for consumers. In addition, Nutri-Vet emphasized that the 3% natural pheromone in its products represented an important advantage over the 2% synthetic pheromone contained in the Ceva/Comfort Zone® products. Nutri-Vet's claims are without factual or scientific support or basis.

29. On information and belief, Nutri-Vet representatives engage in an ongoing and pervasive pattern and practice of similar false and misleading promotion at trade shows and in selling situations with customers. In addition, on information and belief, this pattern and practice is bolstered by conversations with and literature from Nutri-Vet representatives and agents.

NUTRI-VET'S PATENT INFRINGEMENT

30. On June 20, 2000, the United States Patent and Trademark Office ("USPTO") issued U.S. Patent No. 6,077,867 ("the '867 Patent") entitled "Pig Appeasing Pheromones to Decrease Stress, Anxiety, and Aggressiveness." A copy of the '867 Patent is appended hereto as Exh. 7. This patent is directed to pheromonal compositions comprising a mixture of fatty acids and to methods of utilizing the compositions to decrease stress, anxiety and aggressiveness in mammals.

31. The '867 Patent is owned by a French company, Fideline, and has been exclusively licensed to Ceva for practice within the United States.

32. Ceva sells products for distribution within the United States that are covered by the '867 Patent. The '867 Patent and its claims are currently in force, valid and enforceable

33. Nutri-Vet began sells and distributes canine or dog diffuser products under the name "Pet-Ease Pheromone plus™ - Canine diffuser" specifically for the purpose of alleviating stress.

COUNT I
PATENT INFRINGEMENT

34. The allegations set forth in paragraphs 1 through 33 are incorporated by reference as if fully set forth herein.

35. Upon information and belief, Nutri-Vet's sale, offer for sale, and distribution of the "Pet-Ease Pheromone plus™ - Canine diffuser" product constitutes infringement, contributory infringement, and inducement of infringement of one or more of the claims of the '867 Patent.

36. Plaintiff has not authorized Nutri-Vet to sell or distribute the "Pet-Ease Pheromone plus™ - Canine diffuser" products in the United States.

37. On information and belief, Nutri-Vet's infringement of the '867 Patent is willful.

38. Plaintiff has been, and continues to be, irreparably harmed and damaged by Nutri-Vet's infringing activities.

39. On information and belief, Nutri-Vet will continue to infringe the '867 Patent and damage the Plaintiff unless enjoined by this Court.

COUNT II
FALSE ADVERTISING IN VIOLATION OF 15 U.S.C. § 1125(a)

40. Ceva repeats the allegations above as if fully set forth herein.

41. Nutri-Vet engages in media and internet advertising, packaging claims, and trade channel promotion via its distribution network, sales representatives, and trade show promotion in connection with its canine and feline pheromone products.

42. Nutri-Vet's advertising contains false and misleading statements regarding, among other things: the existence of placebo-controlled studies on pheromones; the source of the pheromones contained in its products; the quality and type of pheromones contained in its products; the effects of chemical calmatives on animals; and promotional statements regarding Nutri-Vet's pheromone products.

43. Nutri-Vet has made false and misleading descriptions of fact in connection with the pheromone products it sells in interstate commerce. These descriptions are of material facts, are in commercial advertising and/or promotion, and misrepresent the nature, characteristics, and quality of Nutri-Vet's goods. As such, these false and misleading statements violate Section 43(a)(1)(B) of the Lanham Trademark Act, 15 U.S.C. § 1125(a)(1)(B).

44. As a result of Nutri-Vet's false and misleading statements, Ceva has suffered, and will continue to suffer, damage and irreparable harm to its business reputation and goodwill, loss of sales, and loss of profits.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment as follows:

- a. An Order finding that Defendant violated 35 U.S.C. § 271 by infringing one or more claims of the '867 Patent, which patent is valid and enforceable;
- b. An Order that Defendant, its partners, agents, servants, employees, officers, directors, successors, assigns, attorneys and those persons in active concert or participation with Nutri-Vet or with any of the foregoing be permanently enjoined and restrained from infringing any one or more claims of the '867 Patent in any manner, from inducing others to infringe such patent or from contributing to such infringement, pursuant to 35 U.S.C. § 283;
- c. An Order that Defendant remove from its United States inventory any products that infringe the '867 Patent, and provide a written affidavit that such removal has been completed;
- d. An Order that Defendant be required to deliver to Ceva for destruction all product, displays, advertisements, packaging, brochures, catalogs, order forms, price lists or any other materials, whether in tangible or electronic form (including the Internet), in its possession or control or in the possession or control of its agents which infringe or induce infringement of the '867 Patent;
- e. An Order that Defendant be required to recall and turn over to Ceva for destruction all current catalogs that have been distributed to its sales agents and customers offering the infringing products;
- f. An Order that Defendant be required to account for and pay over to Ceva all the profits which Nutri-Vet has derived from its sales of the infringing products and to pay such damages to Ceva as this Court shall determine is just and proper to adequately compensate Ceva

for the aforesaid patent infringement including prejudgment and post-judgment interest on the same pursuant to 35 U.S.C. § 284;

g. An Order that Defendant's infringement of one or more claims of the '867 Patent was willful and that Defendant be required to pay over to Ceva an increased damages award of three (3) times the amount found or assessed pursuant to 35 U.S.C. § 284;

h. An Order that this case be deemed exceptional under the patent laws and that Defendant be required to pay to Ceva the cost incurred herein including all of Ceva's attorneys' fees pursuant to 35 U.S.C. §§ 284 and 285;

i. An Order that Defendant and its agents, servants, employees, attorneys, and all other persons in active concert or participation with it, be preliminarily and permanently enjoined and restrained from engaging in the above-described false and misleading advertising and promotion and other like conduct;

j. An Order that Defendant file with the Court and serve upon plaintiff within thirty (30) days after the entry and service upon defendant of an injunction, a report in writing and under oath setting forth in detail the manner and form in which Defendant has undertaken to comply and is complying with the Court's injunction;

k. An Order that Defendant engage in corrective advertising, in a form to be approved by the Court, to offset the market damage done by its false and misleading advertising;

l. An Order directing an accounting by Defendant of its profits by reason of its false advertising, awarding Plaintiff recovery of all damages allowed by law, and trebling Plaintiff's damages pursuant to Section 35 of the Lanham Act, 15 U.S.C. § 1117;

m. An Order granting Plaintiff all profits obtained by Defendant in connection with in the above-described false and misleading advertising and promotion and other like conduct;

n. An Order granting Plaintiff its costs and disbursements in this action, including its reasonable attorneys' fees;

o. An Order granting Plaintiff punitive damages for Defendant's intentional, willful, and malicious conduct to the extent permitted by law;

p. An Order granting such other relief as the Court may deem appropriate in the circumstances; and

q. An Order that Plaintiffs have such other and further relief as is warranted by the pleadings and/or the evidence.

DEMAND FOR JURY TRIAL

Ceva hereby demands a trial by jury for all issues for which a jury trial is proper.

DESIGNATION OF PLACE OF TRIAL

Ceva hereby designates Kansas City, Kansas as the place for trial of this action.

Respectfully submitted,

STINSON MORRISON HECKER LLP

A handwritten signature in black ink, appearing to read "B. K. O'Brien", is written over a horizontal line.

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