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2-08 CV - 192

**UNITED STATES DISTRICT COURT
MARSHALL DIVISION
EASTERN DISTRICT OF TEXAS**

COSMEDERM, INC., a California Corporation,

Plaintiff

v.

J.M.A.M. LLC, a New York Limited Liability Company; JOAN RIVERS RESULTS PRODUCTS, LLC, a New York Limited Liability Company; CARRINGTON LABORATORIES, INC., a Texas Corporation; CREATIVE BEAUTY INNOVATIONS, INC., a Texas Corporation; JOAN RIVERS, an individual; MELISSA RIVERS, an individual; DAVID DANGLE, an individual; JAMES HALLIDAY, an individual

Defendants.

Case Number:

COMPLAINT FOR PATENT INFRINGEMENT OF U.S. PATENT NOS. 5,716,625, 5,804,203 AND 6,139,850, and BREACH OF CONTRACT

JURY TRIAL DEMANDED

PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE JUDGES OF SAIDCOURT:

COMES NOW Cosmederm Inc. (hereinafter sometimes referred to as "Cosmederm"), named as Plaintiff herein, which makes the following allegations complaining of the actions of the Defendants J.M.A.M. LLC (hereinafter sometimes referred to as "J.M.A.M."), Joan Rivers Results Products, LLC (hereinafter sometimes referred to as "Joan Rivers Results"), Carrington Laboratories, Inc (hereinafter sometimes referred to as "Carrington Labs"), Creative Beauty Innovations, Inc. (hereinafter sometimes referred to as "C.B.I.") Joan Rivers, (hereinafter sometimes referred to as "J. Rivers"), Melissa Rivers (hereinafter sometimes referred to as "M. Rivers"), David Dangle (hereinafter sometimes referred to as "Dangle") and James Halliday (hereinafter sometimes referred to as "Halliday").

As good and sufficient basis for the invocation of this Court's jurisdiction, Plaintiff would respectfully show this Court as follows:

JURISDICTION AND VENUE

1. This Court has personal jurisdiction over the Defendants Carrington Labs and Creative Beauty insofar as they are corporations domiciled in Texas. This Court may exercise personal jurisdiction over the remaining other Defendants because they have consented to personal jurisdiction and/or because they have maintained minimum contacts with this forum state such that the exercise of personal jurisdiction does not offend traditional notions of fair play and substantial justice and/or because the Defendants have maintained activities which are substantial, continuous and systematic and/or the Defendants have purposefully established contacts with this forum and/or the claims alleged arise out of or are related to Defendants' contacts with this forum.

2. This action for patent infringement and injunctive relief arises under the patent laws of the United States, Title 35 of the United States Code, and under 28 U.S.C. § 2201.

3. This Court has subject matter jurisdiction of the material dispute raised herein

insofar as said dispute arises under the patent laws of the United States, 35 U.S.C. § 1 et seq. and under 28 U.S.C. §§ 1331, 1338(a), and 2201.

4. Venue is proper under 29 U.S.C. §§ 1391 (b), (c) and 1400 (b) in the Eastern District of Texas in that there is personal jurisdiction over the corporate Defendants at the commencement of this action in this district. (*VE Holding Corp v. Johnson Gas Appliance Co.* (1990) 917 F2d 1574, 1583.) Additionally, this district is the judicial district in which a substantial part of the events or omissions giving rise to the claim occurred and where liability arises.

PARTIES

5. Plaintiff Cosmederm, Inc. is a corporation organized and existing under the laws of the State of California, having a principal place of business in La Jolla, California.

6. Plaintiff alleges on information and belief that Defendant J.M.A.M., LLC is a limited liability company organized and existing under the laws of the state of New York, having its principal place of business in New York, New York. This Defendant also conducts business in the Eastern District of Texas.

7. Plaintiff alleges on information and belief that Defendant JOAN RIVERS RESULTS PRODUCTS, LLC is a limited liability company organized and existing under the laws of the state of New York, having its principal place of business in New York, New York. This Defendant also conducts business in the Eastern District of Texas.

8. Plaintiff alleges on information and belief that Defendant CARRINGTON LABORATORIES, INC. is a corporation organized and existing under the laws of the state of Texas, having its principal place of business in Irving, Texas. This Defendant also conducts business in the Eastern District of Texas.

9. Plaintiff alleges on information and belief that Defendant CREATIVE BEAUTY INNOVATIONS, INC. is a corporation organized and existing under the laws of the state of

Texas, having its principal place of business in Carrollton, Texas. This Defendant also conducts business in the Eastern District of Texas.

10. Plaintiff alleges on information and belief that Defendant JOAN RIVERS is an individual, an owner, officer and/or director of J.M.A.M. and Joan Rivers Results, and in this capacity she does business in the Eastern District of Texas.

11. Plaintiff alleges on information and belief that Defendant MELISSA RIVERS is an individual, an owner, officer and/or director of J.M.A.M. and Joan Rivers Results, and in this capacity does business in the Eastern District of Texas.

12. Plaintiff alleges on information and belief that Defendant DAVID DANGLE is an individual and the president of J.M.A.M., and in this capacity does business in the Eastern District of Texas.

13. Plaintiff alleges on information and belief that Defendant JAMES HALLIDAY is an individual and Chief Financial Officer of J.M.A.M., and in this capacity does business in the Eastern District of Texas.

GENERAL ALLEGATIONS

14. Cosmederm is the exclusive owner of all right, title and interest in United States Patent No. 5,716,625 (hereinafter referred to as the "'625 Patent") entitled "Formulations and Methods for Reducing Skin Irritation" issued on February 10, 1998, and which is valid and subsisting. A true and correct copy of the '625 Patent is attached hereto as **Exhibit 1**.

15. Cosmederm is the exclusive owner of all right, title and interest in United States Patent No. 5,804,203 (hereinafter referred to as the "'203 Patent") entitled "Topical Product Formulations Containing Strontium for Reducing Skin Irritation" issued on September 8, 1998, and which is valid and subsisting. A true and correct copy of the '203 Patent is attached hereto as **Exhibit 2** and incorporated herein by this reference.

16. Cosmederm is the exclusive owner of all right, title and interest in United States Patent No. 6,139,850 (hereinafter referred to as the "'850 Patent") entitled "Formulations and Methods for Reducing Skin Irritation" issued on October 31, 2000, and which is valid and subsisting. A true and correct copy of the '850 Patent is attached hereto as Exhibit 3. The '625 Patent, the '203 Patent and the '850 Patent are sometimes hereinafter referred to collectively as the "Cosmederm Patents." At all relevant times, Defendants were aware of the Cosmederm Patents. A true and correct copy of the '850 Patent is attached hereto as **Exhibit 3** and incorporated herein by this reference.

17. On or about July 15, 1998, Cosmederm entered into that certain Marketing and Distribution Agreement (hereinafter referred to as the "Agreement") with J.M.A.M. dated July 15, 1998 to license technology protected by the Cosmederm Patents, along with trademarks, certain trade secrets and other proprietary information related to the technology covered by the Cosmederm Patents. A true and correct copy of the Agreement is attached hereto as **Exhibit 4**.

18. Among other things, the Patents cover topical application of salts of strontium (including strontium nitrate and strontium chloride hexahydrate) for treating itch, irritation and inflammation. Under the terms of the Agreement, J.M.A.M. was allowed to use strontium nitrate in a number of skin care products sold, Plaintiff alleges on information and belief, under the name of, and advertised by Defendants J. Rivers and M. Rivers and distributed by Defendant Joan Rivers Results. Further, the Agreement specified that J.M.A.M. was prohibited from using strontium nitrate in, among other things, over-the-counter ("O.T.C.") drugs.

19. In return for the exclusive rights to the Cosmederm Patents, J.M.A.M. agreed to pay royalties on all of the J.M.A.M. Products sold covered by the Cosmederm Patents or, in the alternative, a minimum annual royalty in accordance with the following schedule:

Initial Term (July 15, 1998 to June 30, 2001)	\$175,000
Renewal Term 1 (June 30, 2001 to June 30, 2002)	\$225,000
Renewal Term 2 (June 30, 2002 to June 30, 2003)	\$275,000
Renewal Term 3 (June 30, 2003 to June 30, 2004)	\$325,000
Renewal Term 4 (June 30, 2004 to June 30, 2005)	\$375,000
And thereafter each year (from June 30, 2005)	\$475,000

20. In or around December, 1998, Cosmederm learned that J.M.A.M. planned to use Defendant CBI to manufacture the J.M.A.M. Products covered by the Cosmederm Patents. In accordance with the Manufacturing Clause of the Agreement, Cosmederm disclosed the existence of the Cosmederm Patents, its trade secrets and other proprietary information to CBI to facilitate the production of Products for J.M.A.M.. On or about April 21, 1998, CBI executed that certain confidentiality agreement dated April 21, 1998 with respect to Cosmederm's proprietary technology ("Confidentiality Agreement"). A true and correct copy of the Confidentiality Agreement is attached hereto as **Exhibit 5**.

21. On or about June 30, 1999, the initial term of the Agreement commenced. In or around July 1999, CBI began manufacturing Products for J.M.A.M. covered by the Cosmederm Patents. In or around August, 1999, J.M.A.M. began selling products covered by the Cosmederm Patents. In or around December, 1999, J.M.A.M. began paying royalties to Cosmederm in accordance with the Agreement.

22. Plaintiff is informed and believes, and thereon alleges, that Defendant Carrington Labs acquired all, or substantially all, of the controlling ownership interest in CBI private label manufacturing business in or around 2003 including those products CBI had been manufacturing for J.M.A.M. containing the Cosmederm Technology.

23. On or about October 1, 2005, the amount of J.M.A.M.'s royalty payments made pursuant to the terms of the Agreement began substantially decreasing.

24. In or around May, 2007, Cosmederm performed a review of the royalty reports provided by J.M.A.M. and discovered that J.M.A.M. was selling products containing strontium chloride hexahydrate (or, simply, strontium chloride), in violation of the terms of the Agreement. Shortly thereafter, Cosmederm contacted J.M.A.M. and indicated that they were selling products containing strontium chloride in violation of the Agreement and not paying royalties for those products. J.M.A.M. responded that all appropriate royalties had been paid and were up to date.

25. In or around September 2007, Cosmederm informed J.M.A.M. that various Joan River's products, including but not limited to Joan Rivers Absolutely Magic Revitalizing Face Treatment, Joan Rivers Absolutely Magic Revitalizing Hand Treatment, Joan Rivers Results Deep Drench Hydrating Mask were indeed covered by the Cosmederm patents, and even if those Products might fall outside the parameters of the Agreement, the products, nonetheless, infringed the Cosmederm Patents. Cosmederm demanded payment of all past due royalties under the Agreement and enter into a new license agreement to the extent the existing Agreement did not address the J.M.A.M. Products. J.M.A.M. refused, and continues to refuse to pay any royalties whatsoever or enter into any new agreements.

26. On or about October 2, 2007, Cosmederm issued a Cease and Desist letter to J.M.A.M. dated October 2, 2007 setting forth its belief that the J.M.A.M. products being sold were not allowed under the terms of the Agreement, and in addition, or in the alternative, were otherwise illegally being sold because they contained technology covered under the Cosmederm Patents. Cosmederm further demanded that J.M.A.M. cease selling and distributing the infringing products and that Carrington Labs cease manufacturing the infringing products. J.M.A.M. has refused to pay royalties and failed to comply with

PLAINTIFF'S ORIGINAL COMPLAINT

Cosmederm's demand to cease and desist from selling the products covered by the Cosmederm Patents. A true and correct copy of the October 2, 2007 letter is attached hereto as **Exhibit 6**.

27. On or about January 15, 2008, Cosmederm received test results on products that were obtained through one or more of the J.M.A.M. distribution channels which revealed that the J.M.A.M. products were indeed infringing the Cosmederm Patents. On or about January 24, 2008, Cosmederm informed J.M.A.M. of the test results and again demanded J.M.A.M. cease and desist from selling these products or, in the alternative, pay royalties for products being sold by J.M.A.M. that contained strontium salts. A true and correct copy of the January 24, 2008 letter is attached hereto as **Exhibit 7**.

28. On or about February 11, 2008, Cosmederm issued a letter to Carrington Labs demanding that Carrington cease and desist from continuing to manufacture strontium containing products for J.M.A.M. or any other clients. A true and correct copy of the February 11, 2008 letter is attached hereto as **Exhibit 8**.

29. Cosmederm is informed and believes, and thereon alleges, that Carrington Labs has been and continues to manufacture products for J.M.A.M. that are covered by the Cosmederm Patents.

30. Cosmederm is informed and believes, and thereon alleges, that J.M.A.M., Joan Rivers Restuls, J. Rivers and M. Rivers have been and continue to sell products covered by the Cosmederm Patents.

31. Cosmederm is informed and believes, and thereon alleges, that Defendants J. Rivers, M. Rivers, Dangle and Halliday (collectively, "Individual Defendants") were aware of the Cosmederm Patents and directed the infringing activities of J.M.A.M. and Joan Rivers Restuls with complete disregard of Cosmederm's rights thereunder.

FIRST CLAIM FOR RELIEF

INFRINGEMENT OF PATENT NO. 5,716,625

(Against All Defendants)

32. Plaintiff hereby incorporates by this reference each and every allegation preceding and subsequent to this claim for relief as part of this claim for relief as though set forth in full herein.

33. Plaintiff is informed and believes that J.M.A.M. has infringed, and still is infringing, the '625 Patent by making, using, advertising, selling, distributing, offering for sale and/or licensing products and services covered by one or more claims of the '625 Patent without Plaintiff's authorization or consent. These products and services include, *inter alia*, hand, foot and other assorted products through outlets such as Q.V.C. and other media channels to consumers.

34. Plaintiff is informed and believes that Carrington Labs has infringed, and still is infringing, the '625 Patent by making, using, advertising, selling, distributing, offering for sale and/or licensing products and services covered by one or more claims of the '625 Patent without Plaintiff's authorization or consent. These products and services include, *inter alia*, hand, foot and other assorted products.

35. Plaintiff is informed and believes that C.B.I. has infringed the '625 Patent by making, using, advertising, selling, distributing, offering for sale and/or licensing products and services covered by one or more claims of the '625 Patent without Plaintiff's authorization or consent. These products and services include, *inter alia*, hand, foot and other assorted products.

36. Plaintiff is informed and believes that Joan Rivers Results has infringed, and still is infringing, the '625 Patent by making, using, advertising, selling, distributing, offering for sale and/or licensing products and services covered by one or more claims of the '625

Patent without Plaintiff's authorization or consent. These products and services include, *inter alia*, hand, foot and other assorted products.

37. Plaintiff is informed and believes that the Individual Defendants have infringed, and still are infringing, the '625 Patent by making, using, advertising, selling, distributing, offering for sale and/or licensing products and services covered by one or more claims of the '625 Patent without Plaintiff's authorization or consent. These products and services include, *inter alia*, hand, foot and other assorted products

38. Plaintiff is informed and believes that Defendants have infringed the '625 Patent, and will continue to do so unless enjoined by this Court

39. Plaintiff is informed and believes and thereon alleges that Defendants are aware of the '625 Patent and that Defendants' infringement has been willful. Plaintiff alleges that prior to the filing of this action, Plaintiff notified Defendants of their infringement of the '625 Patent and Defendants failed to cease their infringement of the '625 Patent.

40. By reason of the foregoing, Plaintiff has suffered damages in an amount to be proven at trial and has suffered irreparable loss and injury.

41. The acts of infringement described above are willful, deliberate and in reckless disregard of Plaintiff's patent rights.

SECOND CLAIM FOR RELIEF

INFRINGEMENT OF PATENT NO. 5,804,203

(Against All Defendants)

44. Plaintiff hereby incorporates by this reference each and every allegation preceding and subsequent to this claim for relief as part of this claim for relief as though set forth in full herein.

46. Plaintiff Cosmederm Technologies, Inc. is the sole owner of the '203 Patent.

47. Plaintiff is informed and believes that J.M.A.M. has infringed, and still is infringing,

the '203 Patent by making, using, advertising, selling, distributing, offering for sale and/or licensing products and services covered by one or more claims of the '203 Patent without Plaintiff's authorization or consent. These products and services include, *inter alia*, hand, foot and other assorted products through outlets such as QVC and other media channels to consumers.

48. Plaintiff is informed and believes that Carrington Labs has infringed, and still is infringing, the '203 Patent by making, using, advertising, selling, distributing, offering for sale and/or licensing products and services covered by one or more claims of the '203 Patent without Plaintiff's authorization or consent. These products and services include, *inter alia*, hand, foot and other assorted products.

49. Plaintiff is informed and believes that CBI has infringed the '203 Patent by making, using, advertising, selling, distributing, offering for sale and/or licensing products and services covered by one or more claims of the '203 Patent without Plaintiff's authorization or consent. These products and services include, *inter alia*, hand, foot and other assorted products.

50. Plaintiff is informed and believes that Joan Rivers Results has infringed, and still is infringing, the '203 Patent by making, using, advertising, selling, distributing, offering for sale and/or licensing products and services covered by one or more claims of the '203 Patent without Plaintiff's authorization or consent. These products and services include, *inter alia*, hand, foot and other assorted products.

51. Plaintiff is informed and believes that the Individual Defendants have infringed, and still are infringing, the '203 Patent by making, using, advertising, selling, distributing, offering for sale and/or licensing products and services covered by one or more claims of the '203 Patent without Plaintiff's authorization or consent. These products and services include, *inter alia*, hand, foot and other assorted products.

52. Plaintiff is informed and believes that Defendants have infringed the '203 Patent, and will continue to do so unless enjoined by this Court.

53. Plaintiff is informed and believes and thereon alleges that Defendants are aware of the '203 Patent and that Defendants' infringement has been willful. Plaintiff alleges that prior to the filing of this action, Plaintiff notified Defendants of their infringement of the '203 Patent and Defendants failed to cease their infringement of the '203 Patent.

54. By reason of the foregoing, Plaintiff has suffered damages in an amount to be proven at trial and has suffered irreparable loss and injury.

55. The acts of infringement described above are willful, deliberate and in reckless disregard of Plaintiff's patent rights.

THIRD CLAIM FOR RELIEF

INFRINGEMENT OF PATENT NO. 6,139,850

(Against All Defendants)

56. Plaintiff hereby incorporates by this reference each and every allegation preceding and subsequent to this claim for relief as part of this claim for relief as though set forth in full herein.

59. Plaintiff is informed and believes that J.M.A.M. has infringed, and still is infringing, the '850 patent by making, using, advertising, selling, distributing, offering for sale and/or licensing products and services covered by one or more claims of the '850 Patent without Plaintiff's authorization or consent. These products and services include, *inter alia*, hand, foot and other assorted products through outlets such as Q.V.C. and other media channels to consumers.

60. Plaintiff is informed and believes that Carrington Labs has infringed, and still is infringing, the '850 Patent by making, using, advertising, selling, distributing, offering for sale and/or licensing products and services covered by one or more claims of the '850

Patent without Plaintiff's authorization or consent. These products and services include, *inter alia*, hand, foot and other assorted products.

61. Plaintiff is informed and believes that C.B.I. has infringed the '850 Patent by making, using, advertising, selling, distributing, offering for sale and/or licensing products and services covered by one or more claims of the '850 Patent without Plaintiff's authorization or consent. These products and services include, *inter alia*, hand, foot and other assorted products.

62. Plaintiff is informed and believes that Joan Rivers Results has infringed, and still is infringing, the '850 Patent by making, using, advertising, selling, distributing, offering for sale and/or licensing products and services covered by one or more claims of the '850 Patent without Plaintiff's authorization or consent. These products and services include, *inter alia*, hand, foot and other assorted products.

63. Plaintiff is informed and believes that the Individual Defendants have infringed, and still are infringing, the '850 Patent by making, using, advertising, selling, distributing, offering for sale and/or licensing products and services covered by one or more claims of the '850 Patent without Plaintiff's authorization or consent. These products and services include, *inter alia*, hand, foot and other assorted products.

64. Plaintiff is informed and believes that Defendants have infringed the '850 Patent, and will continue to do so unless enjoined by this Court.

65. Plaintiff is informed and believes and thereon alleges that Defendants are aware of the '850 Patent and that Defendants' infringement has been willful. Plaintiff alleges that prior to the filing of this action, Plaintiff notified Defendants of their infringement of the '850 Patent and Defendants failed to cease their infringement of the '850 Patent.

66. By reason of the foregoing, Plaintiff has suffered damages in an amount to be proven at trial and has suffered irreparable loss and injury.

67. The acts of infringement described above are willful, deliberate and in reckless disregard of Plaintiff's patent rights.

FOURTH CLAIM FOR RELIEF

BREACH OF CONTRACT

(Against Defendant J.M.A.M.)

68. Plaintiff hereby incorporates by this reference each and every allegation preceding and subsequent to this claim for relief as part of this claim for relief as though set forth in full herein.

69. The Marketing and Distribution Agreement ("Agreement") dated July 15, 1998 by and between Cosmederm and J.M.A.M. commenced on or about June 30, 1999. A true and correct copy of the Agreement is attached hereto as **Exhibit 4** and incorporated herein by this reference.

70. J.M.A.M. commenced making royalty payments pursuant to the Agreement in or around December, 1999.

71. Plaintiff is informed and believes, and thereon alleges, that at some point during the term of the Agreement, J.M.A.M. began manufacturing and selling products containing strontium chloride in violation of the Agreement. J.M.A.M. began manufacturing and selling over-the-counter drugs in violation of the Agreement.

72. J.M.A.M. has breached, and continues to breach, the Agreement by selling products containing strontium chloride and selling products classified as OTC drugs.

73. By reason of the foregoing, Plaintiff has suffered damages in an amount to be proven at trial.

PRAYER

WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

1. The entry of Judgment finding that Defendants have infringed the '625, '203 and '850 Patents under 35 U.S.C. § 271 (a), (b), (c), and (g);
2. The entry of Judgment finding that Defendants have induced infringement and/or contributorily infringed the '625, '203 and '850 Patents;
4. The entry of Judgment finding that Defendants' infringement of the '625, '203 and the '850 Patents were and are willful;
3. The entry of a Permanent Injunction, enjoining and restraining each Defendant, its officers, agents, subsidiaries, servants, partners, employees, attorney and all others in active concert or participation with Defendants from:
 - a. Making, using, selling, importing, or offering to sell any goods that in any way infringe, either literally or under the Doctrine of Equivalent the '625, '203 and the '850 patents, and
 - b. Inducing or contributorily infringing the '625, '203 and '850 Patents.
5. The entry of Judgment for an award of damages adequate to compensate Cosmederm for J.M.A.M.'s and Carrington Labs' infringement of the '625, '203 and '850 Patents, but no less than a reasonable royalty;
6. The entry of Judgment for an award of damages for breach of contract in an amount to be proven at trial.
7. The entry of Judgment for an award of damages trebled pursuant to law as an enhancement pursuant to 35 U.S.C. § 284;
8. The entry of Judgment for an award of attorney's fees pursuant to 35 U.S.C. §285;
9. The entry of Judgment for pre-judgment interest; and costs.

Plaintiff further prays for such further relief, at law and in equity as this Court may deem just and proper.

Dated: _____

Respectfully submitted,

/s/ ERIC V. MOYÉ

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