

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

IOVATE T & P, INC.

Plaintiff,

v.

**BRAND ALTERNATIVES, LLC; DIET
CLASSICS 00 LLC; PERFORMANCE
LABS, INC; and RICHARD M. BURKE,
Jr.,**

Defendants.

Civil Action No. _____

JURY TRIAL DEMANDED

COMPLAINT

Plaintiff, Iovate T & P, Inc., (with its respective predecessors and affiliates, “Iovate” or “Plaintiff”), by and through undersigned counsel, brings this action for patent infringement against Defendants Brand Alternatives, LLC, Diet Classics 00 LLC, Performance Labs, Inc. and Richard M. Burke, Jr. (collectively, “Defendants”), as follows:

PARTIES

1. Plaintiff, Iovate T & P, Inc., is a corporation organized and existing under the laws of Canada, with a principal place of business at 5100 Spectrum Way, Mississauga, Ontario, L4W 5S2.

2. Upon information and belief, Defendant Brand Alternatives, LLC (“Brand Alternatives”) is a corporation organized and existing under the laws of the State of California, with a principal place of business at 5115 Douglas Fir Road, Calabasas, California 91302.

3. Upon information and belief, Defendant Diet Classics 00 LLC (“Diet Classics”) is a Delaware limited liability company, with a principal place of business in Los Angeles County,

California. Upon information and belief, Diet Classics is wholly owned and controlled by Brand Alternatives.

4. Upon information and belief, Defendant Performance Labs, Inc. ("Performance Labs") is a corporation organized and existing under the laws of the State of California, with a principal place of business in Los Angeles County, California. Upon information and belief, Performance Labs is the exclusive distributor of infringing products made, used and/or sold by Defendants Brand Alternatives and Diet Classics.

5. Upon information and belief, Defendant Richard M. Burke, Jr. ("Burke") is an individual residing in California, and owns or otherwise controls Defendants Brand Alternatives, Diet Classics and Performance Labs.

JURISDICTION AND VENUE

6. This is an action for patent infringement arising under the patent laws of the United States, Title 35 of the United States Code.

7. The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1332 and 1338(a).

8. The Court has personal jurisdiction over the Defendants because: (i) the Defendants knowingly transact business in this Commonwealth and district; (ii) the Defendants advertise and market their infringing goods within this jurisdiction; and (iii) the Defendants' conduct outside this jurisdiction is causing injury in this forum.

9. Venue is proper in this Court, pursuant to 28 U.S.C. §§ 1331, 1391(b) and 1391(c), in that a substantial part of the events giving rise to the claims occurred in this district, and the Defendants transact business in this district.

THE IOVATE PATENT

10. On August 21, 2001, United States Patent No. 6,277,396 (“the ‘396 Patent”), titled “Dietary Supplement Containing a Thermogenic Substance and an Adrenal Support Substance,” was duly issued by the United States Patent and Trademark Office. A true and correct copy of the ‘396 Patent is attached as Exhibit A of this Complaint.

11. Iovate T & P, Inc. is the owner of all rights, title and interest in and to the ‘396 Patent.

12. Upon information and belief, Defendants have made, used, offered for sale, sold and/or imported certain nutritional supplements and/or weight loss products, including, without limitation, the products distributed by Defendants under the trade names “Diet Classics Formula 15,” “Diet Classics Formula 36,” “Diet Classics Formula 73,” and “Diet Classics Formula 77” throughout the United States and in this judicial district.

FIRST CAUSE OF ACTION
(Infringement of the ‘396 Patent)

13. Plaintiff realleges and incorporates the allegations of paragraphs 1-12 of this Complaint as if set forth at length and in full herein.

14. Upon information and belief, certain products made, used, sold and offered for sale by Defendants, including, without limitation, the products distributed by Defendants under the trade names “Diet Classics Formula 15,” “Diet Classics Formula 36,” “Diet Classics Formula 73,” and “Diet Classics Formula 77” incorporate or embody the inventions claimed in the ‘396 Patent.

15. By their actions, Defendants have infringed, and are infringing, one or more of the claims of the ‘396 Patent.

16. Upon information and belief, Defendants have actively induced others to infringe the claims of the '396 Patent.

17. Defendants' infringing conduct has been and continues to be unlawful and willful.

18. As a result of Defendants' acts of infringement, Plaintiff has suffered and will continue to suffer damages in an amount to be proved at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for entry of judgment against Defendants as follows:

- A. that Defendants infringe the '396 Patent;
- B. that Defendants have actively induced others to infringe the '396 Patent;
- C. that Defendants' infringement of the '396 Patent is willful;
- D. that Defendants, their officers, directors, affiliates, agents, servants, employees and attorneys, and all those persons in privity or in concert with any of them, be preliminarily and permanently enjoined from infringement of the '396 Patent;
- E. that Plaintiff be awarded damages for infringement of the '396 Patent, and that the damages be trebled;
- F. that this case be declared to be exceptional in favor of Plaintiff under 35 U.S.C. § 285, and that Plaintiff be awarded costs, attorneys' fees, and other expenses incurred in connection with this action;
- G. that Plaintiff be awarded such other and further relief as may be appropriate.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury.

Dated: December 7, 2007

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read "Eric J. Marandett". The signature is written over the "Respectfully submitted," text and extends below it.

Eric J. Marandett (BBO #561730)

Paul D. Popeo (BBO# 567727)

Brian C. Barry (BBO# 661518)

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