UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

OPTIGEN, LLC,

Plaintiff

v.

Civil No. 5:09-cv-457 (GTS/GJD)

TEXAS A&M UNIVERSITY SYSTEM, DNA DIAGNOSTICS, INC., d/b/a SHELTERWOOD LABORATORIES, MELBA S. KETCHUM, INTERNATIONAL GENETICS, INC., GENETIC FULFILLMENT USA, LLC, PINPOINT DNA TECHNOLOGIES, INC., and RICHARD B. DOBBINS,

Defendants.

COMPLAINT

Plaintiff OptiGen, LLC, through its attorneys, Hodgson Russ LLP, alleges as follows:

The Parties

1. Plaintiff OptiGen, LLC ("OptiGen") is a limited liability company organized and existing under the laws of New York, and maintains its principal place of business at 767 Warren Road, Suite 300, Ithaca, New York.

2. OptiGen is engaged in the business of providing DNA-based diagnostic services to test for inherited diseases in dogs.

3. Defendant Texas A&M University System ("Texas A&M") is an entity of the executive branch of the State of Texas, and it may be served with process through its Chancellor, Mike McKinney, at 200 Technology Way, College Station, Texas.

4. Defendant DNA Diagnostics, Inc. d/b/a Shelterwood Laboratories ("Shelterwood") is a corporation organized and existing under the laws of Texas and maintains a place of business at 569 Bear Drive, Timpson, Texas.

5. Defendant Melba S. Ketchum is an individual residing or doing business at 569 Bear Drive, Timpson, Texas. Ketchum is the president and founder of DNA Diagnostics, Inc. d/b/a Shelterwood Laboratories.

6. Defendant International Genetics, Inc. ("InGen") is a corporation organized and existing under the laws of The Bahamas and maintains a place of business at The Bloneva Building, Freeport, The Bahamas. InGen's laboratory is located at #8 Town Center Mall, Freeport, The Bahamas.

7. Defendant Genetic Fulfillment USA, LLC ("Genetic Fulfillment") is a limited liability company organized and existing under the laws of Georgia, and has its principal office at 1395 Cobb Parkway N., Suite G, Marietta, Georgia 30062.

8. Defendant PinPoint DNA Technologies, Inc. ("PinPoint") is a corporation organized and existing under the laws of Georgia, and has its principal office at 3827 Cliff Crest Drive, Smyrna, Georgia 30080.

9. Defendant Richard B. Dobbins ("Dobbins") is an individual residing at 3827 Cliff Crest Drive SE, Smyrna, Georgia 30080. Dobbins is the CEO of PinPoint and the General Manager of InGen.

Jurisdiction and Venue

10. Plaintiff brings this action for patent infringement under the Patent Act, 35 U.S.C. § 1, *et seq*, including 35 U.S.C. § 271. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338(a) and 15 U.S.C. § 1121(a) and supplemental jurisdiction under 28 U.S.C. § 1367.

11. Venue in this judicial district is proper pursuant to 28 U.S.C. §§ 1391 and 1400.

The Patents at Issue

12. United States Patent No. 7,285,388, entitled "METHODS FOR IDENTIFICATION OF ALPORT SYNDROME" (the " '388 patent"), issued on October 23, 2007. A true and correct copy of the '388 patent is attached as Exhibit A.

13. Autsomal Recessive Alport Syndrome ("ARAS") is a hereditary progressive glomerular nephritis caused by genetic mutations. ARAS leads to kidney failure and most usually is treated by kidney transplant. The '388 patent relates to identifying whether a dog is a carrier of ARAS, is predisposed to ARAS, or is genetically normal.

14. Merlogen, LLC is the assignee of the '388 patent. OptiGen is the exclusive licensee of the '388 patent.

15. United States Patent No. 6,210,897, entitled "IDENTIFICATION OF CANINE LEUKOCYTE ADHESION DEFICIENCY IN DOGS" (the " '897 patent"), issued on April 3, 2001. A true and correct copy of the '897 patent is attached as Exhibit B.

16. Canine Leukocyte Adhesion Deficiency ("CLAD") is a fatal immunodeficiency disease characterized by, among other things, severe infections, skin infections, osteomyelitis, and gingivitis. The '897 patent relates to identifying whether a dog is a carrier of or is affected with CLAD.

17. Leif Andersson, James Kijas, Sophie Gafvert, Gunilla Wigh-Trowaldh, and Ake Hedhammer are the inventors on the '897 patent. OptiGen is the exclusive Licensee of the exclusive licensee of the '897 patent and the inventors' CLAD technology.

18. United States Patent No. 6,201,114, entitled "IDENTIFICATION OF CONGENITAL STATIONARY NIGHT BLINDNESS IN DOGS" (the " '114 patent"), issued on March 13, 2001. A true and correct copy of the '114 patent is attached as Exhibit C.

19. United States Patent No. 6,428,958, entitled "IDENTIFICATION OF CONGENITAL STATIONARY NIGHT BLINDNESS IN DOGS" (the " '958 patent), issue on August 6, 2002. A true and correct copy of the '958 patent is attached as Exhibit D.

20. Congenital stationary night blindness ("CSNB") is a recessively inherited retinal disorder characterized by congenital night blindness with various degrees of visual impairment under illuminated daytime conditions. In the 1990s, CSNB was described as having a progressive component and also became known as hereditary or progressive retinal dystrophy

("prad"). The '114 patent and the '958 patent relate to identifying whether a dog is a carrier of or is affected with CSNB/prad, or is genetically normal.

21. Cornell Research Foundation, Inc. is the assignee of the '114 patent and the '958 patent. OptiGen is the exclusive licensee of the '114 patent and the '958 patent.

Factual Background

22. PinPoint was founded in 2006 by Richard Dobbins.

23. PinPoint offered a service called "Pawsitive I.D." for the DNA testing of dogs and cats. When Pawsitive I.D. was purchased by a customer, the customer was sent a kit that was used to collect a tissue sample. The customer then mailed the specimen back to PinPoint for analysis.

24. InGen was established in 2008 in Freeport, Bahamas. InGen purchased assets from PinPoint including the Pawsitive I.D. product and trademark, database, and website domain names.

25. The Pawsitive I.D. website (www.pawsitiveid.net) directs visitors to InGen's website (www.ingen.bs). A copy of the relevant portions of InGen's website is attached as Exhibit E.

26. Dobbins prepared the content of InGen's website.

27. InGen was created by Dobbins for the purpose of attempting to avoid the patent laws of the United States.

28. In January 2009, OptiGen commenced a lawsuit in the United States District Court for the Northern District of New York against InGen, Genetic Fulfillment, PinPoint, and Dobbins, alleging infringement of the United States Patent No. 5,804,388 entitled "CHROMOSOME 9 AND PROGRESSIVE ROD-CONE DEGENERATION DISEASE GENETIC MARKERS AND ASSAYS," and United States Patent No. 7,312,037 entitled "IDENTIFICATION OF THE GENE AND MUTATION RESPONSIBLE FOR PROGRESSIVE ROD-CONE DEGENERATION IN DOG AND A METHOD FOR TESTING SAME." That action is entitled *OptiGen, LLC v. International Genetics, Inc., et al.*, Civil No. 09-cv-00006.

29. On the InGen website, there is a question and answer column directed to InGen's customers and prospective customers. It includes the following questions and answers:

"Q. **Who is International Genetics, Inc.?**

A. International Genetics, Inc. (InGen) is a genetic testing company incorporated in The Bahamas with its headquarters in Freeport. Located only 65 miles east of Ft. Lauderdale, Florida, Freeport is the perfect location to set up an international genetic testing lab. InGen offers the Pawsitive ID™, multi faceted genetic test for companion animals. Pawsitive ID™ provides both Premium & Non-Premium genetic disease screenings.

Q. **What happened to PinPoint DNA Technologies, Inc.?**

A. InGen purchased assets from PinPoint including the Pawsitive ID™ product and trademark, PCS Database system and all web site domain names. PinPoint DNA Technologies still exists, but its primary role is that of a clearing house between laboratories performing Non-Premium tests. PinPoint contracts directly for the Non-Premium testing and then sells these results to InGen who completes the processing and adds the Premium testing which is conducted in Freeport.

Q. **What advantage is there to having a genetics lab located in the Bahamas?**

A. ***Pawsitive ID™ was forced to discontinue certain genetic tests due to patent issues in the United States, Canada & European Union. These patents prohibit unlicensed use of the scientific techniques used in the detection of genetic mutations for some diseases.*** These patents were never filed in The Bahamas and therefore it is perfectly legal and ethical to use the scientific processes needed to determine if an animal has the mutation in this jurisdiction. (Emphasis added).

Q. **What diseases do you offer now that you could not test for previously?**

A. Progressive Rod-Cone Degeneration (PRCD) is the only test we currently offer that is covered by any patents for which we were previously prohibited from selling and testing.

Q. **Why did the price go from $49.95 to $75.00 per test kit?**

A. In order to legally offer some of our genetic tests, we needed to build a laboratory in The Bahamas. This has added many expenses to our product. It will always be InGen's policy to keep our test prices affordable where as many animals can be tested as possible.

Q. **What is the difference between a Premium Test and a Non-Premium Test?**

A. A Premium Test is a genetic test that may have one or more patents associated with it in certain jurisdictions. A Non-Premium Test is a genetic test that does not have a patent associated with it or can be freely conducted in any jurisdiction.

Q. **Do you still use the VeriSNP™ testing platform?**

A. Yes. VeriSNP™ is used to process our Non-Premium Tests, but is not used in any Premium testing.

Q. **What lab processes the VeriSNP™ test?**

A. DNA Diagnostic Labs dba Shelterwood Labs in Timpson, Texas and The Equine Genetics Lab at Texas A&M University process our Non-Premium Tests using the patented VeriSNP™ testing platform. These are contract laboratories and are not otherwise affiliated in any fashion with International Genetics, Inc.

Q. **Why do you use an equine genetic lab to perform dog & cat tests?**

A. The Equine Genetics Lab at Texas A&M University is a full service genetics lab which can perform testing on a wide variety of animals.

30. The InGen website further distinguishes between those tests that have "patent issues" and those that do not:

> **PREMIUM TEST LABORATORIES**
>
> InGen has a laboratory located on Grand Bahama Island in Freeport that processes the test for Progressive Rod-Cone Degeneration (PRCD) and other tests that may have patent issues associated with them. There are no previous or existing patents issued for PRCD in The Bahamas. This being the case, International Genetics, Inc is not violating any Bahamian or international patent laws by processing the PRCD test. InGen's lab is located at #8 Town Center Mall, Freeport, The Bahamas.
>
> **NON-PREMIUM TEST LABORATORIES**
>
> InGen contracts with PinPoint DNA Technologies, Inc of Atlanta, Georgia USA to provide genetic tests that are not associated with any existing patents in the USA. The test includes those needed to obtain a genetic fingerprint, many of our genetic disease tests and physical attribute tests. NO LABORATORIES CONTRACTED BY PINPOINT DNA TECHNOLOGIES, INC CONDUCT ANY TESTING ON ANY GENETIC TEST THAT HAS KNOWN PATENT ISSUES

31. The only means of identifying whether a dog is a carrier of ARAS, is predisposed to ARAS, or is genetically normal is through the methods covered by the '388 patent.

32. The Pawsitive I.D. testing service includes testing procedures for the genetic disease "Autosomal Recessive Hereditary Nephropathy," which is another name for ARAS. A copy of the Pawsitive I.D. Disease/Breed List is attached as Exhibit F.

33. The only means of identifying whether a dog is a carrier of CLAD, is affected with CLAD, or is genetically normal is through the methods covered by the '897 patent.

34. The Pawsitive I.D. testing service includes testing procedures for the genetic disease "Canine Leukocyte Adhesion Deficiency." *See* Exhibit F.

35. The only means of identifying whether a dog is a carrier of or is affected by CSNB/prad is through the methods covered by the '114 patent and the '958 patent.

36. The Pawsitive I.D. testing service includes testing procedures for the genetic disease "Retinal Dystrophy," which is another name for CSNB/prad. *See* Exhibit F.

37. According to the InGen website, InGen contracts with PinPoint for the performance of non-premium tests associated with the Pawsitive I.D. testing service.

38. PinPoint, in turn, contracts with Texas A&M, Shelterwood, and Ketchum for the performance of "non-premium" tests. A copy of relevant pages of PinPoint's website is attached as Exhibit G.

39. On its website, InGen represents that the VeriSNP platform used by Texas A&M, Shelterwood, and Ketchum is patented. *See* Exhibit F.

40. The Shelterwood website states that the VeriSNP platform is "patent pending." A copy of the relevant portions of Shelterwood's website is attached as Exhibit H.

41. According to the InGen website, PinPoint then sells the results of the "non-premium" tests conducted by Texas A&M and Shelterwood to InGen which then completes the processing by adding the premium testing which is conducted in the Bahamas.

42. The representations on the InGen website that the "non-premium" tests are not associated with or protected by issued U.S. patents are false.

43. One "non-premium" test performed by Texas A&M, Shelterwood, and Ketchum is a test for "Autosomal Recessive Hereditary Nephropathy." *See* Exhibit H.

44. Autosomal Recessive Hereditary Nephropathy Familial Nephropathy are other names for ARAS, which the '388 patent relates to.

45. Another "non-premium" test performed by Texas A&M, Shelterwood, and Ketchum is a test for "Canine Leukocyte Adhesion Deficiency (CLAD)." *See* Exhibit H.

46. Another "non-premium" test performed by Texas A&M, Shelterwood, and Ketchum is a test for "Retinal Dystrophy (prad)." *See* Exhibit H.

47. InGen offers the Pawsitive I.D. testing service for purchase through its website, including to customers in the United States and this District. InGen also advertises the Pawsitive I.D. testing service for sale within the United States and this District. InGen has sold the Pawsitive I.D. testing service, including the infringing tests for ARAS, CLAD, and CSNB/prad, to customers in the United States and in this District. Texas A&M, Shelterwood, and Ketchum provide infringing testing services for customers who reside in the United States and in this District.

48. InGen contracts with Genetic Fulfillment as a shipping contractor to fill the orders placed with InGen.

49. When a customer places an order through InGen's website, Genetic Fulfillment ships the kit to the customer from Marietta, Georgia. Once the customer collects the sample from the dog or cat, the customer ships the sample to Genetic Fulfillment at a post office box in Atlanta, Georgia. Genetic Fulfillment then forwards the sample to PinPoint, Texas A&M, Shelterwood, and Ketchum for performance of "non-premium" tests that infringe the '388 patent, the '897 patent, the '114 patent, and the '958 patent.

FIRST CAUSE OF ACTION
(Patent Infringement Against Texas A&M, Shelterwood, and Ketchum)

50. Plaintiff repeats the allegations set forth in paragraphs 1 through 49.

51. Texas A&M, Shelterwood, and Ketchum have infringed the '388 patent by one or more of the following: making, selling, offering for sale, and/or using testing methods for ARAS which incorporate one or more of the inventions claimed in the '388 patent.

52. Texas A&M, Shelterwood, and Ketchum have infringed the '897 patent by one or more of the following: making, selling, offering for sale, and/or using testing methods for CLAD which incorporate one or more of the inventions claimed in the '897 patent.

53. Texas A&M, Shelterwood, and Ketchum have infringed the '114 and '958 patents by one or more of the following: making, selling, offering for sale, and/or using testing methods for CSNB/prad which incorporate one or more of the inventions claimed in the '114 and '958 patents.

54. The infringement by Texas A&M, Shelterwood, and Ketchum is intentional and willful.

55. As a result of Texas A&M's, Shelterwood's, and Ketchum's infringing activities, OptiGen has sustained damages in an amount to be proven at trial.

56. The infringements and inducements to infringe by Texas A&M, Shelterwood, and Ketchum have caused and will continue to cause OptiGen irreparable harm for which there is no adequate remedy at law.

SECOND CAUSE OF ACTION
(Patent Infringement and Inducing Infringement Against PinPoint, InGen, and Dobbins)

57. Plaintiff repeats the allegations set forth in paragraphs 1 through 56.

58. PinPoint, InGen, and Dobbins have infringed the '388 patent by one or more of the following: offering to sell, selling, importing and/or exporting, and/or using testing methods for ARAS under the name of Pawsitive I.D., which incorporate one or more of the inventions claimed in the '388 patent.

59. PinPoint, InGen, and Dobbins have infringed the '897 patent by one or more of the following: offering to sell, selling, importing and/or exporting, and/or using testing methods for CLAD under the name of Pawsitive I.D., which incorporate one or more of the inventions claimed in the '897 patent.

60. PinPoint, InGen, and Dobbins have infringed the '114 and '958 patents by one or more of the following: offering to sell, selling, importing and/or exporting, and/or using

testing methods for CSNB/prad under the name of Pawsitive I.D., which incorporate one or more of the inventions claimed in the '114 and '958 patents.

61. PinPoint, InGen, and Dobbins have also induced others to infringe the '388 patent, in violation of 35 U.S.C. § 271(b) and/or (f). Dobbins has induced infringement by PinPoint, Texas A&M, Shelterwood, InGen, and InGen's customers. PinPoint has induced infringement by Texas A&M and Shelterwood. InGen has induced infringement by its customers.

62. PinPoint, InGen, and Dobbins have also induced others to infringe the '897 patent, in violation of 35 U.S.C. § 271(b) and/or (f). Dobbins has induced infringement by PinPoint, Texas A&M, Shelterwood, InGen, and InGen's customers. PinPoint has induced infringement by Texas A&M and Shelterwood. InGen has induced infringement by its customers.

63. PinPoint, InGen, and Dobbins have also induced others to infringe the '114 and '958 patents, in violation of 35 U.S.C. § 271(b) and/or (f). Dobbins has induced infringement by PinPoint, Texas A&M, Shelterwood, InGen, and InGen's customers. PinPoint has induced infringement by Texas A&M and Shelterwood. InGen has induced infringement by its customers.

64. The infringement and inducement to infringe by PinPoint, InGen, and Dobbins is intentional and willful.

65. As a result of the inducement to infringe by PinPoint, Dobbins, and InGen, OptiGen has sustained damages in an amount to be proved at trial.

66. The inducement to infringe by PinPoint, Dobbins, and InGen has caused and will continue to cause OptiGen irreparable harm for which there is no adequate remedy at law.

THIRD CAUSE OF ACTION
(Inducing Infringement Against Genetic Fulfillment)

67. Plaintiff repeats the allegations set forth in paragraphs 1 through 66.

68. Genetic Fulfillment has actively induced infringement of the '388 patent by others, including its co-defendants and customers, in violation of 35 U.S.C. § 271(b) and/or (f).

69. Genetic Fulfillment has actively induced infringement of the '897 patent by others, including its co-defendants and customers, in violation of 35 U.S.C. § 271(b) and/or (f).

70. Genetic Fulfillment has actively induced infringement of the '114 and '958 patents by others, including its co-defendants and customers, in violation of 35 U.S.C. § 271(b) and/or (f).

71. Genetic Fulfillment's inducement to infringe was intentional and willful.

72. As a result of Genetic Fulfillment's inducement to infringe, OptiGen has sustained damages in an amount to be proven at trial.

73. Genetic Fulfillment's inducement to infringe has caused and will continue to cause OptiGen irreparable harm for which there is no adequate remedy at law.

FOURTH CAUSE OF ACTION
(Misrepresentations Under the Lanham Act Against PinPoint, InGen, and Dobbins)

74. Plaintiff repeats the allegations set forth in paragraphs 1 through 73.

75. PinPoint, InGen, and Dobbins have misrepresented the nature, characteristics, and qualities of their products and services by stating that the Pawsitive I.D. "non-premium" tests are not associated with any existing patents in the United States. These statements are false.

76. PinPoint, InGen, and Dobbins represent that the VeriSNP platform, which includes testing for ARAS, CLAD, and CSNB/prad, is patented. This statement is false.

77. The misrepresentations by PinPoint, InGen, and Dobbins are likely to mislead, and have misled, consumers concerning the nature, characteristics, and quality of their products and services. The purpose of the misrepresentations by PinPoint, InGen, and Dobbins was and is to influence customers to use the DNA-based diagnostic and testing services of InGen rather than OptiGen's services.

78. The misrepresentations by PinPoint, InGen, and Dobbins were and are knowing, intentional, and willful and violate 15 U.S.C. § 1125(a)(1)(B).

79. As a result of this conduct by PinPoint, InGen, and Dobbins, OptiGen has sustained damages in an amount to be proven at trial.

80. The misrepresentations by PinPoint, InGen, and Dobbins have caused and will continue to cause OptiGen irreparable harm for which there is no adequate remedy at law.

FIFTH CAUSE OF ACTION
(Unfair Competition Against PinPoint, InGen, Dobbins, Texas A&M, Shelterwood, and Ketchum)

81. Plaintiff repeats the allegations set forth in paragraphs 1 through 80.

82. PinPoint, InGen, and Dobbins, compete with OptiGen in providing DNA-based diagnostic and testing services for inherited diseases of dogs. By offering these services, they are willfully misappropriating for their own benefit OptiGen's intellectual property and are profiting and unjustly enriching themselves by the unlawful and unauthorized use of OptiGen's intellectual property.

83. InGen was created by Dobbins for the purpose of circumventing the laws of the United States, including the Patent Act and state common law, and PinPoint transferred assets to InGen for this express purpose.

84. The conduct of PinPoint, InGen, and Dobbins in offering for sale and selling tests to the public that misappropriate OptiGen's intellectual property injures the business and goodwill of OptiGen and is in violation of the common law of unfair competition.

85. The conduct of Texas A&M, Shelterwood, and Ketchum in using and carrying out tests that misappropriate intellectual property belonging to OptiGen injures the business and goodwill of OptiGen and is in violation of the common law of unfair competition.

86. As a result of the unfair competition by PinPoint, InGen, Dobbins, Texas A&M, Shelterwood, and Ketchum, OptiGen has sustained damages in an amount to be proved at trial.

87. The unfair competition by PinPoint, InGen, Dobbins, Texas A&M, Shelterwood, and Ketchum is intentional and willful and will continue unless and until they are restrained by this Court.

88. The unfair competition by PinPoint, InGen, Dobbins, Texas A&M, Shelterwood, and Ketchum has caused and will continue to cause OptiGen irreparable harm for which there is no adequate remedy at law.

WHEREFORE, OptiGen is entitled to judgment:

(1) Declaring that Defendants Texas A&M, Shelterwood, and Ketchum directly infringed one or more claims of the ‘388 patent, the ‘897 patent, the ‘114 patent, and/or the ‘958 patent.

(2) Declaring that Defendants PinPoint, InGen, and Dobbins have induced infringement of the ‘388 patent, the ‘897 patent, the ‘114 patent, and/or the ‘598 patent.

(3) Declaring that Defendants PinPoint, InGen, and Dobbins directly infringed one or more claims of the ‘388 patent, the ‘897 patent, the ‘114 patent, and/or the ‘598 patent.

(4) Declaring that Defendant Genetic Fulfillment has induced infringement of the ‘388 patent, the ’897 patent, the ‘114 patent, and/or the ‘958 patent.

(5) Granting an injunction, pursuant to 35 U.S.C. § 283 and 15 U.S.C. § 1116, preliminarily and permanently enjoining each Defendant, its officers, directors, agents, servants, employees, attorneys, subsidiaries, affiliates, and all those acting in concert with or under or through them, from making, selling, offering for sale, using, and/or exporting or importing any diagnostic testing kits or services, including but not limited to Pawsitive I.D., that infringe the '388 patent, the '897 patent, the '114 patent, and the '958 patent, or otherwise directly or indirectly committing or inducing further acts of infringement of the '388 patent, the '897 patent, the '114 patent, and the '958 patent.

(6) Ordering an accounting for damages arising from Defendants' acts of direct infringement and/or indirect infringement, misrepresentations and unfair competition, including an accounting of the profits made by Defendants and/or lost by OptiGen as a result of Defendants' infringing activities, including profits on all related and convoyed products and processes.

(7) Awarding damages pursuant to 35 U.S.C. § 284 and 15 U.S.C. § 1117(a), with interest.

(8) Finding that Defendants' infringement, inducement to infringe, misrepresentations, and unfair competition are intentional and willful and that this is an exceptional case, and granting an order awarding treble damages and reasonable attorneys' fees to OptiGen as permitted by 35 U.S.C. §§ 284-85 and 15 U.S.C. § 1117.

(9) Such further relief as this Court deems proper.

Jury Demand

Plaintiff demands a trial by jury on all issues properly triable to a jury.

Dated: April 17, 2009

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