

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN**

WISCONSIN ALUMNI RESEARCH)	
FOUNDATION,)	
)	
Plaintiff,)	
)	Case No.: 12-cv-897
v.)	
)	Jury Trial Demanded
WH NUTRITIONALS, LLC,)	
)	
Defendant.)	

Plaintiff Wisconsin Alumni Research Foundation (“WARF”), for its Complaint against Defendant, WH Nutritionals, LLC (“Defendant”), states and alleges as follows:

PARTIES

1. Plaintiff WARF is a not-for-profit Wisconsin corporation having its principal place of business at 614 Walnut Street, Madison, Wisconsin 53726. WARF is the designated patent management organization for the University of Wisconsin-Madison (“University”). WARF’s mission is to support research at the University. WARF carries out this mission by patenting and licensing University inventions and by returning the proceeds of that licensing to fund additional research at the University.

2. On information and belief, Defendant WH Nutritionals is a limited liability company organized and existing under the laws of the state of Delaware having its principal place of business at 800 Brazos Street Suite 400, Austin, Texas 78701.

JURISDICTION AND VENUE

3. This is a civil action for patent infringement arising under the patent laws of the United States, 35 U.S.C. § 1 *et. seq.* This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1338(a).

4. This Court has personal jurisdiction over Defendant because Defendant conducts continuous and systematic business within this district and has placed infringing products into the stream of commerce by selling and/or offering to sell products in this judicial district with knowledge that such products would be shipped into this district.

5. Venue is proper in this district under 28 U.S.C. §§ 1391 and 1400(b) because Defendant is subject to personal jurisdiction, and has committed acts of infringement, and continues to commit acts of infringement in this district. Venue is proper further because a substantial part of the events giving rise to this claim occurred in this district, including but not limited to the development of the inventions claimed in the patent that is the subject of this action and the prosecution of that patent. WARF resides in this district.

BACKGROUND

6. Plaintiff repeats and re-alleges each and every allegation of paragraphs 1-5 as though fully set forth herein.

7. WARF is the assignee and lawful owner of United States Patent No. 6,528,542 (hereinafter “the ’542 Patent”), entitled “Calcium Formate for Use as a Dietary Supplement,” which duly and lawfully issued from the United States Patent and Trademark Office on March 4, 2003. The sole-named inventor and assignor of the ’542 Patent is Hector F. DeLuca. A true and correct copy of the ’542 Patent is attached as Exhibit A and made a part hereof.

8. As the owner of the ’542 Patent by assignment, WARF is authorized and has standing to bring legal action to enforce all rights arising under the ’542 Patent.

9. The ’542 Patent claims methods for increasing dietary calcium in a human patient.

10. The ’542 Patent is directed to improving the calcium balance or retention in a human patient by the oral ingestion or administration of sufficient quantities of calcium formate.

11. Women’s Choice Pharmaceuticals is a sub-licensee of the ’542 Patent.

12. Pursuant to its sub-license, Women's Choice markets and sells a pre-natal vitamin supplement under the brand name "Nestabs." Women's Choice's sale of its Nestabs product, including by physician prescription to pregnant women, is covered by the '542 Patent.

13. Subsequent to Women's Choice's introduction of Nestabs into the market, Defendant began to offer for sale, sell and market a product whose label is identical in formulation to the Nestabs product.

14. Defendant has known of the '542 Patent since at least May 2012.

15. At no time has the Defendant had a license to the '542 Patent.

COUNT I – INFRINGEMENT OF U.S. PATENT NO. 6,528,542

16. Plaintiff repeats and re-alleges each and every allegation of paragraphs 1-15 as though fully set forth herein.

17. Defendant has infringed, and is currently infringing, at least claims 1, 2, 5, 6, 7 and 8 of the '542 Patent, in violation of 35 U.S.C. § 271 *et seq.*, by making, using, selling, offering to sell in the United States, and/or importing into the United States, without license or authority, pre-natal vitamin supplements, including without limitation Defendant's Nutri-Tab OB and NutriTab OB + DHA ("Nutri-Tab products").

18. By making, using, selling, offering to sell and/or importing into the United States infringing products and by utilizing methods within the scope of at least claims 1, 2, 5, 6, 7, and 8 of the '542 Patent, Defendant infringes, contributorily and/or through inducement under 35 U.S.C. § 271, either literally or under the doctrine of equivalents.

19. Defendant has actual knowledge of the '542 Patent and actual knowledge that Defendant's activities constitute contributory and/or induced infringement of at least claims 1, 2, 5, 6, 7, and 8 of the '542 Patent and yet continues its infringing activities.

20. Defendant has and continues to contribute to and/or induce infringement actively and intentionally under 35 U.S.C. § 271(b) of at least claims 1, 2, 5, 6, 7, and 8 of the '542 Patent. Upon information and belief, and not by way of limitation, Defendant has placed its Nutri-Tab products into the market to be used, and which are used, by purchasers and end-users, e.g., patients who obtain Nutri-Tab products by prescription from physicians, as an alternative to Women's Choice's Nestabs product. In addition, and not by way of limitation, Defendant's Nutri-Tab product label instructs purchasers and end-users to use the product in a manner that infringes one or more claims of the '542 Patent.

21. There is no substantial non-infringing use for Defendant's Nutri-Tab products.

22. Defendant was aware of the '542 Patent when it marketed and sold its Nutri-Tab products. On information and belief, Defendant was aware of the '542 Patent when it developed its Nutri-Tab products. The formulation set forth on the label of the Nutri-Tab product is identical to the formulation of Women's Choice's Nestabs product. In other words, Defendant's Nutri-Tab product is labeled as having the exact same 14 active ingredients in the same amounts as the licensed Nestabs product. Women's Choice's Nestabs product has been marked with the '542 Patent since the time it was first sold.

23. Defendant disregarded an objectively high likelihood that the making, using, selling and/or offering to sell the Nutri-Tab product would infringe one or more claims of the '542 Patent.

24. Defendant engaged in the foregoing conduct with respect to the '542 Patent during the term of the patent and without authority from Plaintiff.

25. Defendant's infringement of one or more claims of the '542 Patent has been and will continue to be willful, deliberate and intentional.

26. As a direct and proximate result of Defendant's infringement of one or more claims of the '542 Patent, Plaintiff has been and will continue to be irreparably damaged and deprived of its rights in the '542 Patent in amounts not yet determined, and for which Plaintiff is entitled to relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for a judgment that:

- A. Defendant has infringed the '542 Patent;
- B. Defendant's infringement of the '542 Patent is willful;
- C. Defendant, its officers, directors, employees, agents, subsidiaries, licensees, servants, successors and assigns, and any and all persons acting in privity or in concert or participation with Defendant, be permanently enjoined from infringement of the '542 Patent under 35 U.S.C. § 283;
- D. Plaintiff be awarded all damages adequate to compensate Plaintiff for Defendant's infringement of the '542 Patent, and such damages be trebled under 35 U.S.C. § 284 and awarded to Plaintiff, with pre-judgment and post-judgment interest as allowed by law;
- E. This case be adjudged an exceptional case under 35 U.S.C. § 285, and Plaintiff be awarded attorneys' fees, expert witness fees, costs, and all expenses incurred in this action, with interest;
- F. Plaintiff be awarded all actual and compensatory damages; and
- G. Plaintiff be awarded such other and further relief as the Court deems just and proper.

JURY DEMAND

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff demands a trial by jury on all issues triable by jury.

Dated: December 7, 2012

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