

PRICE PARKINSON & KERR, PLLC
Jason M. Kerr (8222)
David R. Parkinson (8258)
Alan W. Dunaway (13514)
5742 West Harold Gatty Drive
Salt Lake City, UT 84116
Telephone: (801) 530-2900
Facsimile: (801) 530-2957

FILED
U.S. DISTRICT COURT
2013 FEB 22 5 4: 23
DISTRICT OF UTAH
BY: _____
DEPUTY CLERK

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

WESTERN HOLDINGS, LLC, a Nevada)	COMPLAINT AND JURY DEMAND
limited liability company)	
Plaintiff,)	
vs.)	
DAVID P. SUMMERS an individual,)	
Defendant.)	Case: 2:13cv00144 Assigned To: Wells, Brooke C. Assign. Date: 2/22/2013 Description: Western Holdings v Summers

Plaintiff WESTERN HOLDINGS, LLC ("Western" or Plaintiff) for its Complaint against defendant DAVID P. SUMMERS (hereinafter "Defendant" or "Summers"), alleges and avers as follows:

INTRODUCTION

This is a dispute regarding Defendant's infringement on patent rights licensed to Plaintiff. In 2003, Nutraceutical Development Corporation (hereinafter "NDC") and Western entered into an Exclusive License Agreement ("Agreement") to license NDC's patented methodology for creating a dietary supplement ingredient, as set forth in US Patent No. 7,074,812 (the "Patent").

The technology embodied in the Patent is administering nicotine or nicotine acetylcholine receptor agonist in combination with exercise to stimulate muscle mass. In 2003, when Western entered into the Agreement with NDC, Defendant was the CEO of NDC and signed the Agreement on behalf of NDC.

Pursuant to the Agreement, Western sublicensed the rights to develop a dietary supplement using NDC's patented methodology to Novex BioTech, LLC ("Novex"). Novex developed a product called Endothil®-CR utilizing the technology embodied in the Patent. Endothil®-CR is a dietary supplement product that, among other things, is designed to assist muscle growth, increase body strength, and increase muscle mass. A key ingredient in Endothil®-CR is green tomato extract which naturally contains nicotine. Novex began to sell Endothil®-CR in 2005. In reliance upon the protection provided by the Patent, Novex invested significant sums of money developing, marketing, and selling Endothil®-CR.

At some point after executing the Agreement on behalf of NDC, Defendant became an officer and director of Metabolic Research, Inc. (hereinafter "Metabolic"), which was a Nevada corporation. Defendant developed a nutritional supplement product called Stemulite, which he licensed to Metabolic. Stemulite utilizes the technology embodied in the Patent and therefore infringes the Patent. Stemulite was and is marketed as a product to increase muscle mass. One of Stemulite's ingredients is eggplant extract, which naturally contains nicotine. Neither Defendant nor Metabolic received a license from NDC or Plaintiff to produce a product based on the methodology embodied in the Patent.

The Agreement explicitly gave both NDC and Western the right to prosecute infringement claims. Pursuant to the Agreement, Western had to notify NDC of the infringement. In the event NDC elected to not prosecute the infringement claim, Western could

then prosecute the infringement claim on its own behalf. In December 2012, Western notified NDC of Defendant's infringement of the Patent. NDC did not exercise its right to prosecute the infringement claim against Defendant. Therefore, Western has elected to exercise its right to prosecute the infringement claim against Defendant.

PARTIES

1. Plaintiff Western Holdings, LLC ("Western") is a limited liability company organized and existing under the laws of the State of Nevada, with its principal place of business located in Carson City, Nevada.

2. Defendant David P. Summers ("NDC") is, upon information and belief, an individual residing in Texas.

JURISDICTION AND VENUE

3. This action arises under the United States patent laws, 35 U.S.C. § 1, et seq.

4. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1338(a).

5. The Court has personal jurisdiction over the Defendant because the Defendant transacted business within this State by developing an infringing product which has been offered for sale and has been sold to consumers in Utah. Thus, this Court has both general and specific personal jurisdiction over the Defendant.

6. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391 and 1400 because Defendant has done business and has infringed on Plaintiff's rights under the Patent in this District.

FACTUAL ALLEGATIONS

THE AGREEMENT

7. Effective July 1, 2003, Plaintiff Western entered into an Exclusive License Agreement (“Agreement”) with NDC to license NDC’s patented methodology for creating a dietary supplement ingredient, as set forth in US Patent No. 7,074,812 (the “Patent”). A true and correct copy of the Agreement is attached as Exhibit 1.

8. At the time the Agreement was signed, NDC had not filed the Patent. On or about August 2, 2003, as required by Section 2.5 of the Agreement, NDC filed a provisional patent application, Application No. 10633325.

9. On or about July 11, 2006 the United States Patent and Trademark Office issued the Patent. A true and correct copy of the Patent is attached as Exhibit 2.

DEVELOPMENT, MARKETING AND SALE OF ENDOTHIL-CR

10. Pursuant to Section 3.5 of the Agreement, Western sublicensed the right to develop and manufacture a dietary supplement utilizing the technology embodied in the Patent to Novex.

11. The technology covered under the Patent includes the administration of nicotine in combination with exercise to develop muscle mass.

12. Novex spent significant sums of money developing a dietary supplement product called Endothil®-CR utilizing the technology embodied in the Patent. Endothil®-CR is a dietary supplement product that, among other things, is designed to assist muscle growth, body strength, and increase muscle mass.

13. Endothil®-CR contains green tomato extract as a primary ingredient. Green tomato extract naturally contains nicotine.

14. Novex began to market and sell Endothil®-CR in 2005. Novex has spent significant sums marketing Endothil®-CR.

15. Western negotiated and relied upon NDC's promise in the Agreement to obtain and maintain the Patent. Western obtained NDC's promise of exclusivity to protect its investment in Endothil®-CR. Western understood that no competitor could utilize the technology embodied in the Patent to create competing products. Without NDC's promises of exclusivity, Western would not have entered into the Agreement and Western would not have invested significant sums developing and marketing Endothil®-CR.

DEFENDANT'S INFRINGING PRODUCT

16. From December 2003 to March 2009 Defendant was not actively involved in the management of NDC, but instead was actively managing other businesses, including Metabolic Research, Inc. In addition, Summers was an owner of Metabolic Research, Inc.

17. Summers, through Metabolic, developed and marketed products, which violate the Patent, marketed and sold under the brand name Stemulite©.

18. For example, Stemulite© has been marketed as a muscle building product and contains eggplant extract as a primary ingredient. Eggplant extract naturally contains nicotine.

RIGHTS TO PROSECUTE INFRINGEMENT UNDER THE AGREEMENT

19. The Agreement granted rights to prosecute infringement claims to both NDC and Defendant.

20. The Agreement requires Western to notify NDC if Western is aware of infringement of the Patent. In the event NDC elects to not prosecute the infringement claim, Western can prosecute the infringement claim on Westerns own behalf.

21. Western notified NDC of Defendant's infringement in December 2012. NDC has elected to not prosecute the infringement claim against Defendant. Therefore Western has elected to exercise its rights under the Agreement and sues Defendant for infringing the Patent.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION

INFRINGEMENT OF PATENT RIGHTS

22. Western reasserts the allegations of paragraphs 1-21, as if set forth in full herein.

23. Plaintiff acquired exclusive rights to the Patent via the Agreement between Western and NDC.

24. Western and Novex invested significant sums of money developing Endothil®-CR, a product based on the technology embodied in the Patent.

25. On information and belief, Defendant developed Stemulite©, a product which is based on the same technology embodied in the Patent because it contains nicotine and is marketed as a muscle building dietary supplement.

26. As a result of Defendant's infringement on Plaintiff's exclusive rights to the Patent, Plaintiff has been and continues to be injured. Plaintiff's injuries include, but are not limited to, lost revenue and profits, a diminishing of Plaintiff's goodwill and reputation, lost sales, and damage to Plaintiff's existing and potential business relations. Plaintiff is entitled to a full recovery of patent infringement damages against Defendant, including special, indirect, incidental, and consequential damages.

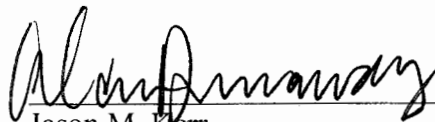
27. As a result of Defendant's infringement on the Patent, Plaintiff has been damaged and is entitled to be compensated for such damages, pursuant to 35 U.S.C. § 284, in an amount to be determined at trial.

28. Plaintiff is entitled to its attorney fees and costs as a result of Defendant's infringement on Plaintiff's rights to the Patent because this is an exceptional case under 35 U.S.C. § 285.

WHEREFORE, Plaintiff requests the following relief from the Court:

1. A judgment that Defendant has infringed the Patent.
2. A judgment and order requiring Defendant to pay damages resulting from Defendant's infringement on Plaintiff's rights to the Patent including, but not limited to, lost revenue and profits, the diminishment of Plaintiff's goodwill and reputation, lost sales, damage to Plaintiff's existing and potential business relations, and reimbursement for the sums spent by Western and Novex developing, marketing, and selling Endothil-CR® in reliance upon the Agreement and the protections bargained for and promised by NDC.
3. A judgment and order requiring Defendant to pay treble damages to Plaintiff to compensate for Defendant's willful and deliberate infringing acts in accordance with 35 U.S.C. § 284.
4. A judgment and order that this is an exceptional case requiring Defendant to pay Plaintiff's costs and attorney fees in bringing this action under 35 U.S.C. § 285.
5. For pre-judgment and post judgment interest as allowed by law.
6. For such other and further relief as the Court deems necessary.

DATED this 22nd day of February, 2013.



Jason M. Kerr
David R. Parkinson
Alan W. Dunaway
Attorneys for Plaintiff

Plaintiff's Address:

Salt Lake City, UT 84116