

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION**

HARCOL RESEARCH, LLC

Plaintiff,

v.

USPLABS, LLC;  
VITAMIN WORLD, INC.;  
NBTY, INC.; and  
VITAMIN SHOPPE, INC.

Defendants.

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CIVIL ACTION NO. 2:13-cv-230

**JURY TRIAL DEMANDED**

**COMPLAINT FOR PATENT INFRINGEMENT**

Plaintiff Harcol Research, LLC (“Plaintiff”) hereby alleges for its Complaint against USPlabs, LLC; Vitamin World, Inc.; NBTY, Inc.; and Vitamin Shoppe, Inc. (“Defendants”), on personal knowledge as to its own activities and on information and belief as to the activities of others, as follows:

**I. THE PARTIES**

1. Plaintiff is a limited liability company organized and existing under the laws of Nevada, with a principal place of business at 5935 Old Bullard Road, Suite 207 in Tyler, Texas, 75703.

2. Plaintiff is the owner and assignee of United States Patent No. 5,817,364 (“the ‘364 patent”) titled “Beverage Containing Alpha-Ketoglutaric Acid and Method of Making.” Plaintiff has owned the ‘364 patent during at least a portion of the period of the Defendant’s infringing acts and still owns the patent.

3. Defendant USPlabs, LLC is a company organized and existing under the laws of Texas with a principal place of business at 10761 King William Drive in Dallas, Texas, 75220.

4. Defendants NBTY, Inc. and Vitamin World, Inc. are both corporations organized and existing under the laws of Delaware with places of business at the Parkdale Mall, 6155 Eastex Freeway, Suite 720, in Beaumont, Texas, 77706, and at Central Mall, 3100 Highway 365,

Space #140 in Port Arthur, Texas, 77642, where they have “Vitamin World” retail stores. These two Defendants also maintain a place of business at 2011 Smithtown Avenue in Ronkonkoma, New York, 11779.

5. Defendant Vitamin Shoppe, Inc. is a corporation organized and existing under the laws of Delaware with a place of business at 5899 Eastex Freeway, Suite 200, in Beaumont, Texas, 77701, where it has a “Vitamin Shoppe” retail store. Vitamin Shoppe, Inc. also maintains a place of business at 2101 91<sup>st</sup> Street in North Bergen, New Jersey, 07047.

## **II. 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. Accordingly, this Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1338, and 1367.

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

8. This Court has personal jurisdiction over Defendants. Defendants, directly or through intermediaries (including distributors, retailers, and others), ship, distribute, offer for sale, sell, and advertise nutritional supplement products in the United States, the State of Texas, and the Eastern District of Texas.

9. Defendant USPlabs, LLC, from its headquarters in Dallas, Texas, designs, formulates, manufactures, makes, ships, distributes, offers for sale, sells, and advertises its products that infringe on one or more claims of the ‘364 patent, including products sold under the “Jack3d” brand name. USPlabs, LLC ships, distributes, offers for sale, and sells its products to Defendants NBTY, Inc., Vitamin World, Inc., and Vitamin Shoppe, Inc. in the Eastern District of Texas.

10. Defendants NBTY, Inc. and Vitamin World, Inc., from retail locations in the Eastern District of Texas, distribute, offer for sale, sell, and advertise products that infringe on one or more claims of the ‘364 patent, including products sold under the “Jack3d” brand name, and/or have done so in the past.

11. Defendant Vitamin Shoppe, Inc., from at least one retail location in the Eastern District of Texas, distributes, offers for sale, sells, and advertises products that infringe on one or more claims of the '364 patent, including products sold under the "Jack3d" brand name.

12. Defendants have purposefully and voluntarily placed products that infringe on one or more claims of the '364 patent, including the "Jack3d"-branded products, into the stream of commerce with the expectation that they will be purchased in the Eastern District of Texas, and they are actually sold and purchased in this District by consumers residing in this District.

### **III. THE DEFENDANTS' INFRINGEMENTS**

13. Defendants have shipped, distributed, offered for sale, sold, and advertised products that infringe on one or more claims of the '364 patent (the "accused products"), including without limitation the "Jack3d"-branded products, whose advertisements and/or labels state that:

- a. they come in powder form and are to be mixed with water and taken as a beverage;
- b. they should be taken prior to working out and have been voted the "Best Energy Supplement";
- c. based on the label and the recommended serving size of the accused products, they contain "Arginine Alpha-Ketoglutarate (A-AKG)" in an amount between approximately 0.1 to 2.5 percent of their wet weight per serving; and
- d. they contain citric acid.

14. Defendants have infringed and are still infringing one or more claims of the '364 patent by making, using, selling, and offering for sale the accused products.

15. Defendants have knowledge of the '364 patent, though the earliest exact date Defendants obtained knowledge of the '364 patent is within the exclusive possession and control of Defendants.

16. Upon information and belief, Defendants had actual, first-hand knowledge of the '364 patent as early as the time Defendants began selling accused products in the marketplace.

For example and upon information and belief, Defendants employ and engage sophisticated, experienced legal counsel with expertise in patent law, and Defendants, through their counsel, conduct or should conduct due diligence on the potential for products Defendants sell to infringe on patents and knew or should have known that the accused products actually infringe or could infringe on the '364 patent, but Defendants decided to infringe the patents anyway or ignored the risk of infringement.

17. In the alternative and upon information and belief, Defendants subjectively believed at the time Defendants began selling the accused products in the marketplace that there is or was a high probability of the fact that a patent covering alpha-ketoglutaric acid as in the '364 patent existed and that Defendants took deliberate actions to avoid confirming that fact, including not conducting due diligence as to potential patent infringements, and that Defendants therefore willfully blinded themselves to the infringing nature of the accused products.

18. At a minimum and in the alternative, Defendants will become aware of the '364 patent at the time of the filing and service of this Complaint, yet Defendants will not cease their own infringing activities despite such knowledge.

#### **IV. FIRST CAUSE OF ACTION**

##### **Infringement of U.S. Patent No. 5,817,364**

19. Plaintiff repeats and re-alleges the allegations of the foregoing paragraphs of this Complaint as if fully set forth herein.

20. Defendants have in the past and still are literally and directly infringing or directly infringing under the doctrine of equivalents one or more claims of the '364 patent by making, using, selling, and offering for sale dietary supplements embodying the patented invention, namely the accused products, and will continue to do so unless enjoined by this Court.

21. Defendants' activities have been without express or implied license by Plaintiff.

22. 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.

23. As a result of Defendants' acts of infringement, Plaintiff has been and will continue to be irreparably harmed by Defendants' infringements, which will continue unless Defendants are enjoined by this Court.

24. Defendants' past infringement and/or continuing infringement has been deliberate and willful, and this case is therefore an exceptional case, which warrants an award of treble damages and attorneys' fees in accordance with 35 U.S.C. § 285.

### **DEMAND FOR JURY TRIAL**

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff hereby demands a jury trial for all issues in this case that properly are subject to a jury trial.

### **PRAYER FOR RELIEF**

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

1. A declaration that Defendants have infringed one or more claims of the '364 patent under 35 U.S.C. §§ 271 *et seq.*;

2. That injunctions, preliminary and permanent, be issued by this Court restraining Defendants, their respective officers, agents, servants, directors, and employees, and all persons in active concert or participation with each, from infringing the '364 patent;

3. That Defendants be required to provide to Plaintiff an accounting of all gains, profits, and advantages derived by Defendants' infringement of the '364 patent, and that Plaintiff be awarded damages adequate to compensate Plaintiff for the wrongful infringing acts by Defendants, in accordance with 35 U.S.C. § 284;

4. That: (a) injunctions, preliminary and permanent, be issued by this Court restraining Defendants, their respective officers, agents, servants, directors, and employees, and all persons in active concert or participation with each, from indirectly infringing the '364 patent; (b) Defendants be required to provide to Plaintiff an accounting of all gains, profits, and advantages derived by Defendants' indirect infringement of the '364 patent; (c) Plaintiff be awarded damages adequate to compensate Plaintiff for the wrongful infringing acts by Defendants, in accordance with 35 U.S.C. § 284; and (d) the damages awarded to Plaintiff with

regard to the '364 patent be increased up to three times, in view of Defendants' willful infringement, in accordance with 35 U.S.C. § 284;

5. That this case be declared to be exceptional in favor of Plaintiff under 35 U.S.C. § 285, and that Plaintiff be awarded its reasonable attorneys' fees and other expenses incurred in connection with this action;

6. That Plaintiff be awarded its interest and costs of suit incurred in this action;

7. Compensatory damages;

8. Punitive damages; and

9. That Plaintiff be awarded such other and further relief as this Court may deem just and proper.

Dated: March 22, 2013

Respectfully Submitted,

By: /s/ William E. Davis, III  
William E. Davis, III  
Texas State Bar No. 24047416  
**THE DAVIS FIRM, PC**  
111 West Tyler Street  
Longview, Texas 75601  
Telephone: (903) 230-9090  
Facsimile: (903) 230-9661  
Email: [bdavis@bdavisfirm.com](mailto:bdavis@bdavisfirm.com)

**ATTORNEY FOR PLAINTIFF  
HARCOL RESEARCH, LLC**