

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

CHARLES R. BAKER,)	
)	
Plaintiff,)	Case No. _____
)	JURY DEMANDED
v.)	
)	
PFIZER, INC.,)	
WYETH INC.,)	
WYETH CONSUMER)	
HEALTHCARE, LTD., and)	
FORT DODGE ANIMAL HEALTH,)	
INC.,)	
)	
Defendants.)	

COMPLAINT FOR FALSE PATENT MARKING

Plaintiff CHARLES R. BAKER (hereinafter “Baker” or “Plaintiff”), for his Complaint against Defendants PFIZER, INC. (hereinafter referred to as “Defendant Pfizer”), WYETH, INC. (hereinafter referred to as “Defendant Wyeth”), WYETH CONSUMER HEALTHCARE, LTD. (hereinafter referred to as “Defendant “Wyeth Consumer Healthcare”), and FORT DODGE ANIMAL HEALTH, INC. (hereinafter referred to as “Defendant Fort Dodge”, and all defendants collectively referred to as “Defendants”), alleges as follows:

NATURE OF THE CASE

1.

This is a *qui tam* action on behalf of the public for false patent marking under Title 35, Section 292, of the United States Code.

2.

As set forth in detail below, Defendants have violated 35 U.S.C. § 292(a) by marking certain of Axid AR ® and Synanthic ® products with various United States patent numbers, even though said patents are expired. On information and belief, Defendants mark Axid AR ® and Synanthic ® branded products with the expired patents with the intent to deceive competitors and the public, and to gain a competitive advantage in the market.

3.

Plaintiff seeks an award of monetary damages against Defendants pursuant to 35 U.S.C. § 292 (b) of up to \$500 for each offense, with one-half going to the use of the United States and the other half going to the person bringing the action.

THE PARTIES

4.

Plaintiff is a person residing in Lakeland, Tennessee.

5.

Defendant PFIZER, INC., is a Delaware corporation with its principal place of business in New York, New York. Defendant Pfizer's registered agent for service of

process is CT Corporation System, 800 South Gay Street, Suite 2021, Knoxville, TN 37929.

6.

Defendant WYETH, INC., is a Delaware corporation with its principal place of business in Madison, New Jersey. Defendant Wyeth and its subsidiaries and affiliates, were acquired by Defendant Pfizer in October, 2009. Defendant Wyeth's registered agent for service of process is CT Corporation System, 800 South Gay Street, Suite 2021, Knoxville, TN 37929.

7.

Defendant WYETH CONSUMER HEALTHCARE, LTD., is a Delaware corporation with its principal place of business in Madison, New Jersey. Defendant Wyeth Consumer Healthcare is a subsidiary of Defendant Wyeth and was acquired by Defendant Pfizer in October, 2009. Defendant Wyeth Consumer Healthcare's registered agent for service of process is The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, DE 19801.

8.

Defendant FORT DODGE ANIMAL HEALTH, INC., is a Delaware corporation with its principal place of business in Overland Park, Kansas. Defendant Fort Dodge is a subsidiary of Defendant Wyeth and was acquired by Defendant Pfizer in October, 2009. Defendant Fort Dodge's registered agent for service of process is The Prentice Hall Corporation System, Inc., 2711 Centerville Road, Suite 400, Wilmington, DE 19808.

JURISDICTION AND VENUE

9.

This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338(a).

10.

Venue is proper in this District under 28 U.S.C. §§ 1391(c) and 1395(a) because, at least in part, Defendants' products that are the subject-matter of this complaint, were and are advertised, offered for sale, and sold within this District.

11.

This Court has personal jurisdiction over all named Defendants because the Defendants have sold and continue to sell falsely marked products in Tennessee and in this District, and/or in the streams of commerce with knowledge that said products would be sold in Tennessee and in this District. Upon information and belief, such sales by Defendants are substantial, continuous, and systematic.

12.

Plaintiff brings this action under 35 U.S.C. § 292(b), which provides that any person may sue for civil money penalties for false patent marking.

GENERAL ALLEGATIONS

13.

Defendants have in the past manufactured and marketed (or caused to be manufactured and marketed), and presently manufacture and market (or causes to be

manufactured and marketed), products for sale to the general consuming public, including Axid AR ® and Synanthic ®.

14.

Specifically, Defendants have marketed and continue to market the following products: Axid AR ®, a non-prescription tablet used to relieve heartburn and indigestion; and Synanthic ®, a veterinary product, used to treat lungworms, roundworms, tapeworms, and other parasites in cattle.

15.

Axid AR ®, including its packaging and/or labeling, has been and continues to be marked with United States patent number 4,375,547 (hereinafter referred to as the “ ‘547 Patent”).

16.

The ‘547 Patent has expired, but Defendants (except Defendant Fort Dodge) nevertheless continue using the improper patent markings on Axid AR ®, with the intent to deceive the public and to gain competitive advantage in the market.

17.

Synanthic ®, including its packaging and/or labeling, has been and continues to be marked with the following United States patent numbers: 3,929,821 and 4,080,461 (hereinafter referred to as the “ ‘821 Patent” and the “ ‘461 Patent,” respectively).

18.

The '821 Patent has expired, but Defendants nevertheless continue using the improper patent marking on Synanthic ®, with the intent to deceive the public and to gain competitive advantage in the market. Similarly, the '461 Patent has expired, but Defendants nevertheless continue using the improper patent marking on Synanthic ®, with the intent to deceive the public and to gain competitive advantage in the market.

19.

When a patent expires, all monopoly rights to the patent terminate irrevocably. Therefore, a product marked with an expired patent is not currently patented by such expired patent. In other words, the product is unpatented.

20.

Marking products with expired patents is likely to, or at least has the potential to, discourage or deter persons and companies from commercializing competing products, which, in turn, causes harm to the consuming public, including Plaintiff, by quelling product innovation and price competition.

21.

Defendants comprise a sophisticated multi-national company with many decades of experience applying for and obtaining patents, and therefore knows that patents do not have an indefinite duration but, rather, expire.

22.

Upon information and belief, Defendants employ in-house legal counsel.

23.

Upon information and belief, attorneys in Defendants' in-house legal departments are responsible for Defendants' intellectual property and marketing, labeling, and advertising law.

24.

Defendants, by themselves or by their representatives, cannot genuinely believe that a patent does not expire, and that prospective patent rights apply even after a particular patent's expiration.

25.

Defendants (except Defendant Fort Dodge) knew that both the '547 Patent marked on Axid AR ® as identified herein, had expired. Similarly, all Defendants knew that the '821 Patent and the '461 Patent, marked on Synanthic ® as identified herein, had expired.

26.

After the '547 Patent expired, Defendants (except Defendant Fort Dodge) marked, or caused to be marked, said expired patent number upon Axid AR ®, its packaging, and/or labeling. Similarly, after the '821 Patent and '461 Patent had expired, all Defendants marked, or caused to be marked, said expired patent number upon Synanthic ®, its packaging, and/or its labeling.

27.

Defendants knew that the patents marked on the products identified herein were expired during time periods Defendants were marking products with such expired patents.

28.

Because all monopoly rights in the aforementioned expired patents have terminated, Defendants cannot have any reasonable belief that Axid AR ® and/or Synanthic ® are patented or otherwise covered by the expired patents marked upon the packaging and/or labeling of these products.

29.

By repeatedly marking Axid AR ® and Synanthic ® with expired patents, Defendants have committed numerous violations of 35 U.S.C. § 292(a).

30.

Defendants have committed such violations of 35 U.S.C. § 292(a) with an intent to deceive competitors and the public.

31.

Plaintiff seeks an award of monetary damages against Defendants, one half of which shall be paid to the United States pursuant to 35 U.S.C. § 292(b).

COUNT ONE: THE '547 PATENT (AXID AR ®)

32.

Plaintiff restates and incorporates the foregoing paragraphs as if fully set forth herein.

33.

United States Patent Number 4,375,547 was filed on October 2, 1980, and issued on March 3, 1983. (Please see United States Patent No. 4,375,547, attached hereto as Exhibit 'A').

34.

The '547 Patent expired on March 3, 2002. (Please see "Certificate Extending Patent Term," attached hereto as Exhibit 'B').

35.

Defendants (except Defendant Fort Dodge) marketed for sale to the public the product known as Axid AR ®, marked with the '547 Patent. (Please see "Axid AR ® Label," p. 5 of 6, attached hereto as Exhibit 'C').

36.

Defendants (except Defendant Fort Dodge) violated 35 U.S.C. § 292(a) by marking, or causing to be marked, the packaging, labeling, and/or product commonly known as Axid AR ® with the '547 Patent, and any and all other products marked with the '547 Patent, subsequent to the date the patent expired with the intent to deceive the public.

37.

Upon information and belief, Defendants (except Defendant Fort Dodge) knew, on or about the date of expiration, that the '547 Patent had expired.

38.

Defendants cannot genuinely believe that the '547 Patent applies even after it expired.

39.

Upon information and belief, Defendants comprise a sophisticated multi-national enterprise with many decades of experience applying for, obtaining, and litigating patents. Defendants have committed a substantial amount of its resources to patent procurement and enforcement. Upon information and belief, Defendants have in-house legal departments and attorneys working therein are responsible for Defendants' intellectual property and marketing, labeling, and advertising law. As sophisticated companies, with in-house legal counsel that regularly handles patent matters, including but not limited to patent procurement and enforcement, Defendants are well-aware of the requirements of 35 U.S.C. § 292.

40.

Defendants (except Defendant Fort Dodge) have falsely marked Axid AR ® as described with the intent to deceive the public, in violation of 35 U.S.C. § 292(a).

41.

Each false marking on the product(s) identified is likely to, or at least has the potential to, discourage or deter persons and companies from commercializing competing products.

42.

Defendants' (except Defendant Fort Dodge) false marking of products with the '547 Patent after it expired has wrongfully quelled competition with respect to such products, thereby causing harm to Plaintiff, the United States, and the general public.

43.

Defendants (except Defendant Fort Dodge) wrongfully and illegally advertised a patent monopoly with respect to the '547 Patent and, as a result, have benefitted commercially and financially by maintaining false statements of patent rights.

WHEREFORE, Plaintiff demands a trial by jury and requests that the Court enter judgment as follows:

- (a) Enter judgment against Defendants (except Defendant Fort Dodge) and in favor of Plaintiff for the violations alleged in Count One of this Complaint;
- (b) Order Defendants (except Defendant Fort Dodge) to pay a civil monetary fine of up to five hundred dollars (\$500) per false marking "offense" (or falsely marked article), or an alternative amount as determined by the Court, one-half of which shall be paid to the United States;

- (c) Order Defendants (except Defendant Fort Dodge) to pay discretionary costs and prejudgment interest;
- (d) Award attorney's fees to plaintiff pursuant to 35 USC § 285;
- (e) Order an accounting for any falsely marked products not presented at trial and an award by the Court of additional damages for any such falsely marked products; and
- (f) Grant Plaintiff such other and further relief, at law or in equity, to which Plaintiff is justly entitled.

COUNT TWO: THE '821 PATENT (SYNANTHIC ®)

44.

Plaintiff restates and incorporates the foregoing paragraphs as if fully set forth herein.

45.

United States Patent Number 3,929,821 was filed on November 21, 1973, and issued on December 30, 1975. (Please see United States Patent No. 3,929,821, attached hereto as Exhibit 'D').

46.

The '821 Patent expired on December 30, 1992.

47.

Defendants marketed for sale to the public the product known as Synanthic ®, marked with the '821 Patent. (Please see "Synanthic ® Label," page 2-4 of 6, attached hereto as Exhibit 'E').

48.

Defendants violated 35 U.S.C. § 292(a) by marking, or causing to be marked, the packaging, labeling, and/or product commonly known as Synanthic ® with the '821 Patent, and any and all other products marked with the '821 Patent, subsequent to the date the patent expired with the intent to deceive the public.

49.

Upon information and belief, Defendants knew, on or about the date of expiration, that the '821 Patent had expired.

50.

Defendants cannot genuinely believe that the '821 Patent applies even after it expired.

51.

Upon information and belief, Defendants comprise a sophisticated multi-national enterprise with many decades of experience applying for, obtaining, and litigating patents. Defendants have committed a substantial amount of its resources to patent procurement and enforcement. Upon information and belief, Defendants have in-house legal departments and attorneys working therein are responsible for Defendants' intellectual property and marketing, labeling, and advertising law. As sophisticated companies, with in-house legal counsel that regularly handles patent matters, including but not limited to patent procurement and enforcement, Defendants are well-aware of the requirements of 35 U.S.C. § 292.

52.

Defendants have falsely marked Synanthic ® as described with the intent to deceive the public, in violation of 35 U.S.C. § 292(a).

53.

Each false marking on the product(s) identified is likely to, or at least has the potential to, discourage or deter persons and companies from commercializing competing products.

54.

Defendants' false marking of products with the '821 Patent after it expired has wrongfully quelled competition with respect to such products, thereby causing harm to Plaintiff, the United States, and the general public.

55.

Defendants wrongfully and illegally advertised a patent monopoly with respect to the '821 Patent and, as a result, have benefitted commercially and financially by maintaining false statements of patent rights.

WHEREFORE, Plaintiff demands a trial by jury and requests that the Court enter judgment as follows:

- (a) Enter judgment against Defendants and in favor of Plaintiff for the violations alleged in Count Two of this Complaint;
- (b) Order Defendants to pay a civil monetary fine of up to five hundred dollars (\$500) per false marking "offense" (or falsely marked article), or an alternative

amount as determined by the Court, one-half of which shall be paid to the United States;

- (c) Order Defendants to pay discretionary costs and prejudgment interest;
- (d) Award attorney's fees to plaintiff pursuant to 35 USC § 285;
- (e) Order an accounting for any falsely marked products not presented at trial and an award by the Court of additional damages for any such falsely marked products; and
- (f) Grant Plaintiff such other and further relief, at law or in equity, to which Plaintiff is justly entitled.

COUNT THREE: THE '461 PATENT (SYNANTHIC ®)

56.

Plaintiff restates and incorporates the foregoing paragraphs as if fully set forth herein.

57.

United States Patent Number 4,080,461 was filed on October 4, 1976, and issued on March 21, 1978. (Please see United States Patent No. 4,080,461, attached hereto as Exhibit 'F').

58.

The '461 Patent expired on March 21, 1998. (Please see "Certificate Extending Patent Term," attached hereto as Exhibit 'G').

59.

Defendants marketed for sale to the public the product known as Synanthic ®, marked with the '461 Patent. (Please see "Synanthic ® Label," attached hereto as Exhibit 'E').

60.

Defendants violated 35 U.S.C. § 292(a) by marking, or causing to be marked, the packaging, labeling, and/or product commonly known as Synanthic ® with the '461 Patent, and any and all other products marked with the '461 Patent, subsequent to the date the patent expired with the intent to deceive the public.

61.

Upon information and belief, Defendants knew, on or about the date of expiration, that the '461 Patent had expired.

62.

Defendants cannot genuinely believe that the '461 Patent applies even after it expired.

63.

Upon information and belief, Defendants comprise is a sophisticated multi-national enterprise and have many decades of experience applying for, obtaining, and litigating patents. Defendants have committed a substantial amount of resources to patent procurement and enforcement. Upon information and belief, Defendants have in-house legal departments and attorneys working therein that are responsible for Defendants'

intellectual property and marketing, labeling, and advertising law. As sophisticated companies, with in-house legal counsel that regularly handles patent matters, including but not limited to patent procurement and enforcement, Defendants are well-aware of the requirements of 35 U.S.C. § 292.

64.

Defendants have falsely marked Synanthic ® as described with the intent to deceive the public, in violation of 35 U.S.C. § 292(a).

65.

Each false marking on the product(s) identified is likely to, or at least has the potential to, discourage or deter persons and companies from commercializing competing products.

66.

Defendants false marking of products with the '461 Patent after it expired has wrongfully quelled competition with respect to such products, thereby causing harm to Plaintiff, the United States, and the general public.

67.

Defendants wrongfully and illegally advertised a patent monopoly with respect to the '461 Patent and, as a result, have benefitted commercially and financially by maintaining false statements of patent rights.

WHEREFORE, Plaintiff demands a trial by jury and requests that the Court enter judgment as follows:

- (a) Enter judgment against Defendants and in favor of Plaintiff for the violations alleged in Count Three of this Complaint;
- (b) Order Defendants to pay a civil monetary fine of up to five hundred dollars (\$500) per false marking “offense” (or falsely marked article), or an alternative amount as determined by the Court, one-half of which shall be paid to the United States;
- (c) Order Defendants to pay discretionary costs and prejudgment interest;
- (d) Award attorney’s fees to plaintiff pursuant to 35 USC § 285;
- (e) Order an accounting for any falsely marked products not presented at trial and an award by the Court of additional damages for any such falsely marked products; and

Grant Plaintiff such other and further relief, at law or in equity, to which Plaintiff is justly entitled.

DEMAND FOR JURY TRIAL

Pursuant to Fed. R. Civ. P. 38(b), Plaintiff demands a trial by jury on all issues so triable.

Respectfully submitted this 4th day of May, 2010.

/s/ W. Daniel Miles, III
W. DANIEL “DEE” MILES, III *

/s/ Roman A. Shaul
ROMAN A. SHAUL (TN BPR # 024265)

/s/ Archie Grubb II

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