

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. _____

DUSA PHARMACEUTICALS, INC., a New Jersey corporation, and
QUEEN’S UNIVERSITY AT KINGSTON, a Canadian academic Organization,

Plaintiffs,

v.

DAVID VEREBELYI, M.D., a Colorado resident, and
AZURE MEDICAL P.C., a Colorado corporation, d/b/a AZURE MEDICAL SPA, P.C. and
d/b/a AZURE MEDICA and d/b/a AZURE MEDICAL and d/b/a AZURE MEDICAL SPA,

Defendants.

COMPLAINT AND JURY DEMAND

Plaintiffs DUSA Pharmaceuticals, Inc.[®] (“DUSA[®]”) and Queen’s University at Kingston (“Queen’s University”) (collectively “Plaintiffs”), through their counsel, hereby allege the following for their Complaint against David Verebelyi, M.D. (“Dr. Verebelyi”) and Azure Medical, P.C., d/b/a Azure Medical Spa, P.C. and d/b/a Azure Medica and d/b/a Azure Medical and d/b/a Azure Medical Spa (“Azure Medical”) (collectively, “Defendants”):

JURISDICTION AND PARTIES

1. This is a civil action for patent infringement of United States Patent Nos. 6,710,066 (“the ‘066 patent”) and 5,955,490 (“the ‘490 patent”) under 35 U.S.C. § 271(a), false advertising under 15 U.S.C. § 1125, trademark infringement under 15 U.S.C. § 1114, and Colorado common law trademark infringement.

2. This Court has jurisdiction under 28 U.S.C. § 1331 and § 1338(a).
3. Venue is proper in this Judicial District under 28 U.S.C. §§ 1391(b) and (c) and § 1400(b).
4. DUSA[®] is a corporation organized under the laws of the State of New Jersey having its principal place of business at 25 Upton Drive, Wilmington, MA 01887.
5. Queen's University is a public university registered in the province of Ontario and located in Kingston, Ontario, Canada.
6. Dr. Verebelyi is a citizen of the State of Colorado and practices medicine at 6660 Timberline Road, Suite 140, Highlands Ranch, CO 80130.
7. Azure Medical is a corporation organized under the laws of Colorado with its principal place of business at 6660 Timberline Road, Suite 140, Highlands Ranch, CO 80130. Azure Medical does business under several names, including Azure Medical, P.C., Azure Medical Spa, P.C., Azure Medica, Azure Medical, and Azure Medical Spa.
8. Dr. Verebelyi practices medicine in concert with Azure Medical at 6660 Timberline Road, Suite 140, Highlands Ranch, CO 80130.
9. Plaintiffs are informed and believe that Dr. Verebelyi and Azure Medical commit acts of infringement of the '066 patent and the '490 patent within this State and Judicial District. A substantial part of the events giving rise to the claim occurred in this Judicial District.

**COUNT I
INFRINGEMENT
OF UNITED STATES PATENT NO. 6,710,066**

10. Plaintiffs repeat and reallege each and every allegation in the foregoing paragraphs as though fully set forth herein.

11. The '066 patent, entitled "Photochemotherapeutic Method Using 5-Aminolevulinic Acid and Other Precursors of Endogenous Porphyrins," was duly and lawfully granted on March 23, 2004, by the United States Patent and Trademark Office. The '066 patent is owned by Queen's University and is exclusively licensed to DUSA[®]. *See* Exhibit A (a true and correct copy of United States Patent No. 6,710,066).

12. DUSA[®], under its license from Queen's University, manufactures, offers for sale, and sells pharmaceutical compositions containing aminolevulinic acid under the trademark, LEVULAN[®], for use in the treatment of actinic keratosis, a nonmalignant hyperproliferative skin lesion, as covered by the '066 patent.

13. Upon information and belief, Dr. Verebelyi and Azure Medical use aminolevulinic acid containing drug products to treat their patients for actinic keratosis, and thereby infringe the '066 patent under 35 U.S.C. § 271(a). *See* www.azuremedical.com (Exhibit B) (a true and correct copy of relevant portions of Defendants' website). Dr. Verebelyi and Azure Medical also own and/or operate the website www.azuremedicalspa.com, which automatically redirects an internet user to www.azuremedical.com.

14. Defendants' infringement of the '066 patent is knowing, willful, and wanton under 35 U.S.C. § 284 and make this an exceptional case under 35 U.S.C. § 285.

**COUNT II
INFRINGEMENT
OF UNITED STATES PATENT NO. 5,955,490**

15. Plaintiffs repeat and reallege each and every allegation in the foregoing paragraphs as though fully set forth herein.

16. The '490 patent, entitled "Photochemotherapeutic Method Using 5-Aminolevulinic Acid and Other Precursors of Endogenous Porphyrins," was duly and lawfully granted on September 21, 1999, by the United States Patent and Trademark Office. The '490 patent is owned by Queen's University and is exclusively licensed to DUSA[®]. *See* Exhibit C (a true and correct copy of United States Patent No. 5,955,490).

17. Upon information and belief, Dr. Verebelyi and Azure Medical use aminolevulinic acid containing drug products to treat their patients for acne, and thereby infringe the '490 patent under 35 U.S.C. § 271(a). *See* Exhibit B.

18. Defendants' infringement of the '490 patent is knowing, willful and wanton under 35 U.S.C. § 284 and make this an exceptional case under 35 U.S.C. § 285.

**COUNT III
FALSE ADVERTISING
UNDER § 43(a) OF THE LANHAM ACT**

19. Plaintiffs repeat and reallege each and every allegation in the foregoing paragraphs as though fully set forth herein.

20. DUSA[®] owns U.S. Trademark Registration No. 2,124,359 for LEVULAN[®]. *See* Exhibit D (a true and correct copy of DUSA[®]'s trademark for LEVULAN[®]).

21. DUSA[®] offers for sale and sells pharmaceutical compositions containing aminolevulinic acid under the registered trademark, LEVULAN[®].

22. Neither Dr. Verebelyi nor Azure Medical has any right to use DUSA[®]'s registered trademark, LEVULAN[®].

23. Upon information and belief, Dr. Verebelyi and Azure Medical sell and advertise aminolevulinic acid containing drug products for the treatment of actinic keratosis and acne.

24. In concert with Dr. Verebelyi, Azure Medical falsely and without authorization use DUSA[®]'s registered trademark, LEVULAN[®] on its website www.azuremedical.com, in connection with the sale of its aminolevulinic acid containing products. *See* Exhibit B.

25. Dr. Verebelyi and Azure Medical have made misleading designations of the origin of the aminolevulinic acid containing drug products, false and misleading descriptions of fact and false and misleading representations of fact. This is likely to cause confusion, mistake or deception as to the source of the aminolevulinic acid containing drug products, which misrepresent the origin or sponsorship of those products and which are likely to cause mistake or confusion as to affiliation, connection or association with the defendants.

26. Dr. Verebelyi's and Azure Medical's actions are intentionally designed to deceive and confuse consumers in violation of 15 U.S.C. § 1125 (§ 43(a) of the Lanham Act).

COUNT IV
TRADEMARK INFRINGEMENT
UNDER § 32 OF THE LANHAM ACT

27. Plaintiffs repeat and reallege each and every allegation in the foregoing paragraphs as though fully set forth herein.

28. DUSA[®] offers for sale and sells pharmaceutical compositions containing aminolevulinic acid containing drug products under the registered trademark, LEVULAN[®].

29. DUSA[®] owns U.S. Trademark Registration No. 2,124,359 for LEVULAN[®]. *See* Exhibit D.

30. Neither Dr. Verebelyi nor Azure Medical has any right to use DUSA[®]'s registered trademark, LEVULAN[®].

31. Upon information and belief, Dr. Verebelyi and Azure Medical sell and advertise aminolevulinic acid containing drug products that are not made or sold by DUSA[®].

32. In concert with Dr. Verebelyi, Azure Medical uses DUSA[®]'s registered trademark, LEVULAN[®] on its website www.azuremedical.com. *See* Exhibit B.

33. Dr. Verebelyi and Azure Medical use DUSA[®]'s registered trademark, LEVULAN[®], in connection with the sale, offering for sale, distribution and advertising of aminolevulinic acid in a manner which is likely to cause confusion, to cause mistake and to deceive.

34. Dr. Verebelyi's and Azure Medical's actions are intentionally designed to likely deceive and confuse consumers in violation of 15 U.S.C. § 1114 (§ 32 of the Lanham Act).

**COUNT V
COLORADO COMMON LAW
TRADEMARK INFRINGEMENT**

35. Plaintiffs repeat and reallege each and every allegation in the foregoing paragraphs as though fully set forth herein.

36. DUSA[®] offers for sale and sells pharmaceutical compositions containing aminolevulinic acid under the federally registered, distinctive trademark, LEVULAN[®], for use in the treatment of actinic keratosis.

37. Upon information and belief, Dr. Verebelyi and Azure Medical sell aminolevulinic acid containing drug products, and advertise aminolevulinic acid containing drug products that are not made or sold by DUSA[®] and do so using the LEVULAN[®] trademark.

38. In concert with Dr. Verebelyi, Azure Medical uses DUSA[®]'s trademark, LEVULAN[®] on its website www.azuremedical.com, in connection with the sale of its aminolevulinic acid containing drug products that are not made or sold by DUSA[®]. *See* Exhibit B.

39. Dr. Verebelyi and Azure Medical use DUSA[®]'s trademark, LEVULAN[®], in connection with the sale, offering for sale, distribution and advertising of aminolevulinic acid containing drug products in a manner which is likely to cause confusion, to cause mistake and to deceive.

40. Dr. Verebelyi's and Azure Medical's actions are intentionally designed to deceive and confuse consumers in violation of Colorado common law of trademark infringement.

WHEREFORE, Plaintiffs pray that:

a. Defendants be preliminarily and permanently enjoined from infringing United States Patent No. 6,710,066;

b. Defendants be preliminarily and permanently enjoined from infringing United States Patent No. 5,955,490;

c. Defendants be preliminarily and permanently enjoined from promoting and advertising aminolevulinic acid containing drug products in a confusingly similar manner to DUSA[®]'s LEVULAN[®] in violation of § 43(a) of the Lanham Act;

d. Defendants be preliminarily and permanently enjoined from promoting and advertising aminolevulinic acid containing drug products using the trademark LEVULAN[®] in violation of § 32 of the Lanham Act;

e. Defendants be preliminarily and permanently enjoined from misrepresenting their aminolevulinic acid containing drug products using the trademark LEVULAN[®] in violation of Colorado common law trademark infringement;

f. Defendants be ordered to pay compensatory damages as a result of their infringement of United States Patent No. 6,710,066, including all damages suffered by Plaintiffs as a result of the infringement;

g. Defendants be ordered to pay compensatory damages as a result of their infringement of United States Patent No. 5,955,490, including all damages suffered by Plaintiffs as a result of the infringement;

h. Defendants be ordered to pay compensatory damages as a result of their false and misleading advertising, including all damages suffered by DUSA[®] as a result of the false and misleading advertising, increased by three times for willful behavior under § 43(a) of the Lanham Act;

i. Defendants be ordered to pay compensatory damages as a result of their trademark infringement of DUSA[®]'s registered trademark, LEVULAN[®], including all damages suffered by DUSA[®] as a result of the infringement, increased by three times for willful behavior under § 32 of the Lanham Act;

j. Defendants be ordered to pay compensatory damages as a result of their false and misleading advertising, including all damages suffered by DUSA[®] as a result of the false and misleading advertising under Colorado common law trademark infringement;

k. that the Court find this case exceptional within the meaning of 35 U.S.C. § 285;

l. that the Court increase by three times the compensatory damages awarded under paragraphs (f) and (g) pursuant to 35 U.S.C. § 285;

m. that the Court award Plaintiffs their costs of this action, including reasonable attorneys' fees, pursuant to 35 U.S.C. § 285;

n. that Plaintiffs be awarded their costs of this action including reasonable attorneys' fees pursuant to 15 U.S.C. § 1117; and,

o. that Plaintiffs be awarded such other further relief as the Court shall deem appropriate.

JURY DEMAND

PLAINTIFFS REQUEST A TRIAL BY JURY ON ALL ISSUES SO TRIABLE

Dated: this 12th day of March, 2007

Respectfully submitted,

s/ Kenzo S. Kawanabe

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