



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

FRED HUTCHINSON CANCER
RESEARCH CENTER; ARGUS
GENETICS, LLC; AND MARS, INC.,

Plaintiffs,

v.

BRANHAVEN, LLC,

Defendant.

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C.A. No. 3:11cv710

COMPLAINT

Plaintiffs Fred Hutchinson Cancer Research Center; Argus Genetics, LLC; and Mars, Inc. (collectively, "Plaintiffs"), for their Complaint against Defendant Branhaven, LLC ("Branhaven"), allege as follows:

PARTIES

1. Plaintiff Fred Hutchinson Cancer Research Center ("FHCRC") is a private, non-profit corporation organized and existing under the laws of the State of Washington, having a principal place of business at 1100 Fairview Ave. N., Seattle, Washington 98109.

2. Plaintiff Argus Genetics, LLC ("Argus") is a company organized and existing under the laws of the State of Washington, having a principal place of business at 1616 Eastlake Ave. E., Seattle, Washington 98109.

3. Plaintiff Mars, Inc. ("Mars") is a corporation organized and existing under the laws of the State of Delaware, having a principal place of business at 6885 Elm Street, McLean, Virginia 22101.

4. Upon information and belief, Defendant Branhaven is a Maryland limited liability company with its principal place of business in Canton, Ohio.

NATURE OF THE ACTION

5. This is a civil action for infringement of United States Patent No. 7,729,863 (“the ’863 Patent”). (Exhibit A). This action is based upon the Patent Laws of the United States, 35 U.S.C. § 100 *et seq.*

JURISDICTION AND VENUE

6. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1332, and 1338(a).

7. Venue is proper in this District under Title 28 U.S.C. §§ 1391 and 1400(b), because, *inter alia*, Branhaven is subject to personal jurisdiction in this judicial district and has committed acts of infringement in this judicial district.

8. Personal jurisdiction exists over Branhaven because, upon information and belief, it has sufficient minimum contacts with the forum as a result of business conducted within the Commonwealth of Virginia and within this judicial district. Personal jurisdiction also exists over Branhaven because, upon information and belief, it has sold and offered to sell infringing services and products required for it to perform those infringing services in this district or, upon information and belief, has placed those products into the stream of commerce by either shipping those products into this judicial district or knowing that the products would be shipped into this judicial district, and such services and products therefore have been offered, purchased, and sold in this judicial district.

THE PATENT-IN-SUIT

9. On June 1, 2010, the ’863 Patent, entitled “Methods and Materials for Canine Breed Identification” was duly and legally issued to FHCRC as assignee.

10. FHCRC is the current assignee of the '863 Patent.

11. Argus, pursuant to an exclusive license it obtained from FHCRC for the '863 Patent, has the right to sue and recover for any infringement of the '863 Patent.

12. Mars, pursuant to an exclusive sublicense it obtained from Argus for the '863 Patent, has the right to sue and recover for any infringement of the '863 Patent.

ACTS GIVING RISE TO THIS ACTION

Infringement of the '863 Patent

13. Plaintiffs restate all of the preceding paragraphs as if fully set forth herein.

14. Branhaven has directly infringed, and is currently directly infringing, one or more of the claims of the '863 Patent in violation of 35 U.S.C. § 271 *et seq.* by using, selling, and/or offering to sell in the United States the dog breed identification services associated with its Canine Heritage XL Breed Test product.

15. Upon information and belief, Branhaven is inducing the infringement of one or more of the claims of the '863 Patent in violation of 35 U.S.C. § 271 *et seq.* by inducing others to perform the dog breed identification services associated with its Canine Heritage XL Breed Test product, and Branhaven is doing so with the knowledge that its actions are inducing infringing acts.

16. Plaintiffs have been injured and damaged monetarily and otherwise by Branhaven's infringement of the '863 Patent. Branhaven is therefore liable to Plaintiffs for actual damages suffered by Plaintiffs, and in no event less than a reasonable royalty.

17. Branhaven's continuing acts of infringement are willful, entitling Plaintiffs to increased damages under 35 U.S.C. § 284 and to attorneys' fees and costs incurred in prosecuting this action under 35 U.S.C. § 285. Prior to the filing of this Complaint, Branhaven acquired knowledge of the existence of the '863 Patent. In conjunction with a Chapter 11

bankruptcy proceeding, *In re MetaMorphix, Inc.*, No. 10-10273 (MFW), in which Branhaven appeared as the “collateral agent” for the secured noteholders with combined claims over \$60 million, Plaintiffs filed and served a limited objection (the “Limited Objection”) stating that the Canine Heritage XL Breed Test product infringes the ’863 Patent. *See* Exhibit B at 2-3. The Limited Objection was filed out of an abundance of caution to give any prospective purchaser of the Canine Heritage XL Breed Test product notice of continuing infringement liability. Branhaven was duly served with a copy of the Limited Objection and thus received notice of the existence of the ’863 Patent and Plaintiffs’ infringement allegations against the Canine Heritage XL Breed Test product. Moreover, after purchasing the Canine Heritage XL Breed Test product via its successful credit bid, counsel for Branhaven, the Debtors, and the Plaintiffs negotiated and approved language that was ultimately inserted into the bankruptcy court’s final sale order preserving all of Plaintiffs’ rights against Branhaven post-sale. In relevant part, the order provides:

Nothing contained in this Order, nor in section 363(f) of the Bankruptcy Code, shall prevent or otherwise impair the ability of Fred Hutchinson Cancer Research Center, Argus Genetics, LLC, Mars, Inc., or any other party from taking action under applicable law to protect their respective intellectual property rights, in respect of any allegedly infringing activity occurring after entry of this Order, including assertion of any claim for patent infringement resulting from manufacturing, using, selling, or offering to sell assets purchased from the Debtors, as hereby authorized by this Order and pursuant to section 363(b) of the Bankruptcy Code.

Order Approving Sale of Substantially All of the Debtors’ Assets Free and Clear of Liens, Claims, Interests, and Other Encumbrances, Approving Assumption and Assignment, or in the Alternative Rejection, of Executory Contracts and Unexpired Leases, and Granting Related Relief, at ¶ 31(a) (attached hereto as Exhibit C). Despite its purchase with full knowledge of its continuing infringement liability, Branhaven has continued its willful infringing activities.

18. Plaintiffs also have been and will continue to be irreparably harmed by Branhaven's patent infringement necessitating the entry of a preliminary and permanent injunction to prevent Branhaven's further and future infringement of the '863 Patent. Plaintiffs do not have an adequate remedy at law.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs request as follows:

A. That this Court enter a judgment that Branhaven has infringed and is infringing one or more claims of the '863 Patent and that such infringement is willful;

B. That this Court enter a judgment and order preliminarily and permanently enjoining Branhaven, its employees and agents, and any person in active concert or participation with each of them from infringing the '863 Patent;

C. That this Court enter a judgment against Branhaven awarding damages adequate to compensate Plaintiffs for the infringement by Branhaven of the '863 Patent, including enhanced damages up to three times the amount of compensatory damages for Branhaven's willful infringement and any supplemental damages for any continuing post-verdict infringement until entry of a final judgment and cessation of such infringement;

D. That this Court assess pre-judgment and post judgment interest and costs against Branhaven, together with an award of such interest and costs, in accordance with 35 U.S.C. § 284;

E. That this Court grant Plaintiffs such other and further relief as the Court deems just, proper, and equitable.

JURY DEMAND

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiffs demand a jury trial as to all matters so triable.

Dated: October 21, 2011

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