

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

OPTIGEN, LLC

Plaintiff,

v.

Civil No. 5:10-cv-940
(FJS/DEP)

ANIMAL GENETICS, INC.,

Defendants.

COMPLAINT

Plaintiff OptiGen, LLC, through its attorneys, Hodgson Russ LLP, alleges as follows:

Parties

1. Plaintiff OptiGen, LLC (“OptiGen”) is a limited liability company organized and existing under the laws of New York, and maintains its principal place of business at 767 Warren Road, Suite 300, Ithaca, New York.
2. OptiGen is engaged in the business of providing DNA-based diagnostic services to test for inherited diseases in dogs.
3. Defendant Animal Genetics, Inc. (“Animal Genetics”) is a corporation organized and existing under the laws of the State of Florida and maintains a place of business at 1336 Timberlane Road, Tallahassee, Florida 32312.

Jurisdiction and Venue

4. Plaintiff brings this action for patent infringement under the Patent Act, 35 U.S.C. § 1, *et seq.*, including 35 U.S.C. § 271. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338(a) and 15 U.S.C. § 1121(a) and supplemental jurisdiction under 28 U.S.C. § 1367.

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

The Patents at Issue

6. Progressive Rod-Cone Disease (“PRCD”) is a hereditary retinal disease that leads to blindness in dogs. The patents at issue relate to identifying whether a dog is a carrier of PRCD, is predisposed to PRCD, or is genetically normal.

7. United States Patent No. 5,804,388, entitled “CHROMOSOME 9 AND PROGRESSIVE ROD-CONE DEGENERATION DISEASE GENETIC MARKERS AND ASSAYS” (the “’388 patent”), issued on September 8, 1998. Cornell Research Foundation, Inc. (“CRF”) is the assignee of the ‘388 patent. OptiGen is the exclusive licensee of the ‘388 patent. A true and correct copy of the ‘388 patent is attached as Exhibit A.

8. United States Patent No. 7,312,037, entitled “IDENTIFICATION OF THE GENE AND MUTATION RESPONSIBLE FOR PROGRESSIVE ROD-CONE DEGENERATION IN DOG AND A METHOD FOR TESTING SAME” (the “’037 patent”), issued on December 25, 2007. CRF is the assignee of the ‘037 patent. OptiGen is the exclusive licensee of the ‘037 patent. A true and correct copy of the ‘037 patent is attached as Exhibit B.

9. The only means of identifying whether a dog is a carrier of or is affected by PRCD is through the methods covered by the '037 patent and the '388 patent.

Factual Background

10. Animal Genetics offers services related to testing for certain genetic disorders in dogs and horses. Among the services offered is the DNA testing and linkage analysis for PRCD in dogs.

11. According to its website, Animal Genetics offers its PRCD test for 22 different dog breeds at a price of \$45.00 per sample. Copies of relevant pages of Animal Genetic's website as of June 28, 2010 are attached as Exhibit C.

12. When the genetic test is purchased by a customer, the customer is sent a kit to obtain a DNA sample from the customer's dog.

13. After collecting the DNA sample, the customer then mails the sample back to Animal Genetics.

14. Animal Genetics then performs the tests that infringe the '388 and '037 patents.

15. The results of the genetic test are emailed to the customer within 2-4 business days of sample receipt. A hard copy of the results is also mailed to the customer for each sample.

16. Animal Genetics offers its testing services (including the PRCD test) for purchase through its website (www.animalgenetics.us), including to customers in the United States and this District.

17. Animal Genetics also advertises its testing services (including the PRCD test) for sale within the United States and this District.

18. Animal Genetics has sold its testing services (including the PRCD test) to customers in the United States and in this District. Copies of a purchase order and test results are attached as Exhibit D.

19. Animal Genetics was on notice that its actions constituted infringement of OptiGen's patents. For example, the first result of an internet search for the terms "PRCD patent" directs you to OptiGen's website. The search also provides websites containing information about a lawsuit filed by OptiGen against International Genetics, Inc., and other entities, alleging infringement of the very patents at issue here.

FIRST CAUSE OF ACTION
(Patent Infringement and Inducing Infringement)

20. Plaintiff repeats the allegations set forth in paragraphs 1 through 19.

21. Animal Genetics has infringed the '388 patent and the '037 patent by one or more of the following: making, selling, offering for sale, and/or using testing methods for PRCD, each of which incorporated one or more of the inventions claimed in the '388 and '037 patents.

22. Animal Genetics has also induced its customers to infringe the '388 patent and the '037 patent, in violation of 35 U.S.C. § 271(b) and (f).

23. The infringement and inducement to infringe by Animal Genetics was intentional and willful.

24. As a result of Animal Genetics's infringing activities, OptiGen has sustained damages in an amount to be proven at trial.

25. The infringements and inducements to infringe by Animal Genetics has caused and will continue to cause OptiGen irreparable harm for which there is no adequate remedy at law.

SECOND CAUSE OF ACTION
(Unfair Competition)

26. Plaintiff repeats the allegations set forth in paragraphs 1 through 25.

27. Animal Genetics competes with OptiGen in providing DNA-based diagnostic and testing services for inherited diseases of dogs. By offering these services, they are willfully misappropriating for their own benefit OptiGen's intellectual property and are profiting and unjustly enriching themselves by the unlawful and unauthorized use of OptiGen's intellectual property.

28. The conduct of Animal Genetics in offering for sale and selling tests to the public that they know misappropriate OptiGen's intellectual property injures the business and goodwill of OptiGen, in violation of the common law of unfair competition.

29. As a result of the unfair competition by Animal Genetics, OptiGen has sustained damages in an amount to be proved at trial.

30. The unfair competition by Animal Genetics is intentional and willful and will continue unless and until they are restrained by this Court.

31. The unfair competition by Animal Genetics has caused and will continue to cause OptiGen irreparable harm for which there is no adequate remedy at law.

WHEREFORE, OptiGen is entitled to judgment:

(1) Declaring that Animal Genetics has directly infringed one or more claims of the '388 and '037 patents.

(2) Declaring that Animal Genetics has induced infringement of the '388 and '037 patents.

(3) Granting an injunction, pursuant to 35 U.S.C. § 283 and 15 U.S.C. § 1116, preliminarily and permanently enjoining Animal Genetics, its officers, directors, agents, servants, employees, attorneys, subsidiaries, affiliates, and all those acting in concert with or under or through them, from making, selling, offering for sale, using, and/or exporting or importing any diagnostic testing kits or services that infringe the '388 and '037 patents, or otherwise directly or indirectly committing or inducing further acts of infringement of the '388 and '037 patents.

(4) Ordering an accounting for damages arising from Animal Genetics's acts of direct infringement and/or indirect infringement, misrepresentations and unfair competition,

